



Secrets of surviving US, EU and Asia antitrust investigations

when the bell tolls, what will you do?

FEBRUARY 5, 2020
NEW YORK

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Overview

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1. Power of the authorities
2. Self-Reporting considerations
3. How to respond to a request for information (RFI)
4. Dawn Raids
5. Rights of defense and legal privilege
6. Duty of cooperation and obstruction
7. Final Recommendations & Conclusion



Powers of the Authorities



Jurisdiction



Authorities	<p>European Commission</p> <p>National Competition Authorities (assistance in the course of the European Competition Network)</p>	DOJ (Civil and Criminal Divisions)	Federal Trade Commission (FTC)	State Attorney General's Offices (State AGs)
		May share information together		
Power	<p>Anti-competitive practices (ACPs) having an effect on trade between the EU Member States)</p>	Anti-competitive practices (ACPs)		
Demand	<p>Simple requests</p> <p>Requests by way of formal decision</p>	Civil Investigative Demand (CID) or Grand Jury Subpoena	Subpoena or voluntary requests	Subpoena

Jurisdiction (2)



Penalties

Maximum 10% of worldwide turnover
No criminal sanction at EU level (national rules differ by Member States)

Individuals: 10 years imprisonment and/or fine \$1,000,000 fine for each violation

Companies: \$100,000,000 fine or double the loss or gain resulting from the antitrust violation, whichever is greater

Civil cases by the government: injunction or decree for companies to conduct business under the eye of a court and the DOJ or FTC

Private enforcement with damages claims (individual or class action by harmed customers or companies)

Powers of Authorities - China

Anti-Monopoly Law (AML)



The 10th anniversary (2018) of the Anti-Monopoly Law will see the first major amendments to the law in the coming five years, which are expected to solve the most pressing problems encountered in previous enforcement of the law

Antitrust Guidelines



On July 1, 2019, the SAMR released three regulations to implement China's Antitrust Law, effective as of September 1, 2019

- Monopoly Agreements
- Abuse of Dominant Market Position
- Abuse of Administrative Rights

Procedural Rules



On December 26, 2018, SAMR promulgated the *Interim Provisions concerning the Procedure for Imposition of Administrative Punishment*, which mentions that more detailed provisions regarding penalty procedures will be drafted

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Powers of Authorities - China

■ Penalties

- Entering into a monopoly agreement – a fine of up to **RMB 500,000** may be imposed upon the company
- Entering into and implementing a monopoly agreement
 - Company will be ordered to cease the illegal conduct
 - Company's illegal income will be confiscated
 - Company must pay a fine ranging from 1% to 10% of the sales value of the preceding year
- Abuse of dominant market position – same as entering into and implementing a monopoly agreement
- No administrative or criminal penalties may be imposed upon employees under the AML, unless they obstruct an investigation

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Self Reporting Considerations



Self-Reporting Considerations – US

Decision whether to self-report/voluntary disclosure

Consequences

1. DOJ considers timely and voluntary disclosure in decision to bring criminal charges
2. Value of the information
3. Controlling the message
4. Premature self-reporting
5. DOJ leniency program – New Policy, announced in July 2019
 - DOJ now will credit companies for effective corporate antitrust compliance programs when making charging decisions and penalty recommendations

Self-Reporting Considerations - China

Decision whether to self-report/voluntary disclosure

1. Primary factors to consider include the magnitude of the misconduct, the likelihood of discovery, and the likelihood of mitigation/cooperation credit
2. Also must consider the location of the events, and the regulator under whose jurisdiction the conduct falls
3. Significant cooperation credits can be obtained if a timely, effective voluntary self-disclosure is made to US regulators
4. Self-disclosure to Chinese regulators is generally much less beneficial in terms of mitigation, but companies may need to make a follow-on disclosure once disclosure has already been made to US regulators
5. When no government investigation has been launched, and starting at the outset of the investigation and continuing as more information is gathered in the course of the investigation, companies and counsel should always be evaluating whether and when to make a voluntary self-disclosure



How to respond to a Request for Information?



How to respond to an RFI?

- **Authority and powers**
- **Purpose of the investigation**
 - Clearly notified
 - Identify the legal framework
 - Identify the sector under investigation
- **Practices under investigation**
- **Procedure and deadline to respond**
- **Risk of sanctions**
- **Duty to preserve documents ?**
- **Any possibility to appeal against the RFI?**

EU



- **Authority and powers**
- **Purpose of the investigation**
 - Not always clear
 - Important to determine ASAP
- **Practices under investigation**
- **Procedure and deadline to respond**
- **Risk of sanctions**
- **Duty to preserve documents**
 - Litigation reasonably anticipated/aware of allegations that are likely to lead to investigation
 - Litigation holds and policies
 - Document retention plan

US





How to deal with dawn raids?



Dawn raids: initial responses

BEFORE

- **Have internal procedures** (compliance program, dawn raid manual)
- **Training**
- **Mock dawn raids**

D-DAY

- **Inform the Legal Department**
- **Call external counsels**

DURING

- **Gather basic information**
 - **Investigation authority**
 - EU: Commission, NCAs
 - US: Lead government agent, Names of the other agents, Agency leading the investigation and Lead prosecutor
 - **Purpose of the investigation**
 - **Legal basis of the investigation**
 - EU: Judge order or decision of the Commission

Dawn raids: start of the investigation



Scope

Premises
Vehicle
Domicile

Dependent on scope of search warrant

Powers

Searching within offices (drawers, cupboards, library, all computer files from all servers accessible locally, mobile phone)

Seizing relevant documents

Asking for explanations and clarifications

Request information and statement (interviews during the investigation)

Searching and seizure of documents (computers, servers, paper files, trash cans/shred bins) permitted

Not required to make any statements to investigators

Direct all requests about documents and employee interviews to counsel

Beware of sealed offices!

Dawn raids: during the investigation



What does the company do ?

- Receives the Commission's decision / judge order / warrant / subpoena
- Names representatives to accompany the investigators at all times during the investigation
- Issues instructions to employees and make sure that they do not communicate externally on the investigation
- Provide investigators with access to the documents
 - Make copies of these documents
 - Even if they contain trade secrets (trade secret protection procedure *ex-post*)

What do the attorneys do?

- Accompany investigators
- Make copies of the notified and seized documents
- Ensure that the company's rights are respected : protected documents (legally privileged, business secret material?), sealed under provisional closed seals, ask judicial police officers to inform court in case of violations
- Attend interviews with staff members

Dawn raids: at the end of the investigation



- Investigators issue a report
 - do not hesitate to express concerns
- Signature of the company representative
- Challenge?
 - Immediate appeal on the legality of the dawn raid decision
 - Appeal against the circumstances of the conduct of dawn raids along with the final decision, unless a decision was adopted during the investigation (e.g. on the seizure of legally privileged documents)



- Conduct employee debriefings and memorialize search activities
- Address document preservation
- Begin internal investigation

Dawn Raids – China

1. Arrival at Reception

Inspectors arrive on the premises.

2. Inspection

Inspectors conduct investigation on premises.

3. Interviews

Inspectors interview select employees.

4. Follow-Up

After the inspection has been completed.



Rights of defense and *legal privilege*



Legal privilege: a limit to seizure powers



- **Conditions of protection**

- Right of defense regarding ongoing proceedings
- Attorney admitted to the bar in an EU Member State

- **Protected documents**

- Communications between a company and its attorneys
- Internal notes that took up a communication with an attorney
- Preparatory documents drafted for the purpose of seeking legal advice from an attorney

- **Rules applicable**

- The Commission investigates
- The NCA assists the Commission in the latter's investigation

- **Procedure**

- Provisional sealing of documents potentially covered by legal privilege



- **Confidentiality**

- Protected Health Information (PHI), Personally Identifiable Information (PII)
- Not a basis to withhold documents

- **Protected documents**

- Attorney/Client Communication
- Work product

- **Limits to protected documents**

- Documents that fall outside the scope of the investigation
- Documents covered by legal privilege

Quiz on legal privilege

Are these documents protected?

- Chain of email with an attorney in the loop
- Audit report / legal advice on practices that are under investigation, but prepared by a law firm prior to the start of the investigation
- Communications between employees of a group and their in-house counsels
- Correspondence between a company and a third party's attorney



Maybe

Maybe

Yes

Yes

No

Maybe

No

No

Legal privilege: initial recommendations

- Appoint an attorney registered with an European Bar Association in the EU
- Label the documents with “*Strictly confidential – Attorney/Client Communication*” or “*Document prepared for the purpose of seeking a legal advise*” or “*Prepared in anticipation of litigation*”
- Keep the protected documents in separate folders
- Do not distribute confidential documents outside the company
- Minimize the production of written documents on sensitive subjects
- Make sure that your concerns / objections to seized documents (based on their confidential nature) are mentioned in the report
- Merely copying an attorney on communications does not make the communication privileged



Attorney-Client Privilege in China

- **Does privilege apply to conduct that occurs in China?**
 - Yes and no
- **Privilege does not exist under Chinese law.**
 - China is not a common law jurisdiction
 - Chinese litigation does not have a “**discovery**” process
 - Instead, fact finding is usually carried out by the judge or law enforcement authorities
 - Chinese attorneys have the duty to maintain confidentiality of certain client information, including trade secrets and personal information
 - However, lawyers may be sanctioned for concealing “important facts” under the Criminal Procedure Law
 - Moreover, “lawyers” are defined to include (1) PRC-licensed lawyers working in local law firms and (2) foreign lawyers licensed with the PRC Ministry of Justice
 - In-house counsel and compliance personnel are not subject to this duty

Attorney-Client Privilege in China



- **Does privilege apply to conduct that occurs in China?**
 - Yes and no
- **However, this does not mean that privilege is irrelevant in China**
 - In litigation in US courts, the “choice of law” (for example, US privilege law vs. Chinese law) does not depend on where the events took place
 - Instead, US courts will apply the privilege rules of the country that has “*the predominant or most direct and compelling interest in whether [the] communications should remain confidential*”
 - In practice, US courts will apply the US rules of privilege regarding any communications concerning:
 - “**legal proceedings in the United States**” or
 - “**advice regarding American law**”...regardless of where the communication took place.



Duty of cooperation and obstruction in an investigation



Obstruction – Legal framework

	Provisions	Sanctions (max.)
	<p>Obstruction is a separate crime, independent of antitrust violations</p> <p>Fifth Amendment for individuals, not for companies</p>	<p>Penalties for obstruction of justice vary, depending on whether the crime is a federal or state level and the severity of the offense. Penalties can range from fines to jail sentences.</p>
	<p>Art. 23 Regulation 1/2003</p>	<p>1% of worldwide turnover before tax</p>

Duty of collaboration / cooperation



Obstruction = Breach of the duty of active and loyal collaboration

Different levels:

- Active and faithful collaboration, i.e. you have to answer to any question truthfully and provide all requested documents/information
- Full, diligent and speedy cooperation in leniency proceedings



Obstruction = Breach of the duty cooperation

- Prompt provision of information relevant to the misconduct at issue and undertake appropriate remediation efforts
- A cooperating company can require its employees to provide relevant documents and be interviewed by outside counsel in connection with the investigation



FOCUS: Duty of Cooperation and Obstruction in an investigation

When employees should retain their own legal counsel

Scope of investigation

- If scope is overbroad, negotiate with agency to narrow the scope of the subpoena or request.

FOCUS: the duty of active and faithful collaboration



Cooperation beyond legal obligations in European investigations

- New cooperation procedure in antitrust cases
- Scope of the cooperation : recognition of the infringement, evidence, commitments
- Uncapped fine reduction
 - Recent cases: 10% to 50%
- Difficult to find balance

<div>  </div> Cooperation decisions			
Decision	Type of cooperation (other than Acknowledgment)	Before/After SO	Reduction
ARA (2016) – 102	• Structural remedy	After SO	30%
Pioneer (2018) – RPM	• Evidence	Before SO	50%
Philips (2018) – RPM	• Evidence	Before SO	40%
Denon&Marantz (2018) – RPM	• Evidence	Before SO	40%
Asus (2018) – RPM	• Evidence	Before SO	40%
Guess (2018) – cross-border sales restrictions	• Evidence	Before SO	50%
Mastercard (2019) – cross-border sales restrictions	• Acknowledgment only	After SO	10%
Nike (2019) – cross-border sales restrictions	• Evidence	Before SO	40%
Ab InBev (2019) – cross-border sales restrictions	• Evidence • Remedy	After SO	15%



What are the limits to the duty of active and faithful collaboration?

What can be done or not done during the investigation?

A. During dawn raids (US)

X Denial of access to premises

X Destruction (or concealment) of documents

X Inteference with the investigators' work

What are the limits to the duty of active and faithful collaboration?



What can be done or not done during the investigation?

A. During dawn raids (EU)

X Denial of access to premises

EUR 38 million fine for E.ON for breach of a seal (affixed to an office) by the cleaning agent during the night (European Commission, 30 January 2008, E.ON AG)



X Fraudulent embezzlement of mailboxes

EUR 2.5 million fine for EPH for having changed the passwords of mailboxes upon the request of one of the employees whose email account had been blocked by the Commission's agents (European Commission, 28 March 2012, EPH)



X Breach of seals

EUR 900 K fin for Akka by the FCA for breach of seal by an employee

'It is irrelevant that the breach of the seal may have been committed negligently by an employee in search of sweets, as argued by the Akka group, since it was the latter's responsibility to take all necessary measures to prevent this type of incident' (FCA, 22 May 2019, Akka)



What are the limits to the duty of active and faithful collaboration?

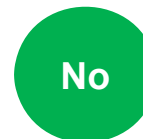


What can be done or not done during the investigation?

B. During interviews

- EU—No absolute right to remain silent in simple investigations
- Prohibition on self incriminating questions

- Can you tell us if a meeting was held on June 18, 2018 at 9:00 a.m.? Who were the participants in this meeting? Can you provide us with the agenda for this meeting?
- Between 2014 and 2016, your company was a party to four steel products agreements. What is the relationship between these agreements and the meeting between competitors on June 25, 2015?



**No
obligation to
answer any
question**

What are the limits to the duty of active and faithful collaboration? – US



What can be done or not done during the investigation?

C. When requesting information

- **All documents relevant to the investigation**
- **Can and will be extremely broad, often requiring the production of a substantial number of documents**
- **Scope of production determined by search warrant which may subsequently, through negotiations between counsel and the government, be narrowed**

What are the limits to the duty of active and faithful collaboration?



What can be done or not done during the investigation?

C. When requesting information

- What can the investigators ask for?
 - accounts
 - invoices
 - professional documents of any kind, in any hands whatsoever, which will likely to facilitate the performance of their duties

BUT: No fishing expedition

- What refusal or limits can the company object to without it being considered an act of obstruction?
 - Motivation of the demand in consideration of the stage of the investigation
 - Proportionality of the demand



Conclusion



Final Recommendations & Conclusion



For dawn raids

- Employee training for dawn raids
- Draft of internal recommendations (do not touch the inspected computers, do not breach seals, etc.)

For the interviews



- Concise and strictly factual answers that are limited to the subject matters of the questions – in case of doubt, do not answer and suggest to answer in writing at a later stage
- Read the minutes of the hearing carefully and insert comments if necessary
- Be accompanied by an attorney



- Don't answer any substantive questions before conferring with outside counsel
- Building early credibility with the prosecutors through timely, responsive actions is critical
- Get ahead of the prosecutors in your fact and legal analysis, as well as the industry and the conduct being investigated
- Determine as early as possible whether key executives may need separate counsel
- A criminal investigation is not like civil litigation. Do not treat prosecutors like a pesky plaintiff's lawyer; stonewalling and unnecessary delays in responding to the government may have serious adverse consequences

Final Recommendations & Conclusion



For the RFIs

- Verify the legal basis and justification for the request for information
- Ensure that the request is justified and proportionate
- Keep all the documents and records of all responses to information requests
- Maintain contact with the investigators during investigations (clarification of requests, amicable negotiations on response times, scope of requests, etc.)

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