Dawn raids by the South African Competition Commission

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The Competition Commission (Commission) is increasingly using dawn raids to gather evidence to prosecute companies involved in anticompetitive conduct in South Africa. Three dawn raids by the South African competition authorities within a four week period in 2015 and a further dawn raid in March 2016 highlight the need for companies operating in South Africa to have a comprehensive plan in place to deal with a search and seizure operation and minimise business disruption.

Here are 10 things to know about dawn raids in South Africa:

01 | **Companies in every sector of the South African economy are at risk**

Although the Commission has explicitly said that it will prioritise investigations in sectors of the economy with a particular impact on poor consumers, it can and does conduct dawn raids on companies not operating in the Commission’s ‘priority sectors’. This means that all companies should be properly prepared for a dawn raid – not just those involved in food and agro-processing, infrastructure and construction, banking and intermediate industrial products. For example, in October 2015, the Commission searched the offices of suppliers of liquefied petroleum gas and cylinders, as well as the LPG Association.

This followed a raid at the end of September 2015 on four furniture removal companies, and another in mid-September 2015 on the offices of three recruitment advertising agencies in Gauteng. In March 2015, the Commission raided the offices of six suppliers of fire control and protection systems. Suppliers of services, as well as products, are at risk.

On 23 March 2016 the Commission raided four companies involved in automotive glass fitment and repair services, including two companies who are not alleged to have contravened the Act. The Commission can raid premises to obtain evidence for an investigation, even if the company is not itself the subject of an investigation.

02 | **You need a plan**

Search operations can be hugely disruptive for both the company and its employees, unless they are dealt with in a carefully coordinated manner. A company may face serious interference with its operations on the day of the raid and thereafter, as well as the risk that its confidential pricing, customer and other information will enter the public domain.

You need a comprehensive plan to deal with the risks posed by a raid. For example, unless the company has proper records of what documents and electronic data have been copied and removed, and which employees were interviewed, it may be difficult to defend the allegations of anticompetitive conduct. If company staff destroy documents during a raid, or obstruct the competition authorities during the search, they may be liable for criminal prosecution.

03 | **Identify your core team**

Your dawn raid plan should identify the core team who will be responsible for dealing with a search, this includes senior management, in-house legal counsel, and the IT and security managers responsible for each site. An external support team, including the company’s competition law advisers and investor relations personnel, should also be identified. This part of the plan needs to be practical in view of travelling distances, and the size and number of company premises potentially involved.

04 | **Be clear on internal process**

Staff need to be clear on the procedures to be followed when dealing with the regulator in the event of a raid. For example, competition authority staff should be asked to wait for the company’s legal advisers to arrive before commencing the search. The applicable warrant should be photocopied. The identification of each official involved in the raid should be checked and recorded. Staff should be appointed to monitor the authorities’ conduct during the search, and record each document reviewed or removed by the authorities. These employees need to receive in-depth training to ensure that they understand the crucial role they will play on the day of the raid.

05 | **Protect confidential information and legally privileged documents**

Adequate measures to protect the company’s legally privileged and highly confidential documents should be put in place. Unless you file a formal confidentiality claim, there is no obligation on the Commission not to release your documents to third parties, like customers, competitors, other regulatory authorities or trade unions. If you don’t clearly identify documents which are legally privileged, like legal opinions written by your lawyers, the Commission may read them during the raid and remove them from your offices. A procedure to identify legally privileged information and store this in separate sealed bags, before these documents are reviewed by Commission officials, needs to be agreed with the Commission when the raid starts.
06 | Electronic searches
As companies increasingly shift to digital rather than physical records, the Commission is more focused on searching electronic data like emails, chats and spreadsheets for evidence of a contravention of the Competition Act. It is common for the search warrant to authorize the Commission's staff to undertake an electronic search of a company's records and the Commission will frequently take a complete electronic copy of the server and computer hard drives. This has the potential to be enormously disruptive on the day, and your IT expert needs to be clear on how to assist the Commission, without the company’s operations grinding to a halt. After the search, appropriate measures need to be taken to prevent the Commission from conducting a digital ‘fishing’ expedition, months or even years, after the raid.

07 | Prepare a communication plan
The Commission frequently releases a press statement while the raid is ongoing which names the companies being raided and provides some details about the anticompetitive conduct which it is investigating. You need an external communication plan to deal with questions from the press and to minimize any damage to your reputation resulting from news of the raid. Listed companies will need to communicate clearly with their shareholders and other interested parties, like analysts. You also need an internal communication plan to make sure that your staff keep the details of the raid confidential and to deal with the impact on staff morale as far as possible.

08 | Internal investigations after a raid
Once the search is over, the company will need to conduct a thorough internal investigation to determine whether the Competition Act (or legislation that is applicable in one or more African jurisdictions) has been contravened. If so, it may be possible to negotiate a substantial reduction in fines if the company offers to cooperate with the investigation being conducted.

09 | Be aware of the race for leniency!
The Commission’s Corporate Leniency Policy offers the first member of a cartel who comes forward and co-operates fully with the Commission immunity from fines in terms of the Competition Act. Leniency may potentially still be available in relation to the conduct which prompted the raid, or there may be other anticompetitive practices which the Commission does not know about, which could form the basis for a leniency application. It is essential to conduct a thorough internal investigation and hold a discussion with your external advisors as soon as possible after a raid.

10 | Industry associations beware
As the recent raid on gas suppliers illustrates, it is fairly common for the Commission to conduct a search at the premises of industry associations at the same time, or shortly after, they search the offices of competitors. Each industry association needs its own comprehensive dawn raid plan in place and should have a separate legal team on brief to assist in the event of a raid. Industry bodies which correspond with their members on issues and collect documents and data from competitors need to have clear procedures in place to identify and protect information which is confidential to their members. Industry associations must also take advice as to the limits on their activities, to avoid crossing the line onto anticompetitive interactions by members.

Dawn raids are an intrusive and disruptive event in the life of your business which merit careful preparation. If you have any queries, please contact Norton Rose Fulbright’s antitrust and competition team for advice.