

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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I. Where enforcers/lawyers interact in cartel cases

Before dawn raids

During dawn raids

Situation assessment post dawn raid

During enforcer's investigation

Before enforcer's decision

Before dawn raids

- 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

- 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

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

- 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

- 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

- 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

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

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)

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)

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)

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)

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)

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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