
Competition Commission Dawn Raids

6 September 2017

In brief

Dawn raids are increasingly being used by the Competition Commission (Commission) as a tool to gather evidence of anti-competitive conduct by businesses in South Africa. In this Alert, we highlight some important things to know about dawn raids in South Africa.

In detail

The dawn raid is a powerful weapon in the Commission's arsenal for combatting anti-competitive practices. In essence, a dawn raid is a search and seizure process permitted under the Competition Act whereby the Commission is able to enter premises to gather evidence of cartel or similar conduct. This year alone, the Commission has conducted three dawn raids: in March the Commission raided nine of South Africa's largest fresh produce agents, in June it raided seven meat suppliers across three provinces, and last month it raided twenty-five fire sprinkler installers.

All businesses are potentially at risk of a dawn raid by the Commission, at any time and without notice. It is therefore important that businesses have adequate risk management plans, policies and programmes in place, to mitigate against the potential adverse consequences of a dawn raid, which include prosecution for anti-competitive conduct, business interruption, and negative effects on investor

sentiment, customer and supplier relationships and staff morale.

Have a team

It is important that you designate a response team, which can be mobilized on short notice, to take responsibility for dealing with a dawn raid. Your team should ideally comprise a spokesperson, a senior decision-maker, in-house legal counsel, and an IT and security manager. Your internal team should be supported by your external competition lawyers and investor relations advisors.

Have a plan

Your employees should receive training on the procedures to be followed in the event of a dawn raid, particularly on how to communicate with and respond to requests for information from the Commission's representatives. Ideally, this should not happen without the involvement of your lawyers.

Your security and reception personnel will be the first to have contact with the Commission's representatives. It is important that they receive training to immediately alert your response team, and to request (but, importantly, they cannot compel) the Commission's representatives to await the arrival of your response team before commencing with the raid. This time should be used to scan the warrant or authorization for the dawn raid, email it to your response team and external lawyers, and check and record the identification of each Commission representative.

Whilst it is important not to obstruct, and to co-operate with, the Commission's representatives, this need not be at the expense of protecting your rights. The Commission must confine itself to the terms of the warrant or authorization in conducting the dawn raid. It may be possible to challenge the warrant or authorization as being too wide, or the procedures followed as being

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irregular, but this will only be possible after the event. For this reason, it is imperative that a precise record be kept of all documents and information inspected, copied or removed by the Commission's representatives, and minutes or recordings kept of any interviews with your employees.

Confidential and privileged information

Electronic data comprises the bulk of business information these days. Consequently, the Commission is likely to focus much of its attention on information stored on your servers and employee laptops, tablets and other electronic data storage devices. It is common for the Commission to take a complete copy of the business' servers and computer hard drives.

It is important to protect your business from unlawful "fishing expeditions" by the Commission, and that

precautions are taken to identify and protect legally privileged and commercially sensitive information.

Confidential information may be protected by filing a formal confidentiality claim in respect thereof. In respect of legally privileged information which is disputed, a procedure would need to be agreed with the Commission whereby such information is "sealed" until the dispute is resolved.

Control the messaging

It is not unusual for the Commission to issue a media release about the dawn raid shortly after it commences. It is therefore important that your spokesperson has a suitable pro-forma media statement ready for immediate release, as part of a broader communication plan, to manage your public image and your investor, customer and supplier relations. You should also have an internal

communication plan to deal with issues in relation to the raid which may affect or be important to your employees.

The day after

It will be important, immediately after the dawn raid, to conduct your own investigation to determine whether in fact there is any evidence of a contravention of the Competition Act as alleged by the Commission. The result of this investigation will assist you in determining whether you may have a defense and, if not, whether there is a basis for applying to the Commission for leniency in terms of its Corporate Leniency Policy. Leniency may potentially be available not only in relation to the conduct which caused the raid, but also in relation to other facts which emerge from the investigation of which the Commission is not aware.

Let's talk

"*Semper paratus*" (be prepared) should be the clarion call for your business. For more information on this Alert, and how we may be able to assist, whether it be preparing a dawn raid manual, devising dawn raid protocols and procedures, or conducting bespoke training and mock raids with key personnel, please contact:

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