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Dawn Raids: Essential tips for preparation and response

The EU Commission, the Competition and Markets Authority (CMA) or other sector regulators with competition powers may conduct unannounced onsite inspections of businesses if they suspect a breach of competition law through anti-competitive activity or conduct. These surprise inspections, often dubbed ‘dawn raids’, are employed to gather evidence in relation to suspected cartels. Such raids are often stressful as a company may be heavily fined in relation to its conduct as well as for the conduct of its employees during the inspection.

The purpose of this guidance is to assist companies and their employees with internal plans for dealing with a dawn raid. While this guidance focuses on the EU Commission, the basic principles are also applicable to national competition authorities, such as the CMA.

Why is this guidance important?

The EU Commission may impose fines of up to 1% of a company’s total turnover for the preceding business year for the following:

- Intentionally or negligently supplying incorrect or misleading information in response to an ‘information request’, whether following a simple request or a formal, binding EU Commission decision.
- Failing to provide information within certain timeframes.
- Refusing to submit to an inspection.
- Providing incomplete documents, incorrect or misleading answers to questions asked, or breaking a seal affixed by the EU Commission (whether or not the inspection has been ordered by decision or under an authorisation).

Periodic penalties of up to 5% of average daily turnover can also be imposed for continued failure to do the following:

- Supply complete or correct information in response to an ‘information request’.
- Submit to an inspection ordered by an EU Commission decision.

What powers does the EU Commission have to conduct investigations?

A summary of what inspectors can do	
CAN	CANNOT
Request information from all undertakings (whether or not they are themselves suspected of infringing the rules).	Review or copy documents outside the scope of the investigation.
Access all parts of a business’ premises/ vehicles and potentially private vehicles/ premises.	Special rules apply to legally privileged documents, limiting powers of the EU Commission in relation to the removal of these documents and their use as evidence.
Obtain business records and conduct IT searches, which are normally done through word searches.	
Interview any person who consents to be interviewed, for the purpose of collecting information.	
Ask (by written request) any person for any relevant document or information, examine and take copies of documents (hard or electronic).	
Some national competition authorities, like the CMA, have the power to seize and take away original documents where there is a warrant for the dawn raid. In practice, the CMA usually takes copies unless it appears necessary to take original documents in order to prevent the destruction of documents or if it is not practicable to copy large numbers of documents.	However, the EU Commission cannot remove original documents. It must take a forensic copy of the original document.
Seal any business premises, books or records during an investigation (normally for no more than 72 hours).	
Ask for explanations about information and documents examined as well as any factual questions necessary.	Ask potentially self-incriminating questions.

How can the EU Commission exercise these powers?

Formal Decisions: The entire EU Commission takes formal decisions for surprise inspections. Inspections must be carried out within a fixed period of time and may be conducted without notice. Compliance is mandatory and subject to the imposition of fines. Inspections of non-business premises can only be conducted through formal decisions.

Simple requests (authorisations): The requests for surprise inspections are issued without the approval of the full EU Commission. Firms may refuse to submit voluntarily to an investigation, although this may result in the adoption of a 'formal decision' imposing a duty of cooperation and compliance on the firm.

The EU Commission may ask national competition authorities to conduct investigations on its behalf. In addition, the relevant EU member state's national competition authority must provide the necessary assistance to allow EU Commission officials to obtain access to the premises, including obtaining a warrant in a situation where the company refuses to comply with the inspection ordered by a decision.

What are the practical considerations for companies under investigation?

Best practices for managing surprise inspections:

Have a dawn raid policy in place:

Have a dawn raid policy in place that all employees are familiar with, including all reception staff. This policy must deal with what to do when officials arrive and cover things like:

- checking who the officials are and their documentation;
- showing them to a meeting room, not leaving them outside; and
- having a checklist of who to contact immediately when the officials arrive along with their contact information. The checklist must also include the contact information of both in-house and external counsel who should be notified immediately. The inspectors should be requested to wait until counsel is either on the scene, or available by phone to direct the response.
- Ensure all employees receive appropriate training regarding what they should do in the event of a dawn raid. Where in doubt, revert all clarifications to the dawn raid team.

Designate key team members:

- Identify an internal dawn raid team consisting of a team leader (preferably from the legal department), a member of senior management, a senior member of the IT staff, and any other appropriate departmental representatives. This team, together with external counsel, should be responsible for interacting with the officials and taking decisions during the inspection.

- Designate a computer expert to assist investigating officials in relation to all electronic records. In practice, investigating officials conduct word searches on computers and often scrutinise side letters. Therefore, one must always explain the purpose of documents or terms within documents.
- Make sure the dawn raid officers and legal advisers are on stand-by.

Confidential and legally privileged documents:

These should be marked in advance. EU Commission officials are not allowed to remove or use legally privileged documents as evidence, although some national competition authorities may do so.

Communication and Press release:

Discuss possible ways to address the prospect of a dawn raid with the company's communications officer. Prepare a draft press release or answers for journalists.

Best practices during the investigation:

Scope of investigation:

- Ask to see the relevant documents of the regulators – do they have a warrant to enter the premises?
- Ensure that the inspection is being conducted under an authorisation or warrant and determine its scope.

Logistical arrangements:

- Make sure the company's legal team or/and dawn raid officer is called immediately.
- Ensure the presence of the company's internal and external legal team and that the investigating officials are accompanied at all times.
- Contact IT and all onsite personnel informing them of the investigation, importance of cooperation, and reminding them to ensure that IT systems do not destroy or delete any documentation during the investigation.

Confidential and legally privileged documents:

Try to agree with the investigating officials what documents are confidential and legally privileged. Where an agreement cannot be reached, an independent third party will make the decision.

The rules of behaviour:

- **No outside contact:** Make no outside contact with competitors, customers or third parties as this might be seen as a 'tip-off'.

- **Courteous and cooperative:** Be cooperative when approached for information, documents or even access to emails, as non-cooperation can have serious consequences.
- **Email accounts, mobile phones and computers:** Investigating officers may require company IT staff to freeze the email accounts (including mobile phones) of certain employees, and to release the accounts when copies have been made. It is also advised to relinquish any requested hardware.
- **Destruction of documents:** Do not hide, conceal or destroy any documents or data. Suspend any policy of document destruction during a raid, as this may result in fines.
- **Breaking of investigation seals:** Be careful not to break official seals as this has resulted in fines of millions of euros.
- **Other general behaviour:**
 - Do not lie to or mislead investigators.
 - Follow the instructions of senior managers or the legal team.
 - If unsure of anything, always clarify.

Best practices after the investigation:

- **Follow up meetings:**
Hold follow-up meetings to decide what further steps should be taken. These include:
 - whether further explanations or documents should be provided to investigating officials; or
 - if there appears to be evidence of infringement, whether a leniency application should be made.
- Retain copies of all documents copied or taken by the investigating officials.
- Take notes of any oral explanations given and of any areas of dispute with the investigating officials (e.g., relating to legal privilege).

Further information

The Reed Smith Competition team has extensive experience in dealing with dawn raids or surprise inspections. Please do contact us if you require advice or have any queries.

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