Dawn raids: dealing with inspections by competition authorities in the UK
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Quickguide overview

This Quickguide provides guidance on how to ensure an effective response to an unannounced inspection (known as a “dawn raid”) by a competition authority. Topics covered include:

- Initial response to a dawn raid
- Managing a dawn raid
- The scope of inspectors' powers
- What to do at the end of a dawn raid
- Dos and don'ts at each stage
- Flowcharts summarising the key steps for the internal response team.

Ashurst also provides a range of additional dawn raid materials, including:

- Dawn raid training for employees and/or your response team
- Tailored dawn raid guidance for your response team to ensure an effective response in the event of a dawn raid

Brexit

On 31 January 2020, the UK ceased to be a member of the European Union, commonly referred to as "Brexit". However, EU law continues to apply with full force and effect in the UK during the Brexit Transition Period (at the time of writing, scheduled to end on 31 December 2020). This Quickguide therefore considers applicable EU law alongside domestic UK law during the Transition Period. It does not consider the potential impact of Brexit on UK competition law post the Transition Period, as this will depend on the terms of the UK’s future relationship with the EU, which were not clear at the time of writing.

For further information on any of the above areas, or if you have any questions regarding how best to deal with a dawn raid, please speak to one of the contacts listed on the final page of this Quickguide, or your usual Ashurst contact.
Dawn raids: dealing with inspections by competition authorities in the UK

1. Introduction

If a competition authority suspects that an infringement of competition law has occurred, it may carry out unannounced inspections ("dawn raids") at the premises of companies suspected of involvement (and, in some circumstances, also at the premises of their customers and/or competitors).

In the UK, competition dawn raids may be carried out by the Competition and Markets Authority (CMA) and/or the European Commission. It is important to clarify at the outset who is leading the dawn raid and the underlying investigation into a suspected infringement of competition law, as this will affect which detailed procedural rules apply to the dawn raid and the scope of the inspectors' powers. It is therefore important to check the inspectors' authorisation documents carefully to determine which rules apply, as detailed below.

Irrespective of which procedural rules apply, a dawn raid places considerable pressure on multiple areas of a business at once, and can be very stressful. Dawn raids may take place in multiple locations (including in different countries) at the same time.

It is therefore crucial that an effective internal response strategy is put in place before being confronted with a dawn raid. All employees must know how to deal with the inspectors, and what their legal obligations and rights are. If a company fails to comply with its legal obligations during a dawn raid, significant fines can be imposed, and individuals may face civil or even criminal sanctions. At the same time, it is important to ensure that the company's rights and the limits on the inspectors' powers are respected, and that the impact of the dawn raid on the day-to-day business of the company is minimised.

The guidance set out in this Quickguide provides an overview of the key stages of a dawn raid in the UK and the powers of the inspectors. It also outlines the steps which should be taken to ensure that a company which is the subject of a dawn raid in the UK responds in an efficient manner while minimising legal risk.

An overview of the key steps to be taken by the internal response team at each stage of the dawn raid is also set out in a flowchart format at the end of this Quickguide. This can be printed separately as a useful quick reference guide to keep to hand alongside a more detailed dawn raid handbook.

2. Initial response to a dawn raid

Although unannounced inspections by competition authorities are generally referred to as "dawn raids", the inspectors will not actually arrive at dawn. They will arrive during normal business hours, usually between 8.30 a.m. and 9.30 a.m. If the investigation into the suspected competition law infringement is being led by the European Commission, the inspectors from the European Commission may also be accompanied by inspectors from the CMA to assist them during the raid.

Reception staff

Reception staff should be trained to follow the company's internal response strategy (it may make sense for an aide memoire of initial steps to be available at reception). The key initial steps to be taken will include:

- alerting a senior member of the internal response team;
- requesting and taking a copy of the inspection team's authorisation documents (which may include a court warrant) and ID cards;
• preparing a list of members of the inspection team; and
• arranging name badges clearly identifying the inspectors as visitors to the premises.

The inspectors should be told that a senior member of staff is on their way and asked to wait in reception or in an empty meeting room/other suitable space while these preliminary administrative tasks are carried out. The inspectors should be willing to agree to this provided any delays are minimal, although it is important to be aware that they are not legally obliged to wait and should not be obstructed if they insist on proceeding.

All conversations with the inspection team should be kept to matters of pure administration at this stage – the conversation should not concern the business or the focus of the investigation.

The internal response team

A senior member of the response team should go to reception immediately to meet the inspection team. In the meantime, other members of the internal response team should prioritise the following tasks:

• immediately contact the in-house legal team (if the company has one) and/or external legal advisers, as well as other key individuals (e.g. senior management) to inform them that a dawn raid is taking place and arrange a brief meeting/call to discuss the subject matter and purpose of the dawn raid;
• ascertain how long it is likely to be before either in-house or external lawyers can be present;
• check the inspectors' authorisation documents (copied by the reception staff): these should state the subject matter of the investigation (albeit usually in broad terms) and the legal basis for the dawn raid. This will enable you to identify which procedural rules will apply to the inspection, and the scope of the limits on the inspectors' powers - see further below;
• appoint a team of "shadowers" (at least as many as the number of inspectors) to accompany the inspectors at all times once they proceed with the inspection. The shadowers should be briefed as to the limits on the inspectors' powers, and, so far as possible, keep a record of which documents have been reviewed/copied (bearing in mind that increased use of forensic search software may make this difficult in practice) and any questions asked/answers given;
• ensure senior members of the internal IT team are available to assist with complying with any requests by the inspectors to shut down telephone and/or e-mail systems during the dawn raid, and any issues which may arise when searching electronic documents/data; and
• send an e-mail to all staff at the premises to explain what is happening and the need to be co-operative but to pass all questions/requests from the inspectors to the response team leader and not to discuss the fact of the dawn raid with anyone outside of the business.

Do the inspectors have to wait for lawyers to arrive before proceeding?

If in-house lawyers will be present within 15 minutes, or external lawyers will be present within 45 minutes, it is reasonable to ask the inspectors to wait until the lawyers' arrival before proceeding with the inspection.

However, there is usually no legal requirement for the inspectors to wait for the arrival of lawyers, and if they refuse to do so then it is important that this is not insisted upon as there is a risk that this could be deemed to amount to non-co-operation or obstruction of the investigation (which could lead to significant fines being imposed).

If the inspectors are not willing to wait for the arrival of lawyers, the inspection should be allowed to proceed, but the internal response team should liaise with the in-house and/or external lawyers by telephone (consider setting up an "open bridge" conference call for this purpose, with a lawyer constantly available for questions).
If the inspectors insist on starting to review documents before either internal or external lawyers arrive:

- seek to agree with the lead inspector that at this stage the inspectors will not take any further steps prior to the lawyers' arrival beyond those necessary to ensure no documents can be concealed/destroyed and no undertakings subject to parallel dawn raids can be tipped off (i.e. no review/copying of documents and no questioning of individual employees before the lawyers arrive);
- or

- if this is not possible, identify (with assistance from the lawyers via telephone) any categories of documents/data which are likely to be relevant to the investigation but which are low risk of containing privileged material. If possible let the inspectors work through these groups of documents/data until the lawyers arrive.

**Key points to remember**

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<thead>
<tr>
<th>DO</th>
<th>DON'T</th>
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<tbody>
<tr>
<td>✓ implement a response strategy before being confronted by a dawn raid</td>
<td>X be hostile to inspectors</td>
</tr>
<tr>
<td>✓ ensure that all employees, have received appropriate training and know what they should do in the event of a dawn raid</td>
<td>X obstruct the investigation by refusing to co-operate</td>
</tr>
<tr>
<td>✓ check the authorisation documents produced by the inspectors and raise any concerns with in-house or external lawyers</td>
<td>X insist that the inspectors wait for the arrival of in-house and/or external lawyers before starting the investigation if they refuse to do so when asked</td>
</tr>
<tr>
<td>✓ immediately contact in-house and/or external lawyers and ask the inspectors to wait until lawyers arrive before commencing the inspection (but do not insist on this)</td>
<td>X try to destroy, delete or hide any documents or files (whether paper or electronic)</td>
</tr>
<tr>
<td>✓ try to delay answering any questions (other than straightforward administrative queries) until a lawyer is present</td>
<td>X tell anyone outside the business that the inspection is taking place or discuss any aspect of it</td>
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<tr>
<td>✓ seek immediate legal advice if at any stage you are uncertain as to your rights and responsibilities</td>
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3. **Managing the ongoing dawn raid**

The detailed rules governing the powers of the inspectors will vary depending on whether the dawn raid is being led by the European Commission or the CMA and also on the type of underlying competition investigation. This information will be included in the authorisation documents presented by the lead inspector on arrival at the premises. There are five possible scenarios:

- dawn raid by the CMA in connection with a CMA civil investigation;
- dawn raid by the CMA in connection with a CMA criminal investigation;
- dawn raid by the CMA in connection with a European Commission investigation (i.e. on behalf of the European Commission);
- dawn raid by the CMA in connection with an investigation by the national competition authority of another EU Member State; or
- dawn raid by the European Commission in connection with a European Commission investigation.
The key powers of the inspectors in each of these scenarios are summarised below.

**Dawn raid by the CMA in connection with a CMA civil investigation**

CMA inspectors may carry out a dawn raid at business premises in respect of a CMA civil investigation on the basis of a written authorisation. Unless the inspectors have also obtained a warrant from either the High Court or the Competition Appeal Tribunal, they may not use force to enter either business or domestic premises. However, failure to permit the inspectors to enter the premises may be punished by fines, and it is generally not advisable to refuse to allow access.

If the inspectors have obtained a warrant, they may use such force as is reasonably necessary to enter the premises, and may also inspect non-business premises (including private homes). Failure to permit the inspectors to access the premises can be punished by fines, and intentionally obstructing an officer in the exercise of his powers under the warrant is a criminal offence.

**Reviewing and copying documents and forensic IT searching**

The CMA inspectors have the right to require any documents to be produced which they consider to be relevant to the subject matter of the investigation (as specified in the authorisation documents), and to make copies of them. This can include both hard copy and electronic documents (including e-mails), and extends to documents stored on desktops, laptops, mobile telephones or any other electronic data storage device.

If the inspectors have obtained a warrant, they have additional powers to actively search the premises and to take original documents if it is not reasonably practical to take copies on the premises or if this is deemed necessary to preserve the documents or prevent interference with them.

In the case of a dawn raid at business premises (but not domestic premises), additional "seize and sift" powers permit potentially relevant material to be seized and removed from the premises for subsequent review (subject to certain conditions). These powers can be exercised even if this could mean that legally privileged material could be seized. This means that the inspectors may be able to, for example, copy the hard drive on a computer and take the whole copy, without having to check on the premises the relevance of every document copied, or ensure that privileged material is excluded, if to do so would not be reasonably practicable. However, before exercising these powers the inspectors must issue a formal notice.

The CMA is becoming increasingly sophisticated in its approach to searching and reviewing electronic data, and the inspectors are likely to be accompanied by forensic IT experts and/or bring hardware with them to enable all potentially relevant electronic data to be fed into a central hub running powerful "Nuix" search software, overseen and partly reviewed on-site by the inspectors. As noted in section 1, it is therefore important to have senior members of the IT team on standby to assist the inspectors with any IT-related issues, including providing access to password-protected documents and providing "administrator access rights" support. If possible, shadowers should try to take a note of any keyword search terms used by the inspectors when searching electronic data, and of any document sets or issues which they seem particularly interested in. However, it is important to be aware that, in practice, where forensic search software is used at least some keyword search terms are likely to be pre-programmed. This is likely to make it much more difficult for those shadowing the inspectors to keep a complete record of exactly which document have been reviewed/copied and/or what search terms the inspectors have used.

Throughout the dawn raid, all shadowers should pass copies of any potentially incriminating "hot documents" which they become aware of to the central senior team without delay. This will be key for the risk assessment that should be made following the investigation.

**Limits on the inspectors' powers to review and copy documents**

The fact that documents may contain confidential information does not offer any protection from being reviewed and copied by the inspectors.
However, the inspectors will not be permitted to require the production of any documents which are not relevant to the subject matter of the investigation, or which are protected by legal privilege under English law. These restrictions operate as important constraints on the inspectors’ powers to search and copy/seize documents. In this regard, it is important to note that English law on legal privilege offers wider protection than EU law on legal privilege, and may apply to correspondence with in-house lawyers and lawyers qualified outside the EU, as well as to correspondence with EU-qualified external lawyers. For more detail on UK legal privilege rules, please see the separate Ashurst Quickguide on this topic.

All shadowers should be made aware of the applicable rules, and they should intervene (seeking support from the response team as necessary) if the inspectors try to review or copy documents which are irrelevant, privileged or otherwise protected.

So far as it is possible to do so, a record should also be kept of every document reviewed and copied by the inspectors during the course of the dawn raid. In practice, the inspectors are likely to provide a list of the documents they are taking away with them at the end of the dawn raid, but it is advisable to keep a separate ongoing record also. Where the search is conducted using forensic IT software, a log of copied documents will be generated, which the inspectors will usually provide to the business at the end of the raid. If this is not voluntarily provided by the inspectors, it should be requested by the response team leader.

**Powers to ask questions**

The CMA inspectors have powers to ask individuals for explanations about any potentially relevant documents, and refusal to answer may result in significant sanctions being imposed on the company and/or the individual. However, any such questioning is subject to the privilege against self-incrimination and should arguably be limited to assisting the inspector in understanding the documents which are in front of him/her, rather than asking about new issues or seeking information above and beyond what is contained in the document being reviewed.

In addition, the CMA can require any individual who has a connection with the undertaking (including ex-employees) to answer questions in relation to its investigation following the issue of a written notice. These compulsory interview powers can be used in the context of a dawn raid, and an individual may be given very little time to prepare. If possible, it is advisable to seek to delay any such interview until after the dawn raid has come to an end. Anyone being asked questions should be supported by a lawyer at all times, and a record should be kept of all questions asked and all answers given. If an individual is asked questions during a dawn raid to which he/she is unable to provide an answer immediately, the company should offer to provide a written response at a later date.

Any statement made by an individual during a compulsory interview can only be used in evidence against that individual in very limited circumstances. However, any statements made may potentially be used against the company. The CMA’s guidance suggests that the CMA may not always permit legal advisers representing the company to be present at the interview, but this is something which is likely to be contested in due course (these are relatively new powers which, as far as we are aware, have not yet been used in the context of dawn raids).

**Use of seals**

If a dawn raid lasts more than one day, the CMA inspectors may place seals across doors or cupboards to prevent any interference overnight with documents contained within those rooms/cupboards. It is very important to make everyone on the premises aware that they must not tamper with the seals under any circumstances.

The CMA takes any interference with seals very seriously. While there have not been any cases to date of sanctions being imposed by the CMA (or its predecessor, the Office of Fair Trading) for breach of seals imposed during a dawn raid, tampering with evidence protected by a seal may constitute a criminal offence.
The company should therefore take all appropriate steps to prevent a breach of a seal – including putting in place clear warning signs and potentially even placing security staff outside the relevant rooms overnight.

**Dawn raid by the CMA in connection with a CMA criminal investigation**

In connection with a criminal investigation under the Enterprise Act 2002, the CMA has the power to enter any premises (including non-business premises) under a warrant obtained from the High Court or Competition Appeal Tribunal. The CMA inspectors are permitted to use such force as is reasonably necessary for the purpose of entering the premises.

**Reviewing and copying of documents and forensic IT searching**

The CMA inspectors have the power to actively search the premises for relevant documents (both hard copy and electronic), and will usually take original documents rather than merely taking copies of, or extracts from, the documents (in accordance with the usual practice under search warrants issued in respect of suspected criminal offences). The CMA inspectors also have "seize and sift" powers in this context (as described above), provided the relevant notice is issued.

The considerations outlined above in relation to ensuring appropriate IT support and shadowing the inspectors at all times apply equally in the context of a dawn raid in connection with a CMA criminal investigation.

**Limits on the inspectors' powers to review and copy documents**

The same limits on the inspectors' powers to review and copy documents apply in this context as in the case of a dawn raid by CMA inspectors in respect of a CMA civil investigation, i.e. the inspectors may not review or copy irrelevant or privileged material. English law on legal privilege will apply.

**Powers to ask questions**

The CMA may require any person to provide an explanation of any document which appears to be relevant to the investigation, or to state where any such document may be found. They may also require individuals to answer questions in relation to its criminal investigation following the issue of a written notice.

Any information provided by an individual during any such compulsory interview can only be used against him/her in very limited circumstances (and will also not be used against the company which employs him/her). In practice, this means that if the CMA inspectors suspect an individual of committing the criminal cartel offence and anticipate that they may wish to rely on the individual's answers (or their silence) in any subsequent criminal prosecution, they will seek to carry out a voluntary interview under caution instead. Information provided during any voluntary interview may also be used in any parallel civil investigation against the company (see further below).

**Use of seals**

The powers of the CMA inspectors to impose seals are the same as in relation to a dawn raid in connection with a CMA civil investigation, and the same precautionary steps should be taken to minimise the risk of interference with any seals imposed.

**Parallel criminal and civil investigations**

In practice, at the time the CMA undertakes a dawn raid, it may not be in a position to know whether it is likely to seek to prosecute an individual for the criminal cartel offence. What will usually happen in such circumstances is that the CMA will use its civil dawn raid powers to enter and search the premises (see section 2) but will bear in mind the possibility that the criminal cartel offence may have been committed, and may subsequently launch a parallel criminal investigation against individuals alongside the civil investigation against the company. Any parallel criminal investigation may also involve the Serious Fraud Office.
To ensure that it is able to use any evidence obtained during the dawn raid in any subsequent criminal prosecution the CMA will act in accordance with the procedural rules on collecting evidence for criminal prosecutions during the dawn raid.

**Dawn raid by the CMA on behalf of the European Commission**

Where the CMA inspectors are conducting a dawn raid on behalf of the European Commission, their powers are the same as the powers the European Commission inspectors would have if they were carrying out the inspection themselves, with the exception of taking an oral statement with consent. These powers are discussed in the section below regarding dawn raids by the European Commission.

In relation to limitations on the CMA inspectors’ powers in this context, it is however important to note that the English law on legal privilege applies, not the more restricted EU rules which would apply if European Commission inspectors were leading the dawn raid (see further below).

If a warrant has also been granted by the UK High Court or Competition Appeal Tribunal, the CMA inspectors also have some additional powers in this context, including:

- the power to use such force as is reasonably necessary to enter the premises;
- the power to actively search for documents and take copies or extracts from them (but not to take possession of originals); and
- the power to seal the premises or part of the premises to the extent necessary for the inspection.

However, the additional "seize and sift" powers available to the CMA inspectors where they have a warrant for the inspection of business premises in connection with a CMA civil or criminal investigation do not apply where the CMA is conducting the dawn raid on behalf of the European Commission.

**Dawn raid by the CMA on behalf of another national competition authority**

The CMA may be asked to carry out a dawn raid on a company based in the UK on behalf of the national competition authority of another EU Member State.

In such circumstances, the CMA inspectors have similar powers to those which apply where they are undertaking a dawn raid in respect of a CMA civil investigation, subject to the following exceptions:

- the CMA inspectors’ "seize and sift" powers do not apply, even if a warrant has been obtained; and
- the CMA inspectors do not have the power to require individuals to answer questions in a compulsory interview, although they can ask for explanations of documents (subject to the privilege against self-incrimination).

Officers of the national competition authority on behalf of which the dawn raid is being undertaken may accompany the CMA inspectors where the dawn raid is being undertaken under a warrant and carry out specific tasks under the supervision of the CMA inspectors.

**Dawn raid by the European Commission in connection with a European Commission investigation**

European Commission inspectors may undertake a dawn raid in connection with a European Commission investigation on the basis of either an authorisation or a decision.

If the inspectors only have an authorisation, they are only permitted to carry out a dawn raid at business premises, and may not use force to gain entry. There is no legal obligation on a company to submit to an inspection carried out on this basis, although once the company has agreed to the inspection, it has a duty to co-operate actively with the inspectors. In practice, refusing to submit voluntarily is unlikely to buy the company much time, as the European Commission could order a
mandatory inspection pursuant to a decision very quickly if necessary (as illustrated by the Akzo case).

If the dawn raid is being carried out pursuant to a formal decision, the company must allow access to the premises (and significant fines may be imposed if it refuses to do so). However, the inspectors may not use force to gain entry unless they have also obtained a warrant from the UK High Court or Competition Appeal Tribunal.

Reviewing and copying of documents and forensic IT searching
The European Commission inspectors may review and copy any relevant documents (both hard copy and electronic), but they may not take possession of originals. It is the European Commission's policy to take electronic copies of electronic documents, rather than printing out hard copies.

Like the CMA, the European Commission is becoming increasingly sophisticated in its approach to searching and reviewing electronic data, and the inspectors are likely to be accompanied by forensic IT experts and bring hardware with them which can run powerful review software. Since April 2013, the European Commission has adopted a process whereby all potentially relevant electronic data is fed into a central hub running "Nuix" search software, overseen and partly reviewed on-site by the inspectors. At the end of the dawn raid, all documents deemed to be relevant will be copied onto a CD-ROM which the inspectors will take back with them to Brussels.

The European Commission inspectors do not have "seize and sift" powers similar to those granted to CMA inspectors carrying out a dawn raid at business premises with a warrant (see section 2 above). However, in a number of recent cases, the European Commission has taken copies of entire hard drives for subsequent review. This has proved to be controversial but has not yet been addressed by the EU courts.

The considerations outlined above in relation to ensuring appropriate IT support and shadowing the inspectors at all times apply equally in the context of a dawn raid by the European Commission.

Limits on the inspectors' powers to review and copy documents
European Commission inspectors are not permitted to review irrelevant or privileged material. However, as noted above, the EU law on legal privilege which applies in this context provides narrower protection than the English law on legal privilege.

EU law only protects certain correspondence between a client and an independent lawyer qualified within the EU. This means that correspondence with in-house lawyers, or any lawyer qualified outside the EU, will not be privileged, and may be reviewed and copied by the inspectors.

Powers to ask questions
European Commission inspectors have the power to ask any company representative or member of staff for explanations of facts or documents relating to the subject matter and purpose of an inspection of business premises. If the questions asked by the inspectors stray beyond factual questions related to the documents being reviewed, or requests for the provision of pre-existing documents, it may be possible to refuse to answer the question by relying on the privilege against self-incrimination.

In addition to this power to ask for explanations, the inspectors have an express power to take statements by interview, and to record them for use as evidence in subsequent proceedings. There are no restrictions on who can be interviewed under this power, but an interview can only be carried out with consent of the individual being questioned. If an interview is requested during a dawn raid, it is advisable to request that the interview (and possibly even the question of whether to participate in the interview at all) should be postponed until after the dawn raid has come to an end.

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1 Case 8/85 Akzo Chemie (Netherlands) and Akzo Chemie UK –v- Commission [1986] ECR 2585. In that case, a formal decision authorising a dawn raid was adopted within a matter of hours of the Commissioner responsible for competition matters being notified that Akzo was not willing to submit voluntarily.
Key points to remember

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<thead>
<tr>
<th><strong>DO</strong></th>
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<tr>
<td>✓ clarify at the outset which authority is leading the dawn raid and the underlying inspection</td>
<td>X leave the inspectors unsupervised at any time</td>
</tr>
<tr>
<td>✓ establish a team of &quot;shadowers&quot; to accompany the inspectors at all times during the raid</td>
<td>X volunteer any documents or information which have not been expressly requested by the inspectors</td>
</tr>
<tr>
<td>✓ ensure that an internal IT expert is available to assist the inspectors</td>
<td>X refuse to supply information or documents (unless advised to do so by a lawyer), or attempt to destroy, delete or hide any documents or data</td>
</tr>
<tr>
<td>✓ ensure that a clear record is kept of everything that happens (including documents reviewed/copied/seized, any questions asked and answers provided)</td>
<td>X attempt to enter any room or open any cupboard that has been sealed by the inspectors</td>
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<tr>
<td>✓ seek immediate legal advice if at any stage you are uncertain as to your rights and responsibilities</td>
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4. The end of the dawn raid

**Before the inspectors leave**

Irrespective of whether the dawn raid is being led by the CMA or the European Commission, a closing meeting should be held with the inspectors before the inspectors leave the company’s premises. During this meeting, the company should consider seeking confirmation that:

- the dawn raid has come to an end (i.e. can the company go "back to business"? Can any blocked e-mail accounts be reactivated? Are there any cupboards/rooms which must remain sealed?);
- the company has co-operated with the inspectors throughout; and
- any seals imposed during the dawn raid have not been tampered with.

The company should also seek to agree with the inspectors:

- a list of any factual points brought up during interviews on which written clarification is to be given and reserving the right to supplement any answers already given;
- a list of any outstanding documents which the company has undertaken to produce; and
- any areas of disagreement, reserving the right to challenge the authority of the inspectors to take disputed documents (e.g. on the basis of irrelevance or privilege).

The inspectors are likely to request that a representative of the company signs an index/log of copied/seized documents which they have drawn up during the dawn raid, to confirm that the company agrees that the index/log is correct.

This index/log should be checked to verify that it tallies with the copies which the investigators have made (both paper and electronic) and/or the original documents which they plan to remove. It should also be compared to the company’s own record.
After the inspectors leave

Once the inspectors have left the premises, a "debriefing" with the in-house/external lawyers should be held to try to establish whether there is any substance to the allegations being made against the company.

A review of all documents copied/seized by the inspectors should then be carried out as quickly as possible, to assess the level of risk faced by the company (if the dawn raid lasts several days, a review should be conducted at the end of each day). If there appears to be evidence of involvement in a competition law infringement, consideration should be given to applying for a "marker" under the relevant leniency regime(s) and then submitting a leniency application – this involves confessing to involvement in the infringement and co-operating with the investigation in return for a reduction in any fine ultimately imposed by the authorities. This may be a difficult decision, which will need careful consideration by the internal response team in conjunction with the in-house and/or external lawyers, in particular due to the risk of potential exposure to claims for damages from those affected by the infringement and damage to corporate reputation. Board level authorisation may be required to make a leniency application.

If any inaccurate information or impression has been given in either the documents provided or in the answers to questions, the lead inspector/case officer should be notified in order to correct the impression given by misleading or ambiguous answers or documents as quickly as possible.

Publicity

It will also be important to consider how to deal with any inquiries about the dawn raid and the company's involvement in any infringement of competition law, both internally and externally.

A press release confirming that dawn raids have been carried out may be issued by the CMA or the European Commission (as appropriate). If the fact of the dawn raid becomes public (whether as a result of a press release issued by the CMA or European Commission or otherwise), the company will need to consider whether to put out a statement in response.

It will also be important to manage effectively the dissemination of appropriate (non-confidential) information to staff, whether by e-mail or briefings by Directors/Managers.

Key points to remember

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<tr>
<td>✓ obtain confirmation that the company has co-operated throughout the dawn raid</td>
<td>✗ allow the inspectors to leave without holding a closing meeting with them</td>
</tr>
<tr>
<td>✓ check the list of documents that have been copied by the inspectors</td>
<td>✗ discuss the dawn raid with anyone outside the business</td>
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<tr>
<td>✓ agree a list of any information/documents the company has undertaken to provide</td>
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<tr>
<td>✓ reserve the right to challenge the authority of the inspectors to take certain documents</td>
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<tr>
<td>✓ carry out a risk assessment as quickly as possible</td>
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<tr>
<td>✓ consider internal and external publicity issues</td>
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<tr>
<td>✓ consider whether a leniency application needs to be made</td>
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5. Summary of key actions to be taken by the internal response team

RECEPTION CALLS YOU – A DAWN RAID IS TAKING PLACE

Ensure relevant staff are informed
- Response team
- Senior management
- IT support

Dealing with inspectors
- Be polite at all times
- Check the authorisation documents – are they valid?
  What is the subject matter of the investigation?
- Ask the inspectors to await the arrival of lawyers – but do not insist on this

Alert lawyers (in-house and/or external)
- Confirm estimated time of arrival
- Discuss contents of the authorisation documents
- Ensure possibility of communication before arrival
  (e.g. set up “open bridge” conference call)

Are the inspectors willing to await the arrival of in-house or external lawyers before proceeding with the dawn raid?

YES

Even if the inspectors are willing to await the arrival of lawyers, you should make an immediate start on these initial next steps:
- hold a brief meeting/call with all members of the internal response team to discuss the subject matter and purpose of the dawn raid
- ensure IT support staff are available to assist – the inspectors will require access to the IT network
- appoint a team of “shadowers” to accompany the inspectors at all times and, so far as possible, keep a record of everything that is reviewed/copied and any questions asked/answers given

NO

If the inspectors insist on starting to review documents before the lawyers arrive, identify (with assistance from in-house or external lawyers via telephone) the files (paper or electronic) which are least likely to throw up issues which would need legal input, such as privilege. The inspectors should be encouraged to start work on these “lower risk” documents, pending the lawyers’ arrival.

Seek advice from in-house and/or external lawyers via telephone if in any doubt as to how to proceed.
DURING THE DAWN RAID

Limits on the dawn raid

**Relevance:** ensure the inspectors are not given access to documents which are not relevant to the subject matter and purpose of the dawn raid, as set out in the authorisation documents.

**Privilege:** if possible, try to ensure privileged documents are identified and removed before the inspectors review the file in question (whether paper or electronic). Agree a process with the inspectors for dealing with privileged documents.

**Self-incrimination:** check whether the privilege against self-incrimination applies under the relevant procedural rules. If it does, object to any questions where the answer could be self-incriminating, i.e. amounting to an admission of infringement.

**Confidentiality:** the fact that a document contains business secrets does not protect it from disclosure to the inspectors.

Managing the dawn raid

**Co-operation:** the company has a duty to co-operate actively with the inspectors.

**Shadowing:** each inspector should be accompanied by a “shadower” at all times. Shadowers should intervene if the inspectors seek to review documents which are irrelevant or privileged, and should keep a record of everything that happens, including which documents are copied (so far as it is possible to do so) and any questions asked/answers given.

**Questioning of individuals:** seek to postpone any detailed questioning until lawyers can be present, and ideally until after the dawn raid has ended. If an individual is suspected of a criminal offence, consider the need for separate legal representation.

**Seals:** seals must not be tampered with in any circumstances and the company must take all appropriate steps to prevent this.

Ensure all decisions and agreed approaches are communicated to all members of the response team as quickly as possible throughout the dawn raid

Managing IT issues and electronic documents

**IT support:** ensure that a senior member of the IT team is available to provide support to the inspectors as requested (including temporarily disconnecting computers from the network, blocking e-mail accounts, providing access to documents, servers, e-mail accounts, etc.).

**Electronic copies:** the inspectors may wish to take electronic copies of electronic documents. If they wish to take a forensic image of an entire hard drive or similar device, consult in-house/external lawyers to confirm whether this is permissible under the applicable rules and whether to formally record an objection.

**Keyword search terms:** take a note of any forensic IT search tools used by the inspectors, including any keyword search terms (if possible).

Managing paper documents

**Photocopying paper documents:** Staff should be appointed to photocopy documents for the inspectors/supervise the inspectors if they insist on doing the copying themselves. Two sets should be made of all copies (second set for the company’s records).

**Seizure of originals:** in some jurisdictions, the inspectors may have powers to seize original documents. Consult in-house/external lawyers if you are unsure of the position.

**Disputed documents:** if there is a dispute as to whether the inspectors can review a particular document (e.g. on grounds of privilege or relevance) the document should be placed in a sealed envelope and not read by the inspectors pending resolution of the dispute.

Throughout the dawn raid, ensure all shadowers flag any potentially incriminating “hot documents” to the central senior team without delay – this will be key to the ongoing risk assessment and the question of whether to make a leniency application.
THE DAWN RAID ENDS

Arrange a closing meeting with the inspectors before they leave the premises

Log/index of copies made
- Check that the inspectors’ log of copies made/original documents is accurate
- Sign the log to confirm

Seek confirmation that:
- The dawn raid has ended
- The company has co-operated with the inspectors throughout
- No seals have been tampered with in any way

Agree with the inspectors:
- List of factual points to be clarified
- List of outstanding documents to be produced
- Any areas of dispute (e.g., relevance/privilege)

Reserve the company’s rights:
- Right to supplement answers given during questioning
- Right to challenge inspectors’ authority to take documents

The inspectors leave the premises

Hold a “debrief!” meeting with in-house and/or external lawyers: establish whether there is any potential substance to the allegations made against the company.

Carry out a risk assessment
Review all documents copied/Seized: is there anything incriminating? If so, how strong is the evidence against the company?
Existence of additional evidence: do the documents taken by the inspectors reflect the company’s full involvement in the agreement or conduct under investigation? Are there any additional relevant documents that the inspectors did not identify/locate?
Clarifying any inaccuracies: if an inaccurate impression has been given in any of the documents or in answers to questions, this must be rectified as soon as possible.

Consider whether a leniency application should be made – note this may be required in more than one jurisdiction.

Deal with any outstanding issues in relation to relevance of particular documents, application of legal privilege, or questions which it has been agreed will be answered in writing after the end of the dawn raid.

Consider how to manage publicity/disclosure issues/obligations – both internally and externally, including any regulatory disclosure obligations on listed companies.
Ashurst Quickguides

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If you would like further information on this guide, please speak to your usual contact at Ashurst or one of our contacts listed below.

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