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Quickguides

Dawn raids: dealing with inspections by competition authorities in the UK



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Quickguide overview

This Quickguide provides guidance on how to ensure an effective response to an unannounced inspection (known as a "dawn raid") by a competition authority. Topics covered include:

- Initial response to a dawn raid
- Managing a dawn raid
- The scope of inspectors' powers
- What to do at the end of a dawn raid
- Dos and don'ts at each stage
- Flowcharts summarising the key steps for the internal response team.

Ashurst also provides a range of additional dawn raid materials, including:

- Dawn raid training for employees and/or your response team
- Tailored dawn raid guidance for your response team to ensure an effective response in the event of a dawn raid

For further information on any of the above areas, or if you have any questions regarding how best to deal with a dawn raid, please speak to one of the contacts listed on the final page of this Quickguide, or your usual Ashurst contact.

Brexit

The UK left the EU on 31 January 2020 and the Brexit Transition Period ended on 31 December 2020. On 1 January 2021, the UK and EU became two fully distinct regulatory, legal and customs territories, whose relationship is governed by the Trade and Cooperation Agreement (TCA).

For new investigations, the European Commission no longer has jurisdiction to carry out dawn raids in the UK, nor to direct the Competition and Markets Authority (CMA) to carry out raids on its behalf. For further information on inspections by European competition authorities see our Quickguide, "[Dawn raids: dealing with inspections by European competition authorities](#)". Businesses should seek legal advice in relation to European Commission investigations that were initiated prior to 1 January 2021.

This publication is not intended to be a comprehensive review of all developments in the law and practice, or to cover all aspects of those referred to. Readers should take legal advice before applying the information contained in this publication to specific issues or transactions. For more information please contact us at London Fruit & Wool Exchange, 1 Duval Square, London E1 6PW T: +44 (0)20 7638 1111 F: +44 (0)20 7638 1112 www.ashurst.com.

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1. Introduction

If a competition authority suspects that an infringement of competition law has occurred, it may carry out unannounced inspections ("dawn raids") at the premises of companies suspected of involvement (and, in some circumstances, also at the premises of their customers and/or competitors).

In the UK, competition dawn raids may be carried out by the CMA or a sectoral regulator with concurrent competition powers¹. It is important to clarify at the outset who is leading the dawn raid and the underlying investigation into a suspected infringement of competition law, as this will affect which detailed procedural rules apply to the dawn raid and the scope of the inspectors' powers. It is therefore important to check the inspectors' authorisation documents carefully to determine which rules apply, as detailed below.

Irrespective of which procedural rules apply, a dawn raid places considerable pressure on multiple areas of a business at once, and can be very stressful. Dawn raids may take place in multiple locations (including in different countries) at the same time.

It is therefore crucial that an effective internal response strategy is put in place before being confronted with a dawn raid. All employees must know how to deal with the inspectors, and what their legal obligations and rights are. If a company fails to comply with its legal obligations during a dawn raid, significant fines can be imposed, and individuals may face civil or even criminal sanctions. At the same time, it is important to ensure that the company's rights and the limits on the inspectors' powers are respected, and that the impact of the dawn raid on the day-to-day business of the company is minimised.

The guidance set out in this Quickguide provides an overview of the key stages of a dawn raid in the UK and the powers of the inspectors. It also outlines the steps which should be taken to ensure that a company which is the subject of a dawn raid in the UK responds in an efficient manner while minimising legal risk.

An overview of the key steps to be taken by the internal response team at each stage of the dawn raid is also set out in flowcharts at the end of this Quickguide. This can be printed separately as a useful quick reference guide to keep to hand alongside a more detailed dawn raid handbook.

2. Initial response to a dawn raid

Although unannounced inspections by competition authorities are generally referred to as "dawn raids", the inspectors will not actually arrive at dawn. They will arrive during normal business hours, usually between 8.30 a.m. and 9.30 a.m.

Reception staff

Reception staff should be trained to follow the company's internal response strategy (it may make sense for an aide memoire of initial steps to be available at reception). The key initial steps to be taken will include:

- alerting a senior member of the internal response team;

¹ Various sectoral regulators have concurrent powers to enforce competition law in their respective sectors. These include the FCA, PSR, OFCOM, OFGEM, OFWAT, CAA and ORR. Although this Quickguide focuses on dawn raids by the CMA, the powers and procedures of concurrent regulators are similar.

- requesting and taking a copy of the inspection team's authorisation documents (which may include a court warrant) and ID cards;
- preparing a list of members of the inspection team; and
- arranging name badges clearly identifying the inspectors as visitors to the premises.

The inspectors should be told that a senior member of staff is on their way and asked to wait, ideally in an empty meeting room/other suitable space while these preliminary administrative tasks are carried out. The inspectors will usually be willing to agree to this provided any delays are minimal, although it is important to be aware that they are not legally obliged to wait and they should not be obstructed if they insist on proceeding.

All conversations with the inspection team should be kept to matters of pure administration at this stage – the conversation should not concern the business or the focus of the investigation.

The internal response team

A senior member of the response team should go to reception immediately to meet the inspectors. In the meantime, other members of the internal response team should prioritise the following tasks:

- immediately contact the in-house legal team (if the company has one) and/or external legal advisers, as well as other key individuals (e.g. senior management) to inform them that a dawn raid is taking place and arrange a brief meeting/call to discuss the subject matter and purpose of the dawn raid;
- ascertain how long it is likely to be before either in-house or external lawyers can be present;
- check the inspectors' authorisation documents (copied by the reception staff): these should state the subject matter of the investigation (albeit usually in broad terms) and the legal basis for the dawn raid. This will enable you to identify which procedural rules will apply to the inspection, and the scope of the limits on the inspectors' powers – see further below;
- appoint a team of "shadowers" (at least as many as the number of inspectors) to accompany the inspectors at all times once they proceed with the inspection. The shadowers should be briefed as to the limits on the inspectors' powers, and, so far as possible, to keep a record of which documents have been reviewed/copied (bearing in mind that increased use of forensic search software may make this difficult in practice) and any questions asked/answers given;
- ensure senior members of the internal IT team are available to assist with complying with any requests by the inspectors to shut down telephone and/or e-mail systems during the dawn raid, and any issues which may arise when searching electronic documents/data; and
- send an e-mail to all staff at the premises to explain what is happening and the need to be co-operative but to pass all questions/requests from the inspectors to the response team leader and not to discuss the fact of the dawn raid with anyone outside of the business.

Do the inspectors have to wait for lawyers to arrive before proceeding?

If in-house lawyers will be present within 15 minutes, or external lawyers will be present within 45 minutes, it is reasonable to ask the inspectors to wait until the lawyers' arrival before proceeding with the inspection.

However, there is usually no legal requirement for the inspectors to wait for the arrival of lawyers, and if they refuse to do so then it is important that this is not insisted upon as there is a risk that this could be deemed to amount to not co-operating or obstructing the investigation (which could lead to significant fines being imposed).

If the inspectors are not willing to wait for the arrival of lawyers, the inspection should be allowed to proceed, but the internal response team should liaise with the in-house and/or external lawyers by telephone (consider setting up an "open bridge" conference call for this purpose, with a lawyer constantly available for questions).

If the inspectors insist on starting to review documents before either internal or external lawyers arrive:

- seek to agree with the lead inspector that the inspectors will not take any further steps prior to the lawyers' arrival beyond those necessary to ensure no documents are concealed/destroyed and no undertakings subject to parallel dawn raids are tipped off (i.e. no review/copying of documents and no questioning of individual employees before the lawyers arrive); or
- if this is not possible, identify (with assistance from the lawyers via telephone) any categories of documents/data which are likely to be relevant to the investigation but which are low risk of containing privileged material. If possible, let the inspectors work through these groups of documents/data until the lawyers arrive.

Key points to remember

DO		DON'T	
✓	implement a response strategy before being confronted by a dawn raid	X	be hostile to inspectors
✓	ensure that all employees, have received appropriate training and know what they should do in the event of a dawn raid	X	obstruct the investigation by refusing to co-operate
✓	immediately contact in-house and/or external lawyers and ask the inspectors to wait until lawyers arrive before commencing the inspection (but do not insist on this)	X	insist that the inspectors wait for the arrival of in-house and/or external lawyers before starting the investigation if they refuse to do so when asked
✓	check the authorisation documents produced by the inspectors and raise any concerns with in-house or external lawyers	X	try to destroy, delete or hide any documents or files (whether paper or electronic)
✓	try to delay answering any questions (other than straightforward administrative queries) until a lawyer is present	X	tell anyone outside the business that the inspection is taking place or discuss any aspect of it
✓	seek immediate legal advice if at any stage you are uncertain as to your rights and responsibilities		

3. Managing the ongoing dawn raid

The detailed rules governing the powers of the inspectors will vary depending on the type of underlying competition investigation. This information will be included in the authorisation documents presented by the lead inspector on arrival at the premises. There are two possible scenarios:

- dawn raid by the CMA in connection with a CMA civil investigation; or
- dawn raid by the CMA in connection with a CMA criminal investigation.

The key powers of the inspectors in each of these scenarios are summarised below.

Dawn raid by the CMA in connection with a CMA civil investigation

CMA inspectors may carry out a dawn raid at business premises in respect of a CMA civil investigation on the basis of a written authorisation. Unless the inspectors have also obtained a warrant from either the High Court or the Competition Appeal Tribunal, they may not use force to enter either business or

domestic premises. However, failure to permit the inspectors to enter business premises may be punished by fines, and it is generally not advisable to refuse to allow access.

If the inspectors have obtained a warrant, they may use such force as is reasonably necessary to enter the premises, and may also inspect non-business premises (including private homes). Failure to permit the inspectors to access the premises can be punished by fines, and intentionally obstructing an officer in the exercise of his powers under the warrant is a criminal offence.

Reviewing and copying documents and forensic IT searching

The CMA inspectors have the right to require any documents to be produced which they consider to be relevant to the subject matter of the investigation (as specified in the authorisation documents), and to make copies of them. This can include both hard copy and electronic documents (including e-mails), and extends to documents stored on desktops, laptops, mobile telephones or any other electronic data storage device.

If the inspectors have obtained a warrant, they have additional powers to actively search the premises and to take original documents if it is not reasonably practicable to take copies on the premises or if this is deemed necessary to preserve the documents or prevent interference with them.

In the case of a dawn raid at business premises (but not domestic premises), additional "seize and sift" powers permit potentially relevant material to be seized and removed from the premises for subsequent review (subject to certain conditions). These powers can be exercised even if this could mean that legally privileged material could be seized. This means that the inspectors may be able to, for example, copy the hard drive on a computer and take the whole copy, without having to check on the premises the relevance of every document copied, or ensure that privileged material is excluded, if to do so would not be reasonably practicable. However, before exercising these powers the inspectors must have a warrant and issue a formal notice.

The CMA is becoming increasingly sophisticated in its approach to searching and reviewing electronic data, and the inspectors are likely to be accompanied by forensic IT experts and/or bring hardware with them to enable all potentially relevant electronic data to be fed into a central hub running powerful "Nuix" search software, overseen and partly reviewed on-site by the inspectors. As noted in section 1, it is therefore important to have senior members of the IT team on standby to assist the inspectors with any IT-related issues, including providing access to password-protected documents and providing "administrator access rights" support. If possible, shadowers should try to take a note of any keyword search terms used by the inspectors when searching electronic data, and of any document sets or issues which they seem particularly interested in. However, it is important to be aware that, in practice, where forensic search software is used at least some keyword search terms are likely to be pre-programmed. This is likely to make it much more difficult for those shadowing the inspectors to keep a complete record of exactly which documents have been reviewed/copied and/or what search terms the inspectors have used.

Throughout the dawn raid, all shadowers should pass copies of any potentially incriminating "hot documents" which they become aware of to the central senior team without delay. This will be key for the risk assessment that should be made following the investigation.

Limits on the inspectors' powers to review and copy documents

The fact that documents may contain confidential information does not offer any protection from being reviewed and copied by the inspectors.

However, the inspectors will not be permitted to require the production of any documents which are not relevant to the subject matter of the investigation, or which are protected by legal privilege under English law. These restrictions operate as important constraints on the inspectors' powers to search and copy/seize documents. In this regard, it is important to note that English law on legal privilege may apply to correspondence with in-house lawyers and lawyers qualified outside the UK. For more detail on UK legal privilege rules, please see the separate [Ashurst Quickguide](#) on this topic.

All shadowers should be made aware of the applicable rules, and they should intervene (seeking support from the response team as necessary) if the inspectors try to review or copy documents which are irrelevant, privileged or otherwise protected.

So far as it is possible to do so, a record should also be kept of every document reviewed and copied by the inspectors during the course of the dawn raid. In practice, the inspectors are likely to provide a list of the documents they are taking away with them at the end of the dawn raid, but it is advisable to keep a separate ongoing record. Where the search is conducted using forensic IT software, a log of copied documents will be generated, which the inspectors will usually provide to the business at the end of the raid. If this is not voluntarily provided by the inspectors, it should be requested by the response team leader.

Powers to ask questions

The CMA inspectors have powers to ask individuals for explanations about any potentially relevant documents, and refusal to answer may result in significant sanctions being imposed on the company and/or the individual. However, any such questioning is subject to the privilege against self-incrimination and should arguably be limited to assisting the inspector in understanding the documents which are in front of him/her, rather than asking about new issues or seeking information above and beyond what is contained in the document being reviewed.

In addition, the CMA can require any individual who has a connection with the undertaking (including ex-employees) to answer questions in relation to its investigation following the issue of a written notice. These compulsory interview powers can be used in the context of a dawn raid, and an individual may be given very little time to prepare. If possible, it is advisable to seek to delay any such interview until after the dawn raid has come to an end. Anyone being asked questions should be supported by a lawyer at all times, and a record should be kept of all questions asked and all answers given. If an individual is asked questions during a dawn raid to which he/she is unable to provide an answer immediately, the company should offer to provide a written response at a later date.

Any statement made by an individual during a compulsory interview can only be used in evidence against that individual in very limited circumstances. However, any statements made may potentially be used against the company. The CMA's guidance suggests that the CMA may not always permit legal advisers representing the company to be present at the interview, but this is something which is likely to be contested in due course.

Use of seals

If a dawn raid lasts more than one day, the CMA inspectors may place seals across doors or cupboards to prevent any interference overnight with documents contained within those rooms/cupboards. It is very important to make everyone on the premises aware that they must not tamper with the seals under any circumstances.

The CMA takes any interference with seals very seriously. While there have not been any cases to date of sanctions being imposed by the CMA (or its predecessor, the Office of Fair Trading) for breach of seals imposed during a dawn raid, tampering with evidence protected by a seal may constitute a criminal offence.

The company should therefore take all appropriate steps to prevent a breach of a seal – including putting in place clear warning signs and potentially even placing security staff outside the relevant rooms overnight.

Dawn raid by the CMA in connection with a CMA criminal investigation

In connection with a criminal investigation under the Enterprise Act 2002, the CMA has the power to enter any premises (including non-business premises) under a warrant obtained from the High Court or Competition Appeal Tribunal. The CMA inspectors are permitted to use such force as is reasonably necessary for the purpose of entering the premises.

Reviewing and copying of documents and forensic IT searching

The CMA inspectors have the power to actively search the premises for relevant documents (both hard copy and electronic), and will usually take original documents rather than merely taking copies of, or extracts from, the documents (in accordance with the usual practice under search warrants issued in respect of suspected criminal offences). The CMA inspectors also have "seize and sift" powers in this context (as described above), provided the relevant notice is issued.

The considerations outlined above in relation to ensuring appropriate IT support and shadowing the inspectors at all times apply equally in the context of a dawn raid in connection with a CMA criminal investigation.

Limits on the inspectors' powers to review and copy documents

The same limits on the inspectors' powers to review and copy documents apply in this context as in the case of a dawn raid by CMA inspectors in respect of a CMA civil investigation, i.e. the inspectors may not review or copy irrelevant or privileged material. English law on legal privilege will apply.

Powers to ask questions

The CMA may require any person to provide an explanation of any document which appears to be relevant to the investigation, or to state where any such document may be found. They may also require individuals to answer questions in relation to its criminal investigation following the issue of a written notice.

Any information provided by an individual during any such compulsory interview can only be used against him/her in very limited circumstances (and will also not be used against the company which employs him/her). In practice, this means that if the CMA inspectors suspect an individual of committing the criminal cartel offence and anticipate that they may wish to rely on the individual's answers (or their silence) in any subsequent criminal prosecution, they will seek to carry out a voluntary interview under caution instead. Information provided during any voluntary interview may also be used in any parallel civil investigation against the company (see further below).

Use of seals

The powers of the CMA inspectors to impose seals are the same as in relation to a dawn raid in connection with a CMA civil investigation, and the same precautionary steps should be taken to minimise the risk of interference with any seals imposed.

Parallel criminal and civil investigations

In practice, at the time the CMA undertakes a dawn raid, it may not be in a position to know whether it is likely to seek to prosecute an individual for the criminal cartel offence. What will usually happen in such circumstances is that the CMA will use its civil dawn raid powers to enter and search the premises (see section 2) but will bear in mind the possibility that the criminal cartel offence may have been committed, and may subsequently launch a parallel criminal investigation against individuals alongside the civil investigation against the company. Any parallel criminal investigation may also involve the Serious Fraud Office.

To ensure that it is able to use any evidence obtained during the dawn raid in any subsequent criminal prosecution, the CMA will act in accordance with the procedural rules on collecting evidence for criminal prosecutions during the dawn raid.

Key points to remember

DO		DON'T	
✓	clarify at the outset which authority is leading the dawn raid and the underlying inspection	✗	leave the inspectors unsupervised at any time
✓	establish a team of "shadowers" to accompany the inspectors at all times during the raid	✗	volunteer any documents or information which have not been expressly requested by the inspectors
✓	ensure that an internal IT expert is available to assist the inspectors	✗	refuse to supply information or documents (unless advised to do so by a lawyer), or attempt to destroy, delete or hide any documents or data
✓	ensure that a clear record is kept of everything that happens (including documents reviewed/copied/seized, any questions asked and answers provided)	✗	attempt to enter any room or open any cupboard that has been sealed by the inspectors
✓	seek immediate legal advice if at any stage you are uncertain as to your rights and responsibilities		

4. The end of the dawn raid

Before the inspectors leave

A closing meeting should be held with the inspectors before the inspectors leave the company's premises. During this meeting, the company should consider seeking confirmation that:

- the dawn raid has come to an end (i.e. can the company go "back to business"? Can any blocked e-mail accounts be reactivated? Are there any cupboards/rooms which must remain sealed?);
- the company has co-operated with the inspectors throughout; and
- any seals imposed during the dawn raid have not been tampered with.

The company should also seek to agree with the inspectors:

- a list of any factual points brought up during interviews on which written clarification is to be given and reserving the right to supplement any answers already given;
- a list of any outstanding documents which the company has undertaken to produce; and
- any areas of disagreement, reserving the right to challenge the authority of the inspectors to take disputed documents (e.g. on the basis of irrelevance or privilege).

The inspectors are likely to request that a representative of the company signs an index/log of copied/seized documents which they have drawn up during the dawn raid, to confirm that the company agrees that the index/log is correct.

This index/log should be checked to verify that it tallies with the copies which the investigators have made (both paper and electronic) and/or the original documents which they plan to remove. It should also be compared to the company's own record.

After the inspectors leave

Once the inspectors have left the premises, a "debriefing" with the in-house/external lawyers should be held to try to establish whether there is any substance to the allegations being made against the company.

A review of all documents copied/seized by the inspectors should then be carried out as quickly as possible, to assess the level of risk faced by the company (if the dawn raid lasts several days, a review should be conducted at the end of each day). If there appears to be evidence of involvement in a competition law infringement, consideration should be given to applying for a "marker" under the relevant leniency regime(s) and then submitting a leniency application – this involves confessing to involvement in the infringement and co-operating with the investigation in return for a reduction in any fine ultimately imposed by the authorities. This may be a difficult decision, which will need careful consideration by the internal response team in conjunction with the in-house and/or external lawyers, in particular due to the risk of potential exposure to claims for damages from those affected by the infringement and damage to corporate reputation. Board level authorisation may be required to make a leniency application.

If any inaccurate information or impression has been given in either the documents provided or in the answers to questions, the lead inspector/case officer should be notified in order to correct the impression given by misleading or ambiguous answers or documents as quickly as possible.

Publicity

It will also be important to consider how to deal with any inquiries about the dawn raid and the company's involvement in any infringement of competition law, both internally and externally.

A press release confirming that dawn raids have been carried out may be issued by the CMA. If the fact of the dawn raid becomes public (whether as a result of a press release issued by the CMA or otherwise), the company will need to consider whether to put out a statement in response.

It will also be important to manage effectively the dissemination of appropriate (non-confidential) information to staff, whether by e-mail or briefings by Directors/Managers.

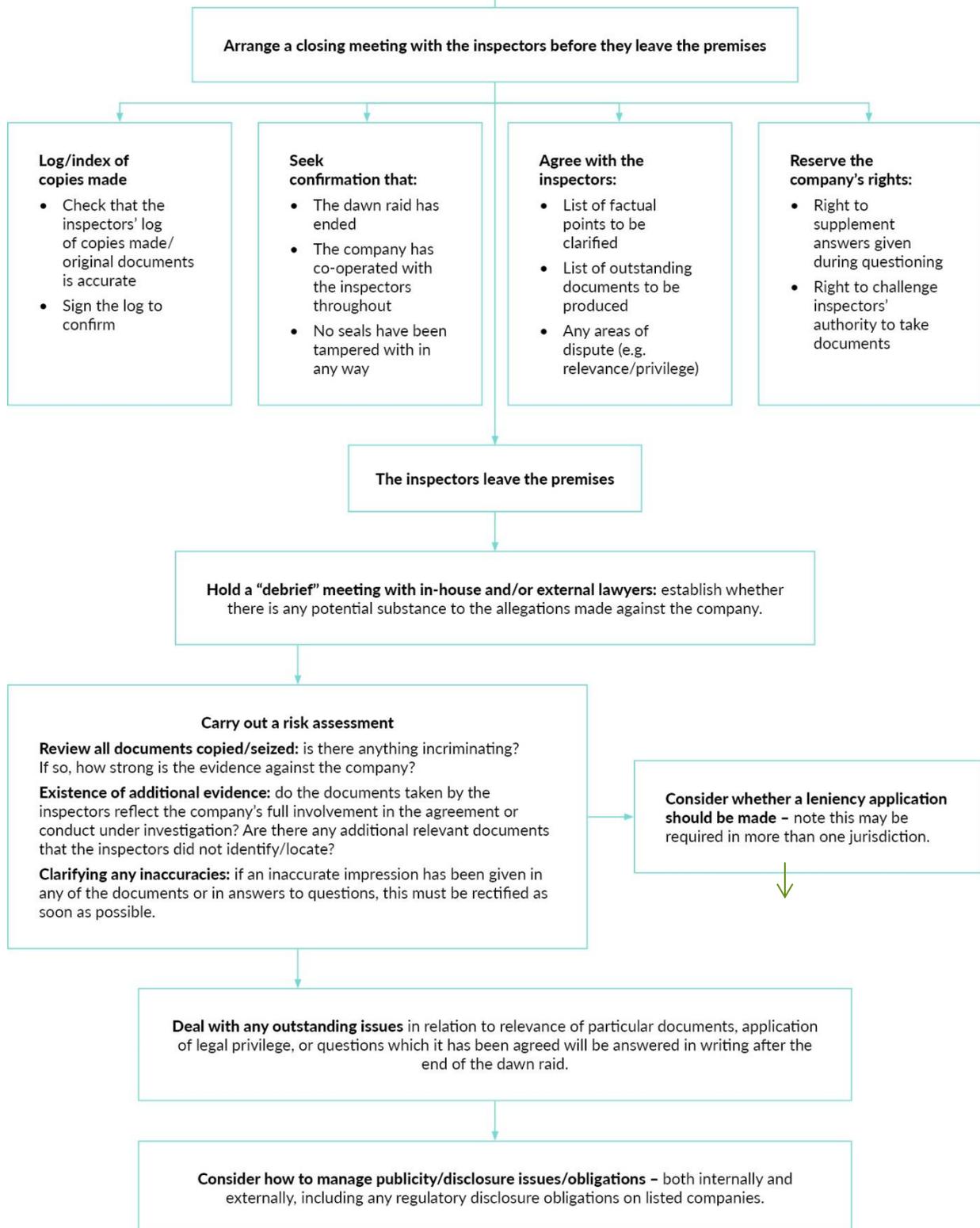
Key points to remember

DO		DON'T
✓ obtain confirmation that the company has co-operated throughout the dawn raid	X	allow the inspectors to leave without holding a closing meeting with them
✓ check the list of documents that have been copied by the inspectors	X	discuss the dawn raid with anyone outside the business
✓ agree a list of any information/documents the company has undertaken to provide		
✓ reserve the right to challenge the authority of the inspectors to take certain documents		
✓ carry out a risk assessment as quickly as possible		
✓ consider internal and external publicity issues		
✓ consider whether a leniency application needs to be made		

5. Summary of key actions to be taken by the internal response team



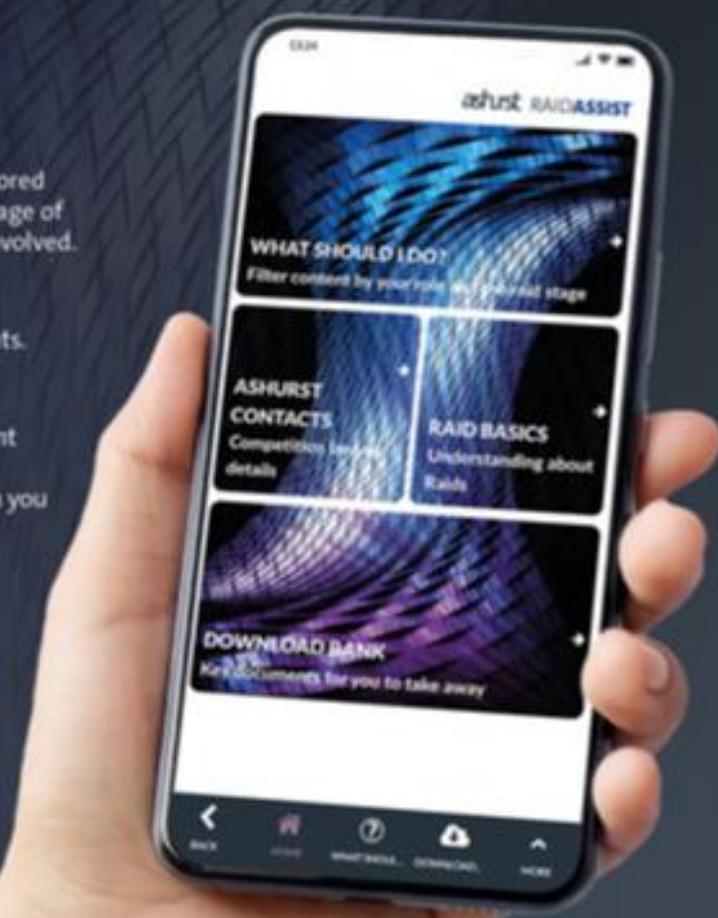
THE DAWN RAID ENDS



Raid Assist

The competition team, in conjunction with Ashurst Advance Digital, have launched a dawn raid app which provides businesses with support preparing for and undergoing a raid by the competition authorities.

The app is free to download from the App Store with no registration needed, and it provides a structured set of key response actions and materials to help all those involved in the raid respond appropriately during what can be a stressful and pressurised event.



RAIDASSIST

Providing businesses with support preparing for and undergoing a raid by the competition authorities.

The application consists of three distinct sections

- 1. WHAT SHOULD I DO?**
Providing straightforward and tailored guidance, broken down by each stage of the raid and the different teams involved.
- 2. MATERIALS**
Re-usable templates and documents.
- 3. ASHURST CONTACTS**
Contact information for the relevant Ashurst partners, counsels, senior associates and associates for when you require further assistance.

FREE to download from the App Store or Google Play with no registration needed.

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If you would like further information on this guide, please speak to your usual contact at Ashurst or one of our contacts listed below.



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