



EU-China Trade Project (II)

中国-欧盟世贸项目(二期)



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PREPARING A CLIENT FOR INVESTIGATIONS

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Support to China's Sustainable Trade and Investment System

支持中国可持续贸易和投资体系

INVESTIGATIONS

Investigations Can Involve:

- Industry or Sector Wide Investigation
- Targeting a Company or Group of Companies
- Unannounced Inspections (“Dawn Raids”) and Requests for Explanations During a Dawn Raid
- Questionnaires
- Interviews By Consent

INVESTIGATIONS

The EU Commission Can Investigate By Requiring Access to Any Business Premises:

- With Assistance of Police and Local Authorities
- Can Attach Seals To Premises To Prevent Access By Others Until Investigation is Over
- Can Examine Books and Records (on Electronic or Other Medium)
- Can Take Copies of or Extracts From Books or Records
- Can Ask Explanation From Management Or Members Of Staff of Company

INVESTIGATIONS

- A “Dawn Raid” Preserves Evidence — No Time to Destroy or Change Evidence.
- Can Provide Evidence of:
 - Intent or Objective of Conduct
 - Purpose of an Agreement or Concerted Practice
 - Effect of Conduct on Competitors / Customers / Suppliers.
 - That the Conduct was ‘Concerted’

REQUIREMENTS FOR AN INSPECTION

Officials Can Only Do An Inspection of A Company Upon Production of a Written Authorization of the European Commission Specifying:

- the Subject Matter and Purpose of the Inspection
- the Date the Inspection Will Begin
- Penalties Provided (for example) if Answers Are Incorrect or Misleading, and
- the Right to Have the Decision Reviewed By the EU Court of Justice.

QUESTIONS TO STAFF DURING INSPECTIONS

During an Inspection (e.g. 'Dawn Raid') of a Company, the Commission May:

- Ask Any Representative or Member of Staff For Explanation
- Such Explanation Can Only Be On Facts or Documents Relating to the Subject Matter and Purpose of the Inspection
- The Commission May Record the Explanations
- Copy of This Record Must Be Made Available to the Company

Strategies For Preparing A Client For Investigation

- Competition Law 'Audit' or 'Review' of Practices and Documents
- Compliance Program
- Mock 'Dawn Raids' (Unannounced Investigations)

Competition Law 'Audit' or Review

Interviews with Key Staff and In-Depth or Random Sampling of:

- Contracts, Standard Procedures, Instructions, Minutes of Management & Board Meetings, Consultants Reports, Website etc.
- Emails of Staff and Management
- Membership of Industry Associations
- Contacts with Competitors
- Contacts with Customers and Suppliers
- Contacts with Government Entities.

Compliance Program

- Redraft Contracts and Procedures to Comply with the Competition Law;
- Company Directors / Leaders to Sign Off on Procedures and Letter to Staff;
- Compliance Handbook: Includes Procedures on what to Do if the Regulator Arrives to Conduct Inspection;
- Mechanisms for Regular Review of Compliance;
- Training of Staff to Achieve Compliance
- Mechanism to Anonymously Report Breaches of Competition Rules

Company Procedures For Unannounced Inspection – “Dawn Raid”

Typically Would Include:

- Who Receptionist Should Contact When Inspectors Arrive: e.g. Senior Managers, In-House and Outside Lawyers
- Ensure the Company Name, Address and Date of Inspection is Correct and Letter of Inspection Satisfies Minimum Legal Requirements
- Separate Room Available With Photocopier For Making Copies of Documents: Ensure Copies Made of All Material Taken

Company Procedures For Unannounced Inspection – “Dawn Raid”

Typically Would Include:

- System for Notifying All Staff that Investigation Is Proceeding And Do's and Don'ts Concerning the Inspection
- Staff Who Are to Accompany Investigators and Ensure a Record is Kept of All Questions Asked and Their Replies
- System For Dealing With Disputes Over Privileged Documents and Material Claimed Not Within Subject Matter of Inspection
- Ensuring, to Extent Possible, a Lawyer is Always Present Before Giving Any Explanations in Response to Questions

MOCK “Dawn Raids”

- Tests The Compliance Program
- Tests That Procedures Are Followed if Regulator Arrives For an Unannounced Inspection.
- Typically Lawyers Act as If They are the Regulatory Authority
- Results in Improved Mechanisms and Procedures to Work as Envisaged

TECHNOLOGY ISSUES

- Emails and Information Held on the Company's Network Drive are a Common Source of Evidence
 - Need Information Technology (IT) Experts to Gain Access to Network Drives: Ensure IT Expert is Quickly Available
 - Investigator May Copy All on Network Drives Including Emails and Sometimes Particular Individual Computer Drives
 - Have a Document and Materials Disposal Policy (e.g. twelve months except for information required by law to be kept longer.)

OTHER ISSUES

- Avoid:
 - Destruction of Documents
 - Obstructionism By Employees
 - Giving Originals of Documents to Investigator to Be Removed (Encourage/Allow copies to be taken)
- Do Not Inform Other Companies of Dawn Raid
- Confer With Investigator on What Can Be Said Publicly About an Inspection – Can Jeopardise An Application For Leniency

THANK YOU

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