How best to protect your rights in US and EU Antitrust Investigations and Dawn Raids

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Robert Bell is head of the EU & UK competition team at Bryan Cave. He is a market-leading competition lawyer with over 20 years' experience in advising clients on their EU and UK competition law matters. He acts on a range of complex competition and regulatory matters and has been involved in some of the leading cases before the OFT, European Commission and the UK and European Courts.

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During the course of his career, he has counseled Fortune 500 clients regarding antitrust matters related to merger and acquisitions, distribution channel issues and antitrust compliance. Mr. Bartz has also represented clients in matters involving the federal antitrust enforcement agencies.

Prior to joining the firm, Mr. Bartz held senior level positions in the Civil Division of the U.S. Department of Justice, including serving as the Deputy Assistant Attorney General for the Federal Programs Branch of the Division, which litigates on behalf of approximately 100 federal agencies.
This webinar will examine the US and EU perspective for the following issues:

1. What happens if you are investigated?
2. How do I deal with information requests, subpoenas and dawn raids?
3. Handling investigations
4. Can I protect my information and documents from disclosure?
5. What happens if the investigation leads to proceedings?
6. How do I negotiate a settlement or appeal a decision?
7. Top tips for dealing with investigators
8. Further reading
What happens if you are investigated?
What happens if you are investigated? – US Perspective

- Federal antitrust investigations in the United States may be commenced by the U.S. Department of Justice or the Federal Trade Commission.
- Investigations can be either criminal or civil in nature.
- A company may be the target of the investigation or simply a witness.
- The who, what, and nature of the investigation all serve to inform how to respond.
What happens if you are investigated? – EU Perspective

- Jurisdiction
- Domestic investigations led by Member State domestic competition authorities, EU wide investigations are carried out by the EU Commission
- Investigations are civil rather than criminal in nature
- Can start investigations on its own initiative or following complaints
- Starts with Information Requests and possibly ‘dawn raids’
Information Requests, Subpoenas and ‘Dawn Raids’
Information Requests, Subpoenas and ‘Dawn Raids’ – US Perspective

- Voluntary Information Requests
  - Typically, advisable to comply if not the target
- Civil Investigative Demands
  - Used in civil investigations
- Subpoenas
  - Used in grand jury investigations
- Access Orders
  - Implies that subject isn’t trusted to produce material
There are two types of Information Request:

- Requests for information
  - No obligation to reply but you can’t lie or mislead!
  - Penalties

- Decision requiring information
  - Obligation to reply
  - Penalties

The importance of working out what type you are dealing with and agreeing a strategy with legal advisors.
How do I deal with Information Requests – EU Perspective

- Inspection powers of EU Commission
- “Dawn raid” powers commonly used
- Inspection by request or by Decision
- What does an inspection involve?
- Duty to assist inspectors and fines for non-compliance
- Don’t be caught out: Have a procedure in place!
- Things to remember:
  - Set aside a room
  - Produce documents to them
  - Take a careful note of documents taken
  - Commission can interrogate witnesses
Handling Investigations
Handling Investigations – US Perspective

• Involve counsel ASAP
• Trust your counsel—share too much instead of not enough
• Begin thinking of exit strategies from the beginning
  – Can we cooperate and walk away?
  – Can we negotiate a settlement?
  – Will we have to litigate?
• Answering these questions informs the approach to handling the investigation
Handling inspections – EU Perspective

- Early involvement of lawyers
- Scrutinise scope of investigators’ mandate
- Co-operate
- Dealing with procedural disputes
- Strong push to shut down investigation early
- Statement of Objections and access to file
Can I protect my information and documents from disclosure?
Can I protect my information and documents from disclosure? – US Perspective

• General Confidentiality of Agency Investigations as a Matter of Federal Law
• Attorney/Client Privilege
  – Complex issue
  – Talk to counsel, don’t assume a document needn’t be disclosed without advising counsel
  – Regulators in the past have asked for waiver of privilege, crucial decision during an investigation
• 5th Amendment Privilege Against Self-Incrimination
  – Does not apply to corporations, only individuals
Can I protect my information and documents from disclosure? – EU Perspective

• Legal privilege
  – What does this cover?
  – Does it cover in-house lawyer communications?
  – EU position
  – UK position

• Privilege against self-incrimination
  – Companies can refuse to answer questions which result in admission
  – Doesn’t extend to an ability to refuse to hand over evidence to the Commission
What happens if the Investigation Leads to Proceedings?
What Happens if the Investigation Leads to Proceedings? – US Perspective

• FTC: Administrative Proceedings
  – Complaint
  – Pre-hearing Procedures
  – Hearing/Trial
  – Initial Decision and Final Commission Decision

• DOJ Proceedings in Federal Court
  – Civil Proceedings
  – Criminal Proceedings
  – Trial
What Happens if the Investigation Leads to Proceedings? – EU Perspective

- Administrative Procedure
- Issue of Statement of Objections
- Reply to the SO
- Access to the Commission’s file
- Right of parties to be heard
How do I negotiate a settlement or appeal a decision?
How do I negotiate a settlement or appeal a decision? – US Perspective

• Settlement Negotiations
  – Criminal Settlements
  – Amnesty
  – Consent Orders (Civil Settlements)

• Appeal
  – Criminal & Civil Cases
  – Administrative
How do I negotiate a settlement or appeal a decision? – EU Perspective

- Early push to close down investigation/administrative priorities
- Settlements
  - Leniency procedure
  - Cartels
    - Cartel settlement procedure: Admit liability but advantages to avoid third party actions
  - Commitments procedure
    - Suitable for certain cases but not others
- Appeals
  - Who hears the appeal and what are the costs?
Top Tips for Dealing with Investigators
Top tips for dealing with investigators – US Perspective

• Talk to the investigators early and often
• Ask for narrowing of information requests to reduce burden
• Negotiations on most matters will be most successful in areas where the government attorneys have greater flexibility instead of areas that are generally deemed “non-negotiable” from an institutional perspective (counsel can help)
Top tips for dealing with investigators – EU Perspective

• Avoid a box ticking culture: effective compliance strategies
• Use of external lawyers
• Co-operate and derail investigation prior to formal commencement of proceedings
• Understanding the advantages and limitations of settlements and seeking leniency
Recap

1. Investigations: Who, where and why?
2. Information Requests, Subpoenas and Dawn Raids
3. Handling investigations
4. Protecting your information from disclosure
5. Proceedings
6. Settlement or Appeal
7. Top tips for dealing with investigators
CPD Points

- CPD points and CLE credit are available for this webinar.

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