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## Bird & Bird

# New rules on Commission's powers in dawn raids



A revised Explanatory Note, two recent judgements of the General Court and a new precedent of the European Commission provide new guidance on the Commission's procedure for seizing IT data and the rights and obligations of companies in Commission dawn raids.

Many companies do not fully appreciate that their duty to cooperate during dawn raids extends to providing IT support required by the Inspectors to exercise their wide powers for seizing data stored in IT systems. The new detailed rules are to be welcomed, and companies would be well-advised to review them in full. Not least since the methods adopted by the Inspectors during a dawn raid cannot be challenged before the European Courts until the Commission has adopted its final decision.

### Companies' duty to cooperate with the Commission

Companies are under a general duty to cooperate with Inspectors

- Requesting the Inspectors to wait 47 minutes before allowing them to enter the premises amounts to a refusal to cooperate. Such a delay cannot be justified by the fact that the company has no internal lawyer or that external lawyers are 60 km away.
- Refusing the Inspectors access to a particular office on the ground that the office does not contain relevant documents constitutes a refusal to cooperate. In a recent case, it resulted in an increase in the fine of over a million euro (10%).

A specific duty to provide IT support to Inspectors

- Czech companies were recently fined 2.5 million euro for failing to block access to an email account during a dawn raid.
- Companies must assist the Inspectors on IT related issues. It is not sufficient simply to explain how the company's IT system is organised; staff must also be made available to carry out specific tasks, such as blocking email accounts, disconnecting computers from the network, etc.

### Wide powers of Inspectors in examining and copying electronic data

- Inspectors may make use of their own dedicated software and hardware to copy, search, and recover data from the company's IT system.

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- Inspectors may keep the company's storage media until the end of the inspection.
- If the inspection of relevant documents cannot be completed during the dawn raid, Inspectors may keep a copy of the data to be examined in Brussels at a later stage.
- At the end of the inspection, Inspectors must entirely wipe their own IT tools.
- The updated Note no longer makes explicit reference to the possibility for companies to protect their legitimate interests by drawing Inspectors' attention to other documents or data.

### The Commission's actions during dawn raids cannot be challenged in Court

- The General Court has held that the methods adopted by the Inspectors during a dawn raid cannot be challenged in their own right. Rather, since they are measures implementing the inspection decision, they can only be challenged in the context of an action against the Commission's final decision in the case.

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## How we can help

For the reasons outlined above, it is now more important than ever that all relevant employees are trained how to behave in case of an unannounced inspection by competition authorities. We have therefore a variety of training programmes, and a full set of written materials, to ensure that your company will be able to protect its rights in case of a dawn raid.

If your company is concerned that its employees may have violated the competition rules, we can also assist in conducting (openly or covertly) internal competition law audits. And, in the event that the investigation reveals evidence of illegal behaviour, Bird & Bird is well-placed - with competition law experts in 13 European countries and established relations with experts in a large number of other jurisdictions - to provide strategic advice and assistance to your company worldwide.

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## Contact us

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