

Dawn Raids: What to do



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What to do – a step by step guide

What powers of search do the inspectors have?

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Introduction

It is absolutely essential to have a procedure in place for dealing with Dawn Raids.

It means that the process, which is stressful at the best of times, can be dealt with in a measured and sensible way and, if mock dawn raids are held to test procedures, in a manner which will also be familiar to staff.

The procedure needs to be reviewed on an annual basis.

This booklet is an outline of what you must do if your company is the subject of a Dawn Raid.

More detailed information is available upon request.

A. The Inspectors arrive

- Usually during normal office hours.
- Probably will be in a small group. EC Commissioners will usually be accompanied by an OFT official or OFT Inspectors.
- Will ask to see either (i) a particular person, or (ii) the MD/CEO (i.e. the most senior company executive on the premises).

What to do – Step by step

1. **Reception must call the person asked for.**
If that person not obtainable – they must call the most senior company executive on the premises. Reception should also call head of legal if there is an in-house legal department. Reception must ask the CEO and the head of in-house legal to come and meet the Inspectors.
2. **Reception should move the Inspectors out of Reception into a sterile Meeting Room.** Tell them that someone will be down to meet them shortly. Provide them with tea and coffee.
3. **Reception should take 3 copies of all of the Authorisation Documents presented by the Inspectors in connection their inspection.**
This may include a Commission Authorisation / Decision, UK court documents (such as a warrant), explanatory notes and minutes. One copy is for the CEO, one for the response team and one for the external lawyers.
4. **Reception should take 3 copies of the European /OFT staff card and full contact details of the most senior official.**
5. **Reception should call the Senior Manager designated to manage the Response Team in the case of "Dawn Raid" (see C2(i) below) and provide him with the copy documents taken in steps 3 and 4.**
6. **That designated Senior Manager should call the external lawyers on "Dawn Raid" standby, and:**

- i. Ask them to attend immediately; and
 - ii. Fax (or scan and email) to them a copy of the Inspectors' Authorisation Documents and details of the most senior official (i.e. a copy of the documents obtained in 3 and 4 above); and
 - iii. Let them know where the Inspectors are from (OFT / European Commission) and how many of them there are;
 - iv. Ask them how long they will take to arrive at your premises; and
 - v. Confirm what sort of investigation it is (EU or UK Competition Authority / Civil or Criminal / With or without search warrant) and ask if there are any particular further instructions / information they can give you at this stage.
7. **If there are no external lawyers on "Dawn Raid" standby, immediately telephone: Adam Glass: Partner, Lewis Silkin 020 7074 8000/8447 or 07766 417 955**
 8. **Senior Manager should arrange for the Dawn Raid Response Team to meet in a designated room (see C1 below).**

Knowledge 1 – What powers of search do the Inspectors have?

1. If the Inspectors have either a search warrant or a formal Commission decision, then they have the legal right to search the premises (including cars on the premises), computer systems, files, documents, briefcases and handbags.
2. If the Inspectors do not have a search warrant or just have a written authorisation (rather than a formal decision - in the case of a Commission investigation), then:
 - i. they do not have the legal right to search as in (1.) above.
 - ii. they can require files and documents to be produced for their review.
 - iii. they can ask for photocopies or electronic copies of files and documents they are entitled to review; and



- iv. in some cases, they have the right to take away the originals of some of the files or documents they have reviewed.

Knowledge 2 –Do you have to co-operate with the Inspectors?

1. There is no obligation to allow an inspection without a formal Commission Decision or a warrant.
2. However, fines can be imposed if you do not allow an investigation ordered by a formal Commission Decision.
3. Obstructing the Investigators whilst they are carrying out their duties can be a criminal offence.

B. Delaying the investigation for external lawyers to arrive

- If you do not have any internal lawyers, ask the Inspectors if they will wait until your external lawyers arrive.
- The Inspectors do not have to wait before beginning their investigation but will usually delay for a reasonable amount of time (30m) for external lawyers to arrive.
- No delay will be permitted where notice has been given of the investigation or where an in-house lawyer is present.
- The Inspectors may want to take measures to prevent other parties being warned of the investigation or ensure that evidence is not removed or tampered with e.g. suspension of external emails / sealing filing cabinets, documentation, premises etc.

What to do—Step by step

1. CEO should explain that the external lawyers have been asked to attend and give their ETA. He should try to persuade the Inspectors to delay their inspection until external lawyers arrive.
2. CEO/In-house legal advisor should closely inspect the Authorisation Documents to establish exactly what sort of investigation is planned and whether or not the Investigators are actually authorised to undertake the Investigation. Establish what

limitations (if any) there are on their right to inspect.

3. Ask the Inspectors whether they are conducting investigations at any of the company's other premises or at the homes of any of the company's executives. If they are, immediately arrange legal support for those premises/company executives.
4. Give every indication of being co-operative with the Inspectors.

C. Gathering the company's response team

Before the Inspectors begin their Inspection.

What to do - Step by step

1. The Company's Dawn Raid Response Team should all congregate in the specifically designated room (see A8 above).
2. The Dawn Raid Response Team must comprise a minimum of:
 - i. Senior Manager - to be in charge of the investigation, to liaise with the Inspectors and to co-ordinate the Response Team;
 - ii. IT Director / senior IT manager – to organise the Inspectors' access to the company's computer systems and the retrieval of information (emails/ documents);
 - iii. Trusted and responsible employees - to shadow the Inspectors to make sure that they are acting within their authority;
 - iv. Senior Communications /marketing manager - to deal with possible PR implications;
 - v. Director or senior in-house lawyer - to make decisions on behalf of the company.
3. Senior Manager should brief the Response Team on what sort of Investigation is taking place - in particular, check that:
 - i. Check that all Response Team members are aware of their duties in relation to the type of investigation taking place

(which should be practised);

- ii. That the shadowing employees are aware of what documents the Inspectors can read and what questions they can ask (see below);
 - iii. Response Team members have each other's mobile telephone numbers, for help and to be able to refer Inspectors' questions to Director / senior lawyer / IT representative.
4. Senior Manager should circulate to Response Team:
 - i. a list of the names of internal and external lawyers who may have sent or received emails and other documents from the company;
 - ii. places where legally privileged documents are kept or likely to be found also whether they are likely to be clearly marked "legally privileged" or similar.

Knowledge 1 - What documents can the Inspectors read?

- The Investigators can read documents that are within the scope of the investigation, as set out in their Authorisation Documents.
- The Inspectors are not entitled to read documents that are covered by legal privilege. This is different depending upon whether the investigation is an EU investigation being conducted by the Commission, or a UK investigation being conducted by the OFT (or a UK sector regulator or the Serious Fraud Office).

EU INVESTIGATION: The Investigators:

Can read:

Correspondence between the company and its internal lawyers except those described below.

Cannot read:

- i preparatory documents created exclusively for the purpose of seeking legal advice from an external lawyer entitled to practice in the EEA in the exercise of the



Company's rights of defence; or

- ii. any written correspondence between the company and its external lawyers which has been created for the purpose of the company's right of defence.

UK INVESTIGATION: The Investigators:

Cannot read:

- i. any written correspondence between the company and its internal lawyers; or
- ii. any written correspondence between the company and its external lawyers (entitled to practice in the EEA) which has been created for the purpose of the company's right of defence.

Knowledge 2 - What questions can the Inspectors ask?

EU INVESTIGATION: The Investigators:

Can ask:

- i. where a document or file may be found;
- ii. for an explanation of a document that the Inspectors are entitled to read;
- iii. for an explanation of facts relating to the scope of the investigation.

Cannot ask:

- i. Questions where the answer might involve an admission of the existence of an infringement. (To be strictly correct, they can ask the question but cannot compel an answer.)

UK CIVIL INVESTIGATION: The Investigators (OFT or a UK sector regulator):

Can Ask:

- i. where a document or file may be found;
- ii. for an explanation of a document that the Inspector is entitled to read.

Cannot ask:

- i. for an explanation of facts relating to the scope of the investigation;
- ii. questions where the answer might involve an admission of the existence of an infringement. (Again, they can ask the question but cannot compel an answer.)

UK CRIMINAL INVESTIGATION: The Investigators (OFT or a UK sector regulator or the Serious Fraud Office):

Can ask:

- i. where a document or file may be found;
- ii. for an explanation of a document that the Inspector is entitled to read;
- iii. for an explanation of facts relating to the scope of the investigation – depending upon the type of interview.
- iv. questions and compel answers even where the answer might involve an admission of the existence of an infringement – depending upon the type of interview.

D. Internal email to staff

Before (preferably) or just after the Inspectors begin their Inspection.

What to do – Step by step

1. Send an internal email to all staff – which should be from the CEO or the company's senior lawyer (and which should have been largely prepared in advance) - the contents of which should:
 - i. inform them that an EU/OFT (whichever is the case) competition investigation is about to take place and that it is the company's intention to co-operate with that investigation;
 - ii. ask them to be polite and professional in their dealings with the Inspectors;
 - iii. instruct them not to delete, destroy or conceal any soft or hard copy documentation or data, that might relate to the subject matter of the investigation;
 - iv. instruct them to suspend normal document destruction activities under the company's record retention policy (i.e. culling old emails and documents) until they are informed otherwise;
 - v. ask them not to volunteer information / documents to the Inspectors without first obtaining permission to do so

- from the Senior Manager in charge of handling the investigation;
- vi. instruct them not to mention to any third party or to company staff not on the premises that an investigation is taking place and not to Twitter, etc that fact either;
- vii. inform them of any particular restrictions that the Inspectors have placed on the company (e.g. not to communicate with other group companies); and
- viii. warn them that any breach of these requirements could be a criminal offence as well as a company disciplinary offence.

E. External communications

- Before (preferably) or just after the Inspectors begin their Inspection.

What to do – Step by step

1. The Senior Communications / marketing manager should organise the monitoring of the websites and Twitter announcements of:
 - i. the company's main competitors;
 - ii. Europa / OFT (as appropriate) for any news / announcements concerning the investigation; and
 - iii. (if appropriate) the Stock Exchanges (e.g. RNS) on which the company is listed
2. The Senior Communications manager, in conjunction with the internal /external lawyers should prepare (or tailor, as a pro-forma should have been pre-prepared) an appropriate press announcement reporting the fact that an investigation is taking place and that the company is co-operating with the Inspectors.
3. If the company is listed it should consider, if necessary in conjunction with its brokers, whether it needs to make a stock exchange announcement to the effect that an investigation is underway.



F. External lawyers arrive

- Before (preferably) or just after the Inspectors begin their Inspection.

What to do – Step by step

1. Senior Manager / Senior internal lawyer should ask the external lawyers to check the Inspectors' Authorisation Documents and:
 - ii. confirm what sort of investigation it is;
 - iii. check that the Inspectors are authorised to conduct the investigation; and
 - iv. confirm the parameters of that investigation.
2. Senior Manager should try to persuade the Inspectors to delay or halt the inspection for a short time to allow the external lawyers and Response Team to hold a brief meeting to discuss;
 - i. the company's duties during the investigation;
 - ii. how the investigation will be monitored; and
 - iii. who will handle disputes with the Inspectors (nominated representatives from both the company and the external lawyers).
3. Senior Manager/Internal lawyers should, with external lawyers, try to evaluate:
 - i. the full scope of the investigation and its real nature (if not already apparent);
 - ii. what the Inspectors already appear to know; and
 - iii. whether there may have been a prior leniency application by a third party.

G. During the investigation: General

- Whilst the investigation is underway:

What to do – Step by step

Employees shadowing Inspectors should:

1. Keep an eye open for legally privileged documents – refer questions to Senior Manager immediately - where necessary;
2. Keep a record of all documents (hard or soft) copied or to be taken by the Inspectors. Where the Inspectors take soft copies of documents, the shadowing employee should make an additional hard or soft copy for the company.
3. Refer all Inspector questions (other than straightforward ones as below) to the Senior Manager.
4. Try not to answer any questions from the Inspectors other than straightforward factual ones, relating to the location of documents/ emails or passwords etc.
5. If in doubt, don't respond and deflect to Senior Manager.

H. Questions from the Inspectors

- The Inspectors are bound to ask questions.

What to do – Step by step

In such cases:

1. The shadowing employee should (except for straightforward questions as in G4 above), deflect all questions to the Senior Manager to answer.
2. The Senior Manager (and shadowing employee where appropriate) when responding to questions should:
 - i. be careful to give replies to questions which are within his/her competence to answer. He/she should not guess or hypothesise;
 - ii. consider whether the question would be better referred to the internal/external legal team;
 - iii. consider whether the question would be better put in writing. (This allows a considered and accurate answer to be given after due investigation of the facts.)
 - iv. not respond:

- a. if the answer to a question may be self-incriminating. Refer the question to the internal/external lawyers;
- b. to questions which are imprecise, unclear or ill-defined. Ask for the question to be clarified or re-formed;
- c. to questions which seem unduly complicated. Ask for it to be put in writing;
- v. if proper to respond:
 - a. be concise and accurate;
 - b. do not attempt to mislead the Inspectors and/or give false answers (which could be a criminal offence and/or cause the company to be fined);
- vi. make a note of all questions asked and the action taken in response to it – including the detail of any answers given; and
- vii. if in doubt, don't respond and refer to the internal / external lawyers.

If you find yourselves subject to a Dawn Raid by the EU/UK competition authorities or would like to speak to us about EU/UK competition law compliance generally, then please contact:

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