

Dealing with Dawn Raids Q&A Guide

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1. What is the evidence in support of all this? Can I see it?

An investigation can be commenced where the regulator has a reasonable suspicion of infringement. The evidential threshold for this is low; the trigger could be as little as an incriminating email. In many instances, the regulator's evidence will come from a whistleblower. You are not entitled to see the evidence at this stage.

2. Can I telephone/contact anyone?

There is no reason to suspend normal business operations unless instructed to do so by the inspectors. It is strongly advisable not to tell anyone outside your organisation, apart from your legal advisers, that a raid is in progress. There is no strict offence of tipping off, but there would be a risk of criminal liability if you informed a competitor that a raid was underway in the knowledge that they would be likely to start destroying documents. Causing (through, for example, a phone call) the destruction or disposition of documents when an investigation is underway may well be an offence under competition law. Similarly, a person can be guilty if, when required to produce a document, he (for example) causes or permits its destruction.

Competition authorities generally have a broad scope to prosecute an individual who may be likely to prejudice an investigation. They may also be authorised to phone tap through listening, monitoring and observing conversations.

3. Do I have to co-operate?

Yes, although the European inspectors have no right under EU law to force entry to the company's premises. The Commission can impose fines (up to 1% of group annual turnover and a lack of co-operation will be considered an aggravating feature in increasing any potential fine) and can obtain assistance through an injunction from a national authority to gain entry and request documents if the company is not co-operative.

In the UK, it is an offence under competition law not to comply with the requisite requirements. There can be fines or, in extreme circumstances, imprisonment for up to two years for individuals who intentionally obstruct investigators.

4. Will they wait for my lawyer to arrive?

It is normal practice for the authorities to wait a short amount of time (around 30 minutes) before they begin their investigation, subject to certain conditions that the company must usually adhere to (such as locking the shredders and not destroying documents or deleting emails). If there is a solicitor already at the premises then the investigators are likely to proceed even if that person is not a lawyer with knowledge of how dawn raids are conducted. The inspectors are not, however, obliged to wait until lawyers arrive and, in practice, any necessary legal advice should be obtained by telephone if the lawyers are still en route when the investigation begins.

5. Do I have to answer that question?

The general answer to this question is yes. The exceptions to the general rule depend on whether the power to instigate the dawn raid has been sanctioned by the EU or by the UK based Office of Fair Trading (OFT) or Serious Fraud Office (SFO).

In the EU context there is more scope for inspectors to ask questions. However:

- questions asked by the inspectors which go beyond seeking factual clarification of the subject matter of the investigation are not permitted;
- company representatives are not compelled to provide answers to questions that might involve an admission of the existence of an infringement that the Commission should be required to prove;
- in terms of an example, a company is compelled to provide factual replies to questions such as whether or not they attended a meeting or dates, places and names of participants in the meetings.

A company's representatives do not have to answer questions if the admission of the infringement may lead to self-incrimination. For example, they do not have to answer questions relating to the purpose of the action taken and questions relating to certain agreements or the subject and outcome of certain meetings.

In the UK context:

in civil proceedings, the OFT investigators can only ask for on-the-spot oral explanations of documents they examine or for a person to state where a document can be found. Broader questions (for example, on facts relevant to any investigation) are not allowed; in criminal proceedings, the authorities can conduct interviews and SFO officials can additionally ask for certain explanations of documents.

Generally if there is any doubt as to the nature of the question being asked (i.e. the answer may lead to a suspicion that an infringement has been committed) you should ask for the question to be put in writing and advise that, after seeking legal advice, if the question is deemed appropriate an answer will be given.

6. Do I have to produce that document?

The general answer again is yes. Investigators can examine books and business records (both paper and electronic) and take away copies and, in some instances, original documentation.

In the EU context, the company is under a continual and active duty to find the documents requested and giving general access to the records is insufficient. The company should not, however, hand over legally privileged documents (i.e. correspondence with external lawyers in the EEA). The company has to justify to the authorities (preferably without the authorities viewing the whole document) that a particular document falls under the privilege exception. There is no such concept as litigation privilege in the EU context.

In the UK context, legal professional privilege comprises both legal advice privilege and litigation privilege. If there are communications between an authorised lawyer and the client seeking legal advice, or which came into existence with the purpose of litigation pending or being contemplated, then it may well be possible to justify the withholding of such documents.

If there is a difference of opinion about the nature of the document and the authorities and the company cannot resolve the dispute, such documents should be placed in a sealed envelope and kept in a safe place for a time when the dispute can be resolved.

7. What should I tell my staff?

There is an inspection underway, co-operate and be accommodating with the investigators but do not speak to them unless in the presence of the company lawyer or representative. Go about your normal business, do not externally communicate that a raid is being carried out and do not destroy any documentation.

8. Is this raid going to be public?

There is a high probability that details of a raid will be published either by the OFT or the Commission through their websites. Both entities release various statements on their websites noting recent investigations though such announcements do not comprehensively include every dawn raid carried out. It may be advisable to prepare a standby press statement if necessary.

9. Who is going to pay my costs?

No-one. You have to bear the costs of complying with the inspectors' requests to produce information etc.

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