



Pinsent Masons

Competition Law Dawn Raid

Checklist & Guidelines

**What to do in the first hour
of a dawn raid**

What to do in the first hour of a Competition Dawn Raid **Checklist**

Action Point		Done?
<p>The Officials arrive</p> <p>They introduce themselves and ask to see either a particular person or the most senior company executive on the premises.</p> <p>[see Guidelines section 1]</p>	<ul style="list-style-type: none"> ■ Arrange for the most senior company executive and, if relevant, the most senior lawyer on-site to meet the officials. ■ Move the officials into a meeting room that doesn't contain any files or access to the company's IT system. ■ Explain that someone will be down to meet them shortly. In the meantime, take 3 copies of their inspection mandate and get contact details of the official in charge. ■ If you have external competition lawyers on stand-by, then call them and ask them to attend immediately. ■ If you have no such existing arrangements, then please call: <ul style="list-style-type: none"> Guy Lougher: 020 7418 7000 or 0121 335 2931 Alan Davis: 020 7418 7000 or 020 7418 7026 Giles Warrington: 020 7418 7000 or 0121 260 4037 ■ Give the external lawyers details of which authority the officials are from, how many officials there are and email/fax to the lawyers a copy of the officials' inspection mandate. ■ Check with the external lawyers the nature of the investigation: is it by an EU or UK competition authority; is it civil or criminal, do the officials have a search warrant? ■ Obtain from the external lawyers an indication of when they are likely to arrive. 	
<p>Holding the ring until help arrives</p> <p>[see Guidelines section 2]</p>	<ul style="list-style-type: none"> ■ The company's senior executive and/or in-house lawyer should check the investigation mandate to see whether the officials are authorised to conduct the investigation. ■ Try to persuade the officials to delay starting their investigation until external lawyers arrive. ■ Emphasise the company's intention to cooperate. ■ Try to establish from the officials whether they are also conducting investigations at any of the company's other sites or at the homes of any company employees. If they are, then arrange comparable support for each of those other locations. 	
<p>Organising the internal team</p> <p>[see Guidelines section 3]</p>	<ul style="list-style-type: none"> ■ Gather and base in a room away from the officials a team comprising the following: <ul style="list-style-type: none"> - a senior member of the IT staff, - a senior employee to act as coordinator, - enough employees to act as a "shadow" for each official. ■ The internal team should read the parts of the Guidelines dealing with the officials' rights to search, read documents and ask questions. ■ Circulate mobile telephone numbers for the internal team, external lawyers and the lead official. 	

Internal communications

[see Guidelines section 4]

- Send an internal email, announcing:
 - the investigation is taking place,
 - the company's intention to cooperate,
 - that there must be no deletion, destruction or concealment of documents or data,
 - that third parties must not be told of the investigation.

External communications

[see Guidelines section 5]

- Monitor websites of the company's main competitors, the stock exchange and the authority from which the officials are drawn for any announcements relating to the investigation.
- Prepare in case it is needed a low-key press announcement reporting the fact of the investigation.
- Consider whether a stock exchange announcement is needed.

External lawyers arrive

[see Guidelines section 6]

- External lawyers to check the officials' documentation and the investigation mandate.
- Try to persuade the officials to allow the external lawyers and internal team to hold a brief meeting to discuss the company's duties and how the investigation will be monitored.
- Nominate a person from the company and the external lawyers who will handle disputes with the officials.

What powers of search do the officials have?

[see Guidelines section 7]

- Confirm with the external lawyers whether:
 - the officials have the power to search,
 - it is a civil or criminal raid,
 - it is a raid by the European Commission or by a UK competition authority.

What documents can the officials read?

[see Guidelines section 8]

- Circulate amongst the external lawyers and in-house team a list of the names of external and the company's in-house lawyers who may have sent or received documents that might be seen by the officials.
- Identify where legally privileged documents are kept and whether they are likely to be clearly marked.

What questions can the officials ask?

[see Guidelines section 9]

- Confirm with the external lawyers what type of investigation it is and the powers that the officials have.
- Identify who from the company will be the preferred contact point for questions.

What to do in the first hour of a Competition Dawn Raid **Guidelines**

1 The Officials arrive

- Officials from the Office of Fair Trading (the "OFT") or European Commission (the "Commission") arrive at Reception or, if relevant, at the company's gatehouse. They will present their investigation mandate and ask either immediately to meet a particular named person or the most senior company official on the premises.
- Call that individual and ask them to attend immediately. If they are not contactable, then keep on calling until you find the most senior executive on site and ask them to attend immediately.
- If relevant, ask the company's most senior in-house lawyer to attend immediately.
- Try to move the officials out of Reception into a meeting room that doesn't contain any files or access to the company's IT system. Explain that the company is intending to cooperate fully. Organise tea and coffee for the officials! Take the contact details (including mobile phone number) of the official in charge.
- Take 3 copies of the officials' investigation mandate. One copy is for the senior company executive, one is for the in-house lawyer or a member of the internal team, the third copy is for the company's external lawyers.
- If you have external lawyers on standby in case of a dawn raid, then call your named contacts and ask them to attend immediately. Give them details of where the officials are from, how many officials there are and send them by email or fax a copy of the officials' investigation mandate. Ask the lawyers for an indication of when they are likely to arrive and exchange mobile telephone numbers.

2 Holding the ring until help arrives

- The company's senior executive and/or in-house lawyer should read the officials' investigation mandate and check to see whether the officials are authorised to conduct the investigation. In particular:
 - does the mandate apply to your company - with the correct address and date?
 - does each official have identification? Take copies of the identification.
 - The company's senior executive and/or in-house lawyer should check the mandate for the subject matter and scope of the investigation? In particular check:
 - which authority is undertaking the investigation (OFT, the Commission, a sector regulator, or the Serious Fraud Office)?
 - is it a civil or a criminal investigation?
 - do the officials have a court warrant allowing them to search the company's premises?
 - do you understand from the scope of the investigation which documents are "relevant" and where and with whom they are located?
 - if there are any discrepancies, then inform the company's lawyers immediately.
 - try to establish whether officials are also conducting investigations at any of the company's other sites or at the homes of any of the company's employees.
 - If the company has no in-house lawyers already on site:
 - the officials will normally wait for a reasonable period (often around 45 minutes) for external lawyers to arrive before starting their investigation IF they are satisfied that the company is cooperating.
 - if external lawyers have already been asked to attend, explain this to the officials, give an estimate of their likely time of arrival and ask the officials to delay starting their investigation until the external lawyers arrive. Emphasise the company's intention to cooperate.
 - if you have not already done so, ask external lawyers to attend immediately, and follow the actions above.
 - the officials may demand that certain offices are locked or files set aside until the investigation commences. It is usually advisable to agree to such a request if the officials have agreed to delay starting their investigation until external lawyers arrive.
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- If the officials learn that the company already has an in-house lawyer on site:
 - the officials may well decide to start their investigation immediately. If they attempt to do so then you can ask them to delay until external lawyers arrive, but the officials may well decline to delay.
 - if the investigation starts immediately, then contact the external lawyers and ask them for guidance.
- If it is a criminal investigation, the officials are likely to start their investigation immediately.

3 Organising the internal team

- Organise and quickly brief an internal team to assist during the investigation. In particular, you will need to gather:
 - a senior member of the IT staff who can explain the company's IT system, deal with any IT problems and assist officials in relation to locating and examining emails and computer records.
 - a senior employee to co-ordinate information and liaise with the officials.
 - employees to shadow the officials (where possible, one employee to each official) to ensure that the officials are complying with their responsibilities.
 - a senior executive who can take decisions on behalf of the company.
- Advise your internal team on how to shadow the officials. In particular, they should know what documents the officials can read (see section 8 below) and what questions they can ask (see section 9 below).
- Ensure that the internal team (and the external lawyers when they arrive) are based in a room away from the officials.
- Circulate mobile telephone numbers for your internal team, the external lawyers and the lead official.

4 Internal communications

- In conjunction with the company's lawyers, send an email to all the company's employees on-site, informing them of the officials' presence and of the company's intention to cooperate.
- This email should advise employees of any restrictions placed on the company by the officials (e.g. in relation to use of communications, etc).
- This email should inform employees that:
 - they should be professional and courteous in their dealings with the officials.
 - they should not, without obtaining the prior consent of the company's executive or lawyers in charge of handling the investigation, volunteer information or documents to the officials.
 - they must not delete, destroy or conceal any documentation or data, whether in hard or soft copy format, that might relate to the subject matter of the investigation.
 - any routine document destruction policy of the company is suspended immediately until further notice.
 - they should not advise any third party (including staff located at the premises of other companies) of the investigation.
 - any breach of these requirements could be a criminal offence and may be a serious disciplinary offence.

5 External communications

- The company should NOT discuss the investigation or even mention that an investigation is underway:
 - with any of its competitors.
 - with any third party, including customers, without obtaining the prior consent of the company's executive or lawyers in charge of handling the investigation.
 - The company should monitor the websites of its main competitors (including the regulatory news service of stock exchanges on which they are listed) and the authority conducting the investigation to see if they make any public announcements relating to the officials' investigation.
 - 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.
 - The company should prepare a low-key press release in case it is needed. The announcement should merely confirm that an investigation is underway and that the company is cooperating with the officials.
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6 External lawyers arrive

- Ask the external lawyers to read and check the officials' investigation mandate and confirm whether the officials are authorised to conduct the investigation.
- Try to persuade the officials to delay starting the investigation until after a brief discussion between the company and the external lawyers:
 - to explain the extent of the company's duty to cooperate.
 - to agree with the external lawyers by whom and how the officials' activities will be monitored.
- Whilst the investigation is proceeding, the company and its external advisers should try to ascertain the scope and nature of the investigation, and what knowledge the officials already appear to possess and whether there may have been a prior leniency application by a third party.
- Nominate a person from the company and the external lawyers who will handle any disputes with the officials.

7 What powers of search do the officials have?

- If the officials **do have** a search warrant (or if they have a formal decision in the case of a Commission investigation):
 - they will have the legal power to conduct a search in relation to the investigation.
 - they can search the premises, files, documents, the IT system, briefcases and handbags and may also search any car on the premises.
- If the officials **do not have** a search warrant (or if they have a written authorisation rather than a formal decision in the case of a Commission investigation):
 - they do not have the above powers to conduct a search in relation to the investigation.
 - but they can require files and documents to be produced for the officials to review.
- The officials have the right to take photocopies or soft copies of documents or files that they are entitled to read and may, in some cases, even have the right to remove the originals of documents or files.

8 What documents can the officials read?

- The officials can read documents that are within the scope of the investigation as described in the investigation mandate.
 - The officials are not entitled to read documents that are covered by legal privilege. What this means in practice depends on the nature of the investigation.
 - **EU investigation:** If the investigation is being conducted by the Commission the officials:
 - **can** read any written correspondence between the company and its internal lawyers, except for certain types of preparatory documents created exclusively for the purpose of seeking legal advice from a lawyer in the exercise of the rights of defence.
 - **cannot** read 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:** If the investigation is being conducted by the OFT, a UK sector regulator or the Serious Fraud Office the officials:
 - **cannot** read any written correspondence between the company and its internal lawyers.
 - **cannot** read any written correspondence between the company and its external lawyers which has been created for the purpose of the company's right of defence.
 - Circulate amongst the external lawyers and in-house team a list of the names of external and the company's in-house lawyers who may have sent or received documents that might be seen by the officials.
 - Take a detailed record of all documents copied (or taken). Where electronic copies are taken, a detailed record should be made and an additional copy should be made for the company to retain.
 - If there is any doubt regarding whether a document or file is legally privileged or relevant to the investigation, ask for the document to be put in an envelope or the email flagged for later consideration with the company's lawyers.
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9 What questions can the officials ask?

- **EU investigation:** If the investigation is being conducted by the Commission the officials:
 - **can** generally ask any company employee for an explanation of a document that the official is entitled to read.
 - **can** ask where a document or file may be found.
 - **can** generally ask any company employee for an explanation of facts relating to the scope of the investigation.
 - **cannot** ask a question if the answer to it might lead to the company incriminating itself.
- **UK civil investigation:** If the investigation is being conducted by the OFT or a UK sector regulator the officials:
 - **can** generally ask any company employee for an explanation of a document that the official is entitled to read.
 - **can** ask where a document or file may be found.
 - **cannot** ask any company employee for an explanation of facts relating to the scope of the investigation.
 - **cannot** ask a question if the answer to it might lead to the company incriminating itself.
- **UK criminal investigation:** If the investigation is being conducted by the OFT, a UK sector regulator or the Serious Fraud Office the officials:
 - **can** generally ask any company employee for an explanation of a document that the official is entitled to read.
 - **can** ask where a document or file may be found.
 - **may, depending on the type of interview,** be able to require any company employee to provide an explanation of facts relating to the scope of the investigation.
 - **may, depending on the type of interview,** be able to ask any company employee to answer a question even if to do so might lead to the company being incriminated.
- If the officials ask questions:
 - the company should try to direct the question to a designated senior employee for an answer (other than straightforward questions relating to the location of documents/password to email accounts, etc.).
 - the person answering on behalf of the company should reply concisely, limit their reply to what they know and should not speculate.
 - the person answering on behalf of the company should ensure that their response is not false or misleading (as otherwise, that might be a criminal offence and/or expose the company to the risk of fines).
 - a note should be taken of any questions and answers.
 - if the question is vague or complicated, say so and seek clarification.
 - if a reply to the question may be self-incriminating, the company should consult its lawyers before replying.
- If possible, it is usually preferable for any questions from the officials about documents or facts to be addressed later in writing on behalf of the company, rather than being addressed orally during the investigation. Providing a written answer allows the company to ascertain more precisely the relevant facts and ensure that any answer given is accurate and reduces the risk of any reply being misunderstood by the officials.

10 Do you have to cooperate?

- If the officials are obstructed when they are trying to exercise their legal powers that may be an imprisonable criminal offence for individuals and also lead to the company and/or individuals being fined.
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Contact us

If you are 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 the partners below

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