

Dawn Raid?

Linklaters

Linklaters Dawn Raid Hotline (+44) 20 7456 5055

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Any company, no matter how big or small, may be raided by the European Commission or a national competition authority investigating a suspected breach of competition laws.

You need to know how to handle such surprise raids, not only to protect your legal position, but also to minimise the impact on your business and the company's reputation. You may wish to put in place a dawn raid procedure and train designated staff.

Linklaters has a wealth of experience in this area and a 24-hour dawn raid hotline for you to call in the event of a raid, which will put you in immediate contact with experienced competition lawyers across Europe, as well as in the US and China.

Inspectors at the door

Remain calm. You are legally obliged to co-operate fully and actively with the inspection. Note that high fines (potentially several million euros) can be imposed for obstructing an inspection.

- > Politely ask the Inspectors to wait for a short period in a document-free room while you get organised. Note, however, that the Inspectors' request for access cannot be denied for any period of time. They must immediately be granted entry to any premises of the company to notify the inspection decision. In addition, they must be allowed to occupy the offices of their choice and to control telephone and email communication from the moment they arrive.
- > The Inspectors will give you a copy of their mandate. This document contains critical information about the purpose and scope of the inspection and needs to go to your lawyer immediately. Carefully review this document to understand the powers of the team and the scope of the inspection.
- > Implement your dawn raid procedures. Discuss with your Legal Department how to arrange for legal assistance on the premises; you can call your Linklaters contact or the Linklaters Dawn Raid Hotline (see details at the bottom of this page) to get external assistance. If you have no internal counsel on site, you should ask the Inspectors if they would be prepared to wait for a short period in order to allow counsel time to arrive.
- > Assemble support for handling the inspection and introduce them to the Inspectors. The team should include "shadowers", administrative support and an IT specialist familiar with the company's IT systems and fully dedicated to dealing with the Inspectors' (lawful) instructions.
- > Set up a response team including a representative from the Legal Department, the senior Linklaters lawyer on site, a representative from the Communications Department and a senior executive. This team should deal with all important issues, including internal and external enquiries. Make sure they are available throughout the raid and can all be easily contacted e.g. via a dedicated email distribution list.

- > Email staff on the premises, informing them of the raid as well as their obligation to co-operate. Identify someone to whom queries about the raid should be addressed. Warn staff not to be hostile or obstruct the inspection, not to destroy documents and not to tell anyone outside the company about the raid. Note that, in some countries, obstructing a raid is a criminal offence.
- > Agree with the Inspectors from the outset the procedures to be used during the raid, in particular in relation to copying materials and handling disputed (e.g. out of scope, privileged) documents – see next section (Shadowing).

Shadowing

Each Inspector must be accompanied at all times.

In general, Inspectors have wide powers to:

- > search the premises
- > copy relevant documents (whether hard copy or electronic)
- > take the company's storage media and keep this until the end of the inspection
- > ask for explanations of facts or documents
- > seal premises/rooms

The Inspectors will most likely focus on the IT environment. They will bring IT experts, as well as their own dedicated software and/or hardware and use these resources to copy, search and recover data from the company's IT systems and storage media (laptops, desktops, tablets, mobile phones, CD-ROMs, DVDs, USB-keys and so on).

Shadowers should:

- > Compile as full a record of the inspection as possible, for each day of the raid. Note down key questions asked, answers given and search terms used.
- > Ask the Inspectors for a copy of any electronic documents they have copied, including any reference details. Make a duplicate of each hard copy document copied by the Inspectors (after it has been labelled by them).

- > Verify each document for privilege and relevance. Inspectors should neither read nor copy documents which are privileged (see next section), and should not make a copy of documents that are not relevant to the scope of the inspection (but note that the Inspectors will make the final decision on relevance).
- > Do not volunteer any documents or information that is not requested. Questions which relate to specific documents can be answered on the spot, but answers should remain factual and to the point. Ask the Inspectors to clarify where the question is not clear and do not speculate or expand beyond answering the question. Where questions are more wide-ranging in scope, or if they are potentially incriminating, ask to defer to a later point in the raid when a lawyer can be present. The lawyer should take a careful note and you should also ask for a copy of the note made by the Inspectors.
- > Ask the Inspectors to note formally in their minutes any specific points or objections you wish to raise, for example, if you wish to reserve your position on a point of privilege / relevance or if you object to the raid being carried out without a warrant. Ask for a copy of these minutes. Record all these points or objections in your minutes, and also set them out in an email to the Linklaters team to create a contemporaneous paper trail.
- > Remain polite and co-operative. Do not hamper the Inspectors in their task, beyond the exercise of your legitimate rights. Your legal counsel can help you in this respect. Try to agree on a proper way of interacting with the Inspector you are shadowing.

Privilege

Under EU law (national law may differ), communications between a company and EU external counsel for the purpose of seeking legal advice in the interests of the company's rights of defence are protected from disclosure on the grounds of privilege. Note that:

- > Advice from an in-house lawyer will not be protected, unless merely reporting the text or content of advice from an external lawyer.
- > Documents prepared by the company exclusively for the purpose of seeking external legal advice will, however, be privileged.

If you are in doubt about privilege or if you believe a document (or part of a document) may be privileged, ask the Inspectors to allow you to review the document first and then show the Inspectors just enough of the document to demonstrate that it is privileged (e.g. the letterhead, lawyer's name on the email). Where the privileged status cannot be agreed in this manner, put the document on a separate pile (or a separate folder, if the review is electronic) for discussion at the end of the day and seek legal advice.

Where showing part of the document would be impossible without revealing its privileged contents, you may refuse to allow the Inspectors even a cursory glance provided you give reasons for this. Put the document aside if this is the case and seek legal advice. The lawyers may request that the disputed document be put in a sealed envelope for resolution after the dawn raid.

Privilege issues need advice from a lawyer as there can be a fine line between asserting your company's rights and obstructing an inspection.

Other tips during the raid

- > Make sure nobody interferes with any seals applied by the Inspectors overnight. Make very visible signs to indicate that the relevant door or box should not be opened. Note that locking a door may not be sufficient. Place security guards outside the sealed premises to ensure there is someone guarding the seals at all times. Fines for a broken seal can be very significant (millions of euros).
- > Brief the lawyers and response team properly about the events and what you have learned during the day.
- > If in doubt, consult with the lawyers or a member of the response team (on the spot or by telephone) before taking a decision. Do not participate in an interview with the Inspectors or answer questions (beyond factual questions about the documents) without having a lawyer present.
- > Get the PR right. Prepare a draft press release for discussion with senior management. It is likely that the press will be informed about the raid and the competition authority itself may issue a press release.
- > Prepare internal communications to keep employees/shareholders and other stakeholders appropriately informed.
- > Take time to think. Bear in mind that issues can be deferred for debate at a later stage in the raid.
- > At the end of the raid, make sure that you obtain a copy of all documents copied by the Inspectors (including the inventory they have made), the Inspectors' minutes of the inspection including the record of oral explanations provided and the minutes relating to any seals used, if relevant.

Dawn Raids in the US

The Department of Justice (DOJ), generally in conjunction with law enforcement agencies such as the Federal Bureau of Investigation, conducts investigations related to suspected violations of US competition laws. Although dawn raids in the US are similar to those in other jurisdictions, the key difference is that the DOJ may seize any documents or data that may be related to their investigation. In addition:

- > The ability to shadow the agents is more limited and subject to negotiation.
- > You do not have the right to make copies of the documents seized by the agents.
- > You do not have the right to review copies of all seized materials and note their contents.
- > Agents may seize privileged documents, although privilege issues can be negotiated before or during the raid, and privileged documents may be returned later.
- > Computer technicians will accompany the agents and will generally copy the company's entire server.

Each of the above points is negotiable with the agents conducting the search, but because the raiding agents are under no obligation to allow shadowing, copying or access to documents, or withholding of documents based on privilege claims, it is crucial that you contact counsel immediately to assist in negotiating these issues.

For assistance in the US, call your usual antitrust contact or dial +1 202 654 9292

Dawn Raids in China

The National Development and Reform Commission, or the State Administration for Industry and Commerce or their respective local commissions can launch a dawn raid into suspected breaches of the Anti-Monopoly Law. Dawn raids typically commence in the morning and may last several days. Sometimes advance warning is given by the authorities on the previous day but this is not always the case.

Be mindful of the following special features of dawn raids conducted by Chinese enforcement agencies:

- > The Inspectors do not need a warrant to start a dawn raid, but you can ask them to show you the inspection notice.
- > Do not withhold documents based on privilege claims as the concept of legal privilege is not recognised in China.
- > Officials are under no obligation to allow shadowing and there is no established practice in this regard yet. You should decide whether to shadow an Inspector depending on the circumstances (e.g. the Inspector's reaction). If you do shadow an Inspector, do it in a subtle way and cease if the Inspector objects.

There is currently very little clarity regarding dawn raid procedures in China, and judgement calls need to be made during the process. Therefore, you should inform your counsel of the raid as soon as possible.

For assistance in China, call your usual antitrust contact or dial +86 1 065 350 686.

Linklaters has extensive experience in preparing clients for dawn raids by putting in place bespoke procedures as well as conducting innovative interactive training sessions (using DVDs or eLearning) in a number of languages.

Should a raid take place, Linklaters lawyers will immediately attend and support you in appropriately defending your company.

Dawn Raid Basics

This booklet is intended merely to highlight issues and not to be comprehensive, nor to provide legal advice.

Should you have any questions on issues reported here or on other areas of law, please contact one of your usual Linklaters contacts.

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