

A Day in the Life of a Dawn Raid Victim

First International Medical Device
Compliance Congress

Paris, 26-27 May 2008

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Linklaters

Agenda

- The Investigators Arrive
- The First Hour
- The Office Search
- At the End of The Day
- How to Manage the Dawn Raid Risk

The Investigators Arrive

The Investigators Arrive

- Investigations usually start in the morning
- Investigators arrive in teams, e.g.:
 - Commission officials
 - Members of national competition authority
 - IT expert
 - Sometimes: Police officers
- Investigators are well prepared (site maps, names of staff members etc.)
- Simultaneous investigations at various companies or locations

Golden rules for Reception & Security

- Legal obligation to co-operate actively
 - ➔ Don't be obstructive or hostile to the officials
- Ask investigators to wait in a separate room
- Contact the Legal Department / Compliance Officer
- Tell the investigators that someone is coming to meet them
- Do not let investigators wander around unattended

The First Hour

Managing the First Hour

- Greet investigators
- Ask the investigators for their staff cards or identity cards
- Ask the investigators for their mandate and/or court warrant
- Read the investigators' documents carefully and check what the scope of the investigation is
- Take a copy of the documents
- Alert external counsel and fax them copies of the investigators' documents

Sample of a Commission decision ordering an investigation

Commission Decision

of 1 May 2008 requiring On-yer-bike plc to submit to an investigation pursuant to Article 20(4) of Council Regulation No 1/2003 of 16 December 2002 (Case COMP/34.123 - Bicycles)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community, and in particular Article 81 thereof,
Having regard to Council Regulation No 1/2003 of 16 December 2002, and in particular Article 20(4) thereof,

Having consulted the competent authority of the relevant Member States pursuant to Article 20 of Regulation No 1/2003,

WHEREAS:

The Commission has received information indicating that there are **parallel pricing practices for bicycles between a number of bicycle producers**. The circumstances give rise to the possibility that collusive behaviour between the addressee and its competitors in the UK and elsewhere in the EEA is taking place.

If proved to exist, agreements and/or concerted practices of the type indicated above may constitute very serious infringements of Article 81 of the EC Treaty and of Article 53 of the EEA Treaty.

In order for the Commission to be in a position to ascertain all the relevant facts concerning the possible practices it is necessary to adopt a decision under Article 20(4) of Regulation No 1/2003 requiring the undertakings to submit to an investigation.

In order to safeguard the effectiveness of the investigation, notably in view of the serious and potentially Community-wide nature of the suspected infringements of EC competition law, it is necessary that the undertakings and the association of undertakings should not be informed thereof in advance.

In accordance with the provisions of Articles 23 and 24 of Regulation No 1/2003, the texts of which are attached in extract form to this Decision, the Commission may by decision impose on undertakings, or associations of undertakings:

- 1) fines where, intentionally or negligently, they produce the required books or other business records in incomplete form during investigations under Article 20 or refuse to submit to an investigation ordered by decision issued in implementation of Article 20(4);
- 2) periodic penalty payments of a given amount per day, calculated from the date appointed by the decision, in order to compel them to submit to an investigation which it has ordered by decision taken pursuant to Article 20(4).

HAS ADOPTED THIS DECISION:

Article 1

The undertaking referred to in Article 3 of this Decision is hereby required to submit to an investigation into its possible participation from 2003 to present in anti-competitive agreements and/or concerted practices contrary to Article 81 of the EC Treaty and Article 53 of the EEA Treaty in relation to the sale and marketing of bicycles.

The above-mentioned undertaking shall permit the Commission officials authorised to carry out the investigation and the officials of the competent national competition authorities, acting in accordance with Article 20(5) of Regulation No 1/2003, to enter all its premises, land and means of transport during normal office hours. It shall permit such officials to examine all books and other business records on the spot and to take copies of all relevant documents. The officials are also empowered to ask on the spot for oral explanations on the subject-matter of the investigation.

Article 2

The investigation shall take place on any of the premises of the firms indicated in Article 3 below as well as other undertakings belonging to the same groups, and shall begin on or after 1 May 2008.

Article 3

This Decision is addressed to:

On-ye-bike plc having its registered office at One Silk Street, London EC2Y 8HQ, United Kingdom, together with its respective subsidiaries.

This Decision shall be notified by being handed over to a representative of the undertaking concerned immediately before the investigation by the duly authorised Commission officials.

Article 4

An action challenging this Decision may be brought before the Court of First Instance of the European Communities in Luxembourg in accordance with Article 230 of the EC Treaty. Such action shall not, pursuant to Article 242 of the EC Treaty, have suspensory effect, unless the Court decides otherwise.

Done at Brussels: 01.05.2008

For the Commission
Neelie Kroes
Member of the Commission

Sample of a Commission authorisation under Article 20(2)

COMMISSION OF THE EUROPEAN COMMUNITIES
DIRECTORATE GENERAL FOR COMPETITION
DG COMP

Brussels, 1 May 2008

AUTHORISATION TO INVESTIGATE

Mr Luke Around

holder of internal service pass No. 47708

is hereby authorised to carry out an investigation at
On-ye-bike plc, One Silk Street, London EC2Y 8HQ, United Kingdom,

for the purpose of

obtaining information and documentary evidence concerning suspected collusive pricing practices between bicycle producers since 2003 until the present, which if proved to exist may constitute very serious infringements of Article 81 of the EC Treaty and of Article 53 of the EEA Treaty.

To this end, he has been invested with the powers set out in Article 20 Paragraph 2 of Council Regulation No. 1/2003.

The Commission, with reference to Article 20 Paragraph 3 of Council Regulation No. 1/2003, hereby draws attention to the provisions of Article 23 Paragraph 1 (c) 101(e) of that Regulation 1/2003.

For the Commission,

Managing the First Hour

- Ask the investigators to wait until the arrival of external lawyers
 - Investigators generally not willing to wait if (in-house) lawyers are present on site
- If the investigators are prepared to wait
 - Offer a guided tour of the offices
 - Set up call with external lawyers to agree practical arrangements

Managing the First Hour

- Before the investigators start the search
 - Arrange a team of shadowers
 - Brief senior management
 - Brief employees (speak to lawyers first)
 - Ensure senior IT backup
- When the search starts
 - Ask investigators to wear badges
 - Make sure every investigator is accompanied by a shadow

The Office Search

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The Powers of the Investigators

- The European Commission is entitled to
 - review all relevant documents
 - print/take copies of all relevant documents
 - question individuals who consent to be interviewed
 - search domestic premises (if court warrant)
- Unlike certain national authorities it may **not**
 - take away originals of documents
 - seize equipment (e.g. server)
 - use force to enter premises/open furniture

Limits on Investigators' Powers

- Confidentiality?
- Relevance
- Legally privileged communications
- Privilege against self-incrimination
- But: Degree of cooperation with the investigation can increase or decrease fines

Confidential Information, Relevance

- Confidential information
 - Cannot refuse access on grounds of confidentiality, however sensitive it is
- Relevance
 - Only documents within scope of investigation
 - But: investigators can examine document to check relevance
 - Investigators' decision as to relevance is final (on the day)

Privilege against Self-incrimination

- Investigators cannot compel admission of breach, e.g.:

“Did you agree to fix prices at this meeting?”

- In practice borderline is blurred, e.g.:

“Did you attend this meeting?”

“What was the purpose of this meeting?”

Golden Rules: Documents

- Show the investigators “just enough” to demonstrate legal privilege or irrelevance
- Establish procedure for disputed documents, e.g.
 - discussion of all disputed documents at end of the day
 - “sealed envelope“ for documents where no agreement can be reached
- Take legal advice before saying “No”

Golden Rules: Electronic Documents

- Investigators use search terms to find relevant documents and emails
- Review each document/email individually with investigator
- For emails select view that does not show contents of message
- Print off/copy document only if relevant and not privileged

Golden Rules: Questions/Interviews

- Ensure that a lawyer is present
- Check relevance & self-incrimination
- Answer precisely and concisely
- Do not guess, speculate or volunteer info
- Do not refuse to answer without legal advice
- Ask for a copy of the investigator's record
- Shadower to keep notes of Q&As

At the End of the Day

At the End of the Day

- Investigators may seal filing cabinets and doors: inform security & cleaners!
- Ask for confirmation of full co-operation
- Request signed copies of any records and inventories
- Discuss privilege/relevance/confidentiality

At the End of the Day

- Time out!
- De-briefing sessions
 - Shadowers/Employees
 - Management
 - Legal
- Establish complete record of events
- Plan the strategy going forward

How to Manage the Dawn Raid Risk

How to Manage the Dawn Raid Risk

- Dawn raid response procedures
- Specialist training for key dawn raid “actors”
- Mock dawn raids

Questions?

