

## Dawn Raids

The advent of high profile scandals such as WorldCom and Enron, and the increase in regulatory offences being created by statute, now means that any business faces the real prospect of a dawn raid by a host of Government regulators such as the Office of Fair Trading and the Financial Services Authority.

Another governmental body, the Serious Fraud Office, recently revealed in its annual figures that it secured 37 convictions in 2004/2005 and that it is introducing an additional support unit to deal with the sheer volume of work. It also obtained confiscation orders worth £17.5 million against 17 defendants within this period.

Anil Rajani is head of IBB Solicitors' Business Investigations & Governance Unit (BIG), which specialises in corporate fraud and white collar crime in London and the South East. "The powers these bodies wield and the penalties they can dish out are severe," he warns. "Some of them have the power to use intrusive and covert surveillance, to raid your office, your car and your home, using force if they have to, and they can make you dish the dirt on your friends and colleagues."

### So who are these bodies?

The main ones are:

- Financial Services Authority (FSA)
- Office of Fair Trading (OFT)
- Dept of Trade & Industry
- Revenue & Customs
- Serious Fraud Office (SFO)
- Health & Safety Executive

This list is not exhaustive. Each has different powers and areas of operation. By way of example, the Serious Fraud Office investigates and prosecutes serious and complex fraud. It crosses national boundaries in pursuit of criminals and shares information with authorities in other jurisdictions. In August of this year, Danish businessman, Bjorn Stiedl, was found guilty of pension fund fraud of over £2 million and sentenced to 4.5 years in prison. This was despite Stiedl volunteering to repay £2.817 million to the pension fund. His co-conspirator, Carsten Iversen was extradited from Denmark and sentenced to two years imprisonment in June 2005.

In their own words, the Office of Fair Trading will, 'uproot and deter all forms of anti-competitive behaviour, including cartels and the abuse of market power'. This includes price fixing, limiting production, market sharing and bid rigging. In February 2002 Argos and Littlewoods were fined £17.28 million and £5.37 million respectively for price fixing. The whistleblower was Hasbro, who was also guilty and had been fined £4.95 million but escaped a potential £15.59 million fine in return for its cooperation.

### So what happens in a dawn raid?

This is how a dawn raid might proceed. Let us take the Financial Services Authority (FSA) as an example. Under the Financial Services and Markets Act 2000, the FSA was given powers

to carry out criminal prosecutions for certain offences, including falsely claiming to be authorised, insider dealing and market manipulation amongst a host of others.

The FSA suspects Mr Weasel of having committed a type of offence whereby, under Section 168 (2), no notice of being under investigation is required. It appoints two investigators to look into his affairs – Mr Weasel is not aware of this. The investigators believe relevant documents are held at his office and that Mr Weasel may dispose of them if he gets wind of the investigation. They obtain a search warrant to enter, search for and seize relevant documents. The investigators also believe that Mr Weasel has secreted relevant documents at his home. They therefore obtain a further warrant to enter and seize those documents. Mr Weasel must allow them access – they can use reasonable force if they have to. If he tries to stop them, he is committing a separate offence.

They search through company books, records, memoranda and emails. They ask one of Mr Weasel's employees to copy certain files and to compile information on sales figures that they cannot locate. They also bring in an expert to recover electronic files that have been deleted. They also check his car for any documents.

In the course of the searches Mr Weasel is questioned. If he gives false information he is guilty of a separate offence punishable by up to two years! Mr Weasel is then required to attend a compulsory interview and produce any documents requested. He is compelled to answer and cannot exercise his right to silence! The investigators then summon Mr Weasel's co-directors, Dr Buchs and Ms De Mena for a compulsory interview. They then review their information and interview Mr Weasel under caution – anything said in this interview is admissible evidence. If he makes no comment an adverse inference could be drawn against him, if says something inconsistent with his previous interview he could be committing a separate offence! He cannot win! The investigators review the case using certain criteria and decide to prosecute Mr Weasel. He then faces the full panoply of the criminal system including the prospect of being remanded into custody.

“What you also have to bear in mind,” says Anil Rajani, “Is that this is only one regulatory body. All of these regulators have a policy of joined up investigation, they share information. Once one of them takes a bite, they all move in for the kill. You could find yourself party to charges from two or three.”

Another government body with wieldy powers is the Office of Fair Trading (OFT). The Enterprise Act made cartel activity a criminal offence. With that it gave the OFT extremely wide draconian powers of investigation including the powers to search homes and businesses and compel answers to interviews. It has also given the OFT the powers to carry out covert and intrusive surveillance - it can conceal a listening device in your premises and hear everything that is said. Yes the walls do have ears!

“In a case I dealt with,” Anil Rajani says, “Initially it was investigated by the DTI, but soon the insolvency service, OPRA, closely followed by HM Revenue and Customs all got involved. Not to be left out, the OFT had their two pennies' worth and finally the SFO, who prosecuted the individuals!”

### **So what should you do if dawn raided?**

Whilst prevention is better than cure and anti-competitive practices should be avoided at all costs, if the investigators do come knocking, what is the best course of action to limit your exposure to potentially damaging business consequences following a dawn raid?

Although a dawn raid is most often not ‘at dawn’, it is normally a ‘surprise’, and the first indication a company may have that it is under investigation (even though it may have been under surveillance for a considerable period of time). To this end, it is a good idea to have a crisis management plan in place – something to fall back on in the midst of chaos:

- Ask the Investigating Officer to show you the authorisation and check that it sets out the purpose of the investigation.
- Contact your lawyer immediately – the officials should allow reasonable time for him/her to arrive.
- Although at the dawn raid stage it is highly likely that someone has already ‘blown the whistle’, there may still be time for the company to apply for corporate immunity or for an individual to seek a ‘no action’ letter.
- Organise an internal meeting immediately. Encourage employees not to attempt to hide or destroy any documents as they may be committing a criminal offence.
- Assign two of your staff to assist the officials in copying. Never leave the officials alone and do not allow access to legally privileged documents or documents, which are not relevant to the investigation.
- Keep a record of any interview sessions and a copy of any documents the investigators take away with them.
- Consider liaising with the media in the interest of damage limitation, but only with the advice of your lawyer. Consider other stakeholders and what you are going to say to them.

### **Post-raid**

- Make a report, considering whether there was valid reason for the investigation.
- The Investigating Officers may make a request for further documents and information.
- If an infringement has occurred written notice is given to those concerned to allow representations to be made.
- Directions may be given to end the infringement before the completion of the investigation. Such practice is to prevent serious, irreparable damage. However, a penalty will be imposed if an infringement was committed intentionally or negligently.

### **Whistleblowing**

“Once the investigators are in,” says Mr Rajani, “It can become an undignified scramble for immunity or leniency. Illegal activity is difficult to detect and the UK has learnt from the US in this respect. Regulatory authorities are largely reliant on whistleblowing employees to uncover such activity. In the Christies case, Christopher Davidge, a senior employee implicated in the illegal price-fixing, won immunity by providing enough information to prosecute.”

In the case of Enron, employee Sherron Watkins wrote a memo to the chairman, Kenneth Lay, warning him of irregular accounting practices but was not taken seriously until it was too late. Many companies have since realised that the vigilance of their own employees is the best anti-fraud system money can buy, and are actively encouraging a culture where employees have nothing to fear from raising concerns. Problems can be identified at an early stage

before they become too serious and it also acts as a very effective deterrent as culprits are more likely to be caught. The OFT actively encourages whistle blowing with the issuing of a No action letter those who get in there first to assist and provide information on their colleagues.

Finally, Mr Rajani has this to add, “The sanctions that can now be enforced are draconian. A company found guilty of a regulatory offence may be fined up to 10% of its annual turnover. Directors can also be imprisoned if found guilty of bending the rules. The new rules apply to small – medium sized enterprises and multinational companies alike. Dawn raids are no longer the preserve of the silver screen! Corporate fraud is difficult to detect and to some extent, legislation acts as a deterrent more than anything. But it naturally follows that where infringements are found, authorities will not fail to swoop and hang the culprits out to dry.”

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