

# How to deal with lawyers in an effective and efficient manner?

EU-China Trade Project (II)

4th Anti-monopoly Law  
Competition Week

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Presentation by Dr. Michael HAN

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Freshfields Bruckhaus Deringer LLP



# I. Where enforcers/lawyers interact in cartel cases

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Before dawn raids

During dawn raids

Situation assessment post dawn raid

During enforcer's investigation

Before enforcer's decision

# Before dawn raids

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- Conducting an internal antitrust audit for the client to identify the infringement
- Assessing the risk
- Advising the client on whether to blow the whistle
- Internal Communication
- International cooperation

**LAWYER - CLIENT**

- Contacting the agency to put down a marker
- Making a leniency application

**LAWYER - AGENCY**

# During dawn raids

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- Identifying scope of inspection and authority's mandate/rights
- Clarifying and ensuring client's required cooperation as well as protection of its rights in dawn raid
- Coordinating interactions between client and authority (who answers questions, takes decisions, etc.)
- Ensuring legal professional privilege
- Reviewing documents and data with regard to leniency and cooperation
- Advising on data protection (access to e-mails, servers, etc.), labor law, personal criminal law, etc. issues
- Internal communication

**LAWYER - CLIENT**

- Shadowing officials
- Agreeing on scope of search (incl. e-search terms)
- Seeking legal professional privilege
- Coordinating the authority's requests
- Building up the trust/avoid any confrontational relationship

**LAWYER - AGENCY**



# Background: Legal professional privilege in the EU

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## The EU LPP covers (varies in Member States):

- Work products of external lawyers on the subject matter covered by the inspection
- Work products of in-house lawyers that outline or summarize a phone conference with external lawyers on the subject matter covered by the inspection
- Internal memoranda, as long as they are prepared exclusively for seeking external legal advice on the subject matter covered by the inspection

## The EU LPP does NOT cover (varies in Member States):

- Work-products by in-house lawyers that are not clearly linked to a communication with external lawyers on the subject matter covered by the inspection (e.g., own assessment of legal questions)
- Work-products by non-EU lawyers



# Situation assessment post dawn raid

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- Conducting antitrust audit (interviews, e-search, etc.)
- Assessing risk and defense strategies
- Advising on whether to request leniency (clarity, transparency, reliability and fair application of leniency programme are crucial in attracting leniency applicants)
- Advising on labor law, personal criminal prosecution, private action, etc. risks
- Working out PR strategies
- Examining neighbouring markets for parallel breaches

**LAWYER - CLIENT**

- Negotiating re leniency
- Relationship with agency is crucial
- Negotiating re scope of investigation, prosecution (subject matter, persons, duration, etc.)
- Responding to information request

**LAWYER - AGENCY**



# During the investigation

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- Ongoing antitrust audit and risk assessment
- Coordinating cooperation, leniency and/or defense
- Advising re press, financial reporting obligations, labor law, criminal law, etc.
- Liaising with client's management and general counsel
- Assessing and inquiring re evidence and potential misunderstandings on the enforcer's side

**LAWYER - CLIENT**

- Negotiating re scope of decision (subject matter, duration, persons involved, etc.)
- Negotiating re access to file
- Clarifying evidence and misunderstandings
- Responding to the information request

**LAWYER - AGENCY**



# Before the decision

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- Liaising with client's management and general counsel
- Advising re press, financial reporting obligations, labor law, criminal law, etc.

**LAWYER - CLIENT**

- Exploring and negotiating settlements
- Negotiating re scope of decision (subject matter, duration, persons involved, etc.)
- Negotiating re amount of fine
- Negotiating re access to file

**LAWYER - ENFORCER**





## II. Interaction in dominance cases

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### Enforcement often starts with complaint by third party

- With the exception of dawn raids, the interactions in dominance cases are similar to interactions in cartel cases

- Understanding the complaint, the underlying business practice and the business justifications for behaviour
- Assessing risk and defense strategies vis-à-vis enforcer and potentially in court (civil proceedings, where applicable)
- Involving economists and other experts

**LAWYER - CLIENT**

- Explaining and negotiating with the agency whether business practice violates competition law or is justified
- Negotiating how business practice must be changed to avoid further proceedings
- Greater prospect of formal or informal settlement

**LAWYER - AGENCY**



# III. Dealing with lawyers effectively and efficiently

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## Advantages of effective enforcer-lawyer interactions (“why?”)

- Lawyers may ease tension between enforcers and clients
- Incentives for effective enforcer-lawyer interaction on both sides

## Recommendations for effective and efficient interactions (“how?”)

- Build working relationships with lawyers
- Communicate expectations on form of interactions
- Critical for lawyers to win the enforcers’ trust from the outset
- transparency throughout the process helps to build up the trust and manage the expectations of the parties involved



# Advantages of effective interaction (I)

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## Lawyers may help the interaction between enforcers and clients

- Direct contact with client's senior management and GC
- Objective view on legal assessment and risks (combined with experience)
- More trusted by clients than the enforcers
- Thus, may smoothen the communication/interaction



# Advantages of effective interaction (II)

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## Incentives for effective enforcer-lawyer interaction on both sides

- For enforcers: reducing investigation work and fostering investigation success without involving risks for enforcers
  - Investigation becomes easier and more effective
  - Cooperation is voluntary on both sides
  - Sharing preliminary thoughts on certain issues or infringement theories is not binding and based on common understanding that it will not be used against the enforcer
  - Investigation work becomes easier where enforcers can discuss their theories, understanding or certain aspects with lawyers/clients and cooperate with them in investigation
  - Reduces frictions between enforcers and lawyers/clients (e.g., technicalities)



# Advantages of effective interaction (III)

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## Incentives for effective enforcer-lawyer interaction on both sides

- For lawyers: fostering representation in investigation and/or leniency
  - Reducing the scope of investigation by sharing and discussing theories or aspects of case
  - Ensuring adequate scope of leniency by receiving hints for further internal investigations and enlarging leniency where necessary
  - Increasing lawyers' standing vis-a-vis their clients if lawyers have working relationship with enforcers and receive additional value (which, in turn, increases cooperation with enforcers)
  - Additional incentives due to repeat play (lawyers interact with enforcers repeatedly)
- For clients: investigation is better, quicker and cheaper outcomes
- For all: reciprocity (quid pro quo)

# Recommendations for effective interactions (I)

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## Build up working relationships and the trust of both sides

- Be open rather than confrontational
- Be fair and reasonable
- Act (and react) predictable, reliable and trustworthy
- Be transparent as to process and timing, where possible
- Treat each other with respect and as reliable counterparts

## Communicate expectations on form of interaction

- Communicate clearly on what is expected
- Be open to reasoning, arguments and difficulties on the client's side

Finally while realizing lawyers work for their clients' best interest, please do not treat them as your enemy!

- Good lawyers make everyone's life easier



# Recommendations for effective interactions (II)

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## Group discussion:

- What are the potential risks in dealing with lawyers?
- How do you expect lawyers to act?
- What are do's and do not's for lawyers and enforcers in dealing with each other?

# Thank you for your attention!

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