



Beware dawn raids –

Competition authorities focus on the energy sector

Briefing

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The energy sector is currently under investigation by the South African competition authority. Companies need a comprehensive plan and procedures in place to manage this in a co-ordinated manner that minimises business disruption.

Four dawn raids by the South African competition authorities in 2015, including a raid on suppliers of liquefied petroleum gas, highlight the need for companies operating in the energy sector in South Africa to have a comprehensive plan in place to deal with a search and seizure operation. This investigation is ongoing.

In October 2015, the Competition Commission (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 on four furniture removal companies, and another in mid-September 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 system companies. What lessons can one learn from these recent raids?

Have 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. 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 the competition authorities are obstructed during the search, they may be liable for criminal prosecution. It is thus essential for companies to have a comprehensive plan in place to deal with a dawn raid. This plan should identify the team responsible for dealing with a search, including 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 needs to be practical in view of travelling distances, and the size and number of company premises potentially involved.

Be clear on internal process

Staff need to be clear on the procedures to be followed and who is responsible for 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 and the applicable warrant should be photocopied. The identification of each official involved in the raid should be checked. Staff should be appointed to monitor the conduct of 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. Adequate measures to protect the company's legally privileged and highly confidential documents should be put in place. It is a good idea to formulate an external communication plan to deal with questions from the press, as well as an internal communication plan to preserve confidentiality and deal with the impact on staff morale as far as possible.

After a raid

Once the search is over, the company will need to conduct a thorough internal investigation in order to determine whether the legislation 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.

Further, companies with operations in Africa should consult with their competition law advisers and put in place a detailed dawn raid plan. The powers granted to African competition authorities to search and seize documents and question staff members may differ from country to country, and competition regulators approach raids differently depending on their level of experience. The company accordingly needs to customise their dawn raid plan appropriately for each jurisdiction which is potentially at risk of a dawn raid.

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