

Bird & Bird & Surviving a dawn raid

Any company, no matter how small, can be subject to a dawn raid by authorities investigating a competition law infringement. By their nature, dawn raids are usually unannounced and unexpected. Understanding what will happen, and knowing your obligations, and indeed your rights, will help you ensure that the business cooperates fully, but while minimising disruption and protecting your legal position.

Which authorities carry out dawn raids and what are they investigating?

There are four authorities, or types of authorities, which can carry out dawn raids in the UK. These are the European Commission; the Office of Fair Trading ('OFT'); sector regulators with concurrent competition law powers (such as Ofgem and Ofcom); and the Serious Fraud Office ('SFO').

What powers do they have?

The powers that the authorities have vary significantly depending on the type of investigation. At their most extensive, the powers allow authorities to enter premises by force, and search premises, cars, IT systems etc., and even domestic properties. They can question employees, seal rooms or computers and take away original documents. Particular care is needed in responding to an investigation and questioning of suspected criminal conduct.

What are the penalties for failure to comply

Again, the penalties for failure to comply with a dawn raid vary depending on the type of investigation. They can be very serious, including criminal penalties (e.g. for concealing or destroying documents, providing false or misleading information) and civil fines, up to 1% of annual turnover or periodic payments of 5% of daily turnover.



During the Investigation

Remember:

- Always be cooperative. Obstructing an investigation, giving misleading information, and withholding documents or information can all be criminal offences.
- Inform your PR team/PR advisors. The press may hear of the investigation and they will need to consider a response.
- Dedicate someone senior to review the evidence/talk to staff to decide if a leniency application is advisable.
- Correspondence with in-house solicitors does not attract privilege during an investigation by or on behalf of the EC.

Shadowing

- Each inspector must be accompanied by a shadower (preferably a lawyer) who should be briefed on the scope of the investigation and the powers that the investigators have available to them.
- Record all questions asked, all documents reviewed, and all search terms entered electronically.
- Ensure documents are checked for legal privilege and are relevant to the investigation. Confidential documents must still be provided but confidentiality, privilege and non-relevance should be asserted as appropriate.
- In the absence of a warrant ensure no original documents are taken.
- Ensure that a lawyer is present when employees are questioned, and that they are aware of their obligations/rights.
- If it is a criminal investigation, only provide compulsory interviews. Check that the correct statutory process is followed.

IT

- Ensure that any routine document destruction is suspended immediately until further notice.
- Ensure that someone from the IT team with the relevant know-how and full administration rights is on standby in case investigators need assistance.
- Permit access to the company's IT hardware, as well as any built-in search tools. Ensure that investigators are also able to use their own forensic software and hardware.
- If the investigators take copies of hard-drives, ask to be present during the later review of contents and ensure deletion or return of all privileged or non-relevant documents.

End of the Day

- Before the investigators leave, the dawn raid coordinator should ensure you have a copy of the investigators' list of documents and a signed copy of the investigators' official notes of any oral explanations given.
- Discuss legal privilege issues with the investigators and ensure a note is taken of any claims of privilege. Make employees aware of the requirement not to break seals.
- Pull together at least two copies of all documents copied, all questions asked, all notes taken etc.
- For listed companies, contact your brokers and discuss with lawyers whether to make a stock exchange announcement.

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Dawn raid checklist

Preparation

- Ensure staff who may have to greet investigators (e.g. reception staff, security staff) are aware of their role.
- Nominate a dawn raid coordinator, and a number of deputies. Ensure that they have received the relevant training.
- Provide teams with 'prompt cards' to remind them what to do and who to call during an investigation.

Arrival of the Investigators

- Reception staff should always allow investigators entry and should immediately call both the person the investigators have asked for and the dawn raid coordinator.
- Reception staff should find an empty meeting room for the investigators and start to organise catering and photocopiers to which the investigators will need access (and staff to assist if possible).
- The dawn raid coordinator should call external lawyers immediately.
- Ask the investigators if they will wait until external lawyers arrive - they are not obliged to wait but will often agree to do so for a short time. Follow any directions that they give in the meantime (e.g. sealing offices)
- Accompany the investigators at all times.

Check Mandates

- Ask the investigators to see their mandate:
 - » Does it apply to the company and this particular address?
 - » What type is it and what powers does that give them? In particular, check if is a civil or criminal investigation.
 - » Is the period of the mandate valid?
 - » What is the subject matter and period of the alleged infringement being investigated?
- Check the identity documents of all the investigators.
- Take copies of the mandates and identity documents.

Managing Employees

- Send a company-wide email warning staff to co-operate, be polite and professional but not to volunteer information and documents without being asked.
- Warn staff not to destroy or conceal any documents (including deleting electronic documents) and not to disclose to anyone outside the organisation that there is an investigation ongoing.

Preparing for a dawn raid

Investigators usually arrive unannounced but during office hours. Investigations under criminal powers may start before normal office hours. Even a minimal amount of preparation can make all the difference in helping to ensure a dawn raid runs smoothly. Our checklist (overleaf) indicates some key points to remember. As a minimum, ensuring that you have a designated and trained dawn raid coordinator and that reception staff, IT staff and the in-house legal team know how to react will buy time and protect your company if the worst should happen.

Bird & Bird offers a full range of support to ensure you are ready for dawn raids. We can help train in-house teams so that they understand the differences in the types of investigations and what the limits of the authorities' powers are in each case. We can put in place dawn raid manuals and packs and provide prompt sheets for those who will be at the front line of the investigation. We can also offer a dawn raid response team, which, at very short notice, can be at offices throughout Europe, to advise and provide support during an investigation.

Summary of relevant authorities and the scope of their powers

	Article 101/102 TFEU	Chapter I/II Competition Act	Cartel Offence	Conspiracy to defraud
European Commission (EC)	√			
OFT on behalf of EC/ another NCA	√			
OFT	√	√	√	
Sector regulator	√	√		
SFO			√	√

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