

# Dawn raids: dealing with inspections by European competition authorities

This Quickguide provides an overview of guidance on how to ensure an effective response to an unannounced inspection (known as a "dawn raid") by a competition authority in Europe.

**Brexit:** This Quickguide does not consider the potential impact of Brexit on UK competition law or the continued application of EU competition law in the UK, given the degree of uncertainty at the time of writing as to the outcome of EU/UK negotiations.

## 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).

A dawn raid places considerable pressure on multiple areas of a business at once, and can be very stressful. The inspectors have wide powers to search the company's premises (and, in some jurisdictions, the homes of individuals), take copies of documents and ask questions of employees. Dawn raids may take place in multiple locations (including in different countries) at the same time.

The inspectors use forensic software to search for relevant documents and require access across the company's IT architecture. They may also require external telephone lines, e-mail accounts and/or servers to be blocked during the raid.

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.

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.

The general guidance set out in this Quickguide provides an overview of the key stages of a dawn raid by a competition authority in Europe, and outlines the steps which should be taken to ensure that a company which is the subject of a dawn raid responds in an efficient manner whilst minimising legal risk.

The detailed rules governing the powers of the inspectors in different jurisdictions are beyond the scope of this guide. However, the general guidance and the "do's and don'ts" set out below are applicable in all European jurisdictions, and are intended to provide a useful starting point for the development of more detailed response strategy.

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 a flowchart format 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.

## Initial response to a dawn raid

Although unannounced inspections by competition authorities are generally referred to as "dawn raids", inspectors will arrive during normal business hours, usually between 8.30 a.m. and 9.30 a.m. If the investigation into the suspected competition law infringement is being led by the European Commission, the inspectors from the European Commission may also be accompanied by inspectors from the national competition authority of the country in which the dawn raid is taking place: for example, in a dawn raid taking place in the UK, you may find inspectors from both the European Commission and the Competition and Markets Authority on your doorstep, or in the case of a dawn raid taking place in Spain, the European Commission and the Comisión Nacional de los Mercados y de la Competencia.

### 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;
- 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 whilst these preliminary administrative

tasks are carried out. The inspectors should be willing to agree to this provided any resulting delays are short (less than 30-45 minutes), although it is important to be aware that they are not legally obliged to wait and 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 inspection team. 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;
- appoint a team of "shadows" (at least as many as the number of inspectors) to accompany the inspectors at all times once they proceed with the inspection. The shadows should be briefed as to the limits on the inspectors' powers, and, so far as possible, keep a record of which documents have been reviewed/copied (to the extent possible where forensic search software is being used) and any questions asked/answers given;
- ensure senior members of the internal IT team are available to assist with giving the inspectors access to the business's IT system, 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 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 non-co-operation or obstruction of 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 at this stage the inspectors will not take any further steps prior to the lawyers' arrival beyond those necessary to ensure no documents can be concealed/destroyed and no undertakings subject to parallel dawn raids can be 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 at 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
<ul style="list-style-type: none"> <li>• implement a response strategy before being confronted by a dawn raid</li> <li>• ensure that all employees, including the Reception team, have received appropriate training and know what they should do in the event of a dawn raid</li> <li>• check the authorisation documents produced by the inspectors and raise any concerns with in-house or external lawyers</li> <li>• 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)</li> <li>• try to delay answering any questions (other than straightforward administrative queries) until a lawyer is present</li> <li>• seek immediate legal advice if at any stage you are uncertain as to your rights and responsibilities</li> </ul>	<ul style="list-style-type: none"> <li>• be hostile to inspectors</li> <li>• obstruct the investigation by refusing to co-operate</li> <li>• 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</li> <li>• try to destroy, delete or hide any documents or files (whether paper or electronic)</li> <li>• tell anyone outside the business that the inspection is taking place or discuss any aspect of it</li> </ul>

## Managing the on-going dawn raid

The company has a duty to co-operate actively during the raid by allowing access to the premises and by providing any documents and information requested by the inspectors which is potentially relevant to the investigation.

The detailed rules governing the powers of the inspectors will vary depending on which competition authority is carrying out the raid and in which jurisdiction it is taking place, but the inspectors will generally have wide powers to:

- request documents and information and, in some jurisdictions, actively search the premises;
- copy relevant documents (whether hard copy or electronic) and, in some jurisdictions, seize original documents;
- require particular servers, e-mail accounts and/or external telephone lines to be blocked/shut down to minimise the risk of other companies being "tipped off" about the dawn raid;
- ask for explanations of facts or documents and, in some jurisdictions, carry out interviews with employees; and
- seal premises/rooms to prevent any tampering with documents where the dawn raid lasts more than one day.

However, the inspectors' powers are also subject to important limitations. It is important that each inspector is "shadowed" at all times and is not permitted to go beyond the scope of his powers. Shadowers should be briefed on the applicable rules, and encouraged to seek advice from in-house or external lawyers if in any doubt.

## Reviewing and copying documents and forensic IT searching

The 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. In some jurisdictions the inspectors may also have the power to actively search the premises, and/or to seize original documents and/or to take forensic copies of entire hard drives for subsequent review.

The competition authorities are becoming increasingly sophisticated in their approach to searching and reviewing electronic data, and the inspectors will probably be accompanied by forensic IT experts and/or bring hardware with them on which can run powerful review software. For example, since April 2013 the European Commission has adopted a process whereby all potentially relevant electronic data is fed into a central hub running "Nuix" search software, overseen and partly reviewed on-site by the inspectors. The same software is now also used by the UK Competition and Markets Authority, and a similar approach is being adopted by many other national competition authorities.

As noted in section 1, it is therefore essential 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 flag 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. They must still be disclosed, although the business can usually request that they are treated as confidential and not subsequently disclosed to third parties.

However, as a general rule 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. These restrictions operate as important constraints on the inspectors' powers to search and copy documents. It is important to ascertain exactly which procedural rules apply to a particular dawn raid in order to ensure that the applicable limitations on the inspectors' powers are properly respected.

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 also. 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.

## Answering questions

The powers of the inspectors to ask questions of employees will vary depending on the procedural rules which apply to the dawn raid in question. However, as a general rule, the inspectors are likely to have powers to ask employees to provide explanations of documents, and these powers may also extend to asking for explanations of facts, or even to carrying out mandatory interviews. Refusal to answer permitted questions may result in significant sanctions being imposed on the company and/or the individual.

On the other hand, the privilege against self-incrimination means that a person cannot be required to answer a question if the answer would incriminate him (or his employer). It is legitimate to refuse to answer such a question. However, this principle does not extend to pre-existing documents, which must be disclosed even if they are incriminating.

It is sensible to seek the inspectors' agreement to postpone any questioning of employees 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.

Competition law dawn raids usually concern allegations against the business. If an individual being questioned is himself suspected of having committed a criminal offence (such as the criminal cartel offence in the UK), additional procedural requirements are likely to apply, such as administering a caution, and respecting the privilege against self-incrimination. Consideration may also need to be given to whether the individual requires separate legal representation, if his/her interests and the interests of the company may not be aligned.

## Use of seals

If a dawn raid lasts more than one day, the 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.

If a seal is breached, this can lead to very large fines being imposed on the company. For example, in the context of a dawn raid by the European Commission, E.ON was fined €38 million for breaching a seal, despite there being no evidence that any documents had actually been tampered with as a result. In a separate incident, Lyonnaise des Eaux was fined €8 million even though the sealed room had not been entered and notwithstanding that the company had co-operated extensively with the European Commission and had investigated the breach itself, including reporting the incident to the police.

It is therefore important to 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.

## Key points to remember

DO	DON'T
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<ul style="list-style-type: none"> <li>• clarify at the outset which authority is leading the dawn raid and the underlying inspection</li> <li>• establish a team of "shadows" to accompany the inspectors at all times during the raid</li> <li>• ensure that an internal IT expert is available to assist the inspectors</li> <li>• ensure that a clear record is kept of everything that happens (including documents reviewed/copied/seized, any questions asked and answers provided)</li> <li>• seek immediate legal advice if at any stage you are uncertain as to your rights and responsibilities</li> </ul>	<ul style="list-style-type: none"> <li>• leave the inspectors unsupervised at any time</li> <li>• attempt to destroy, delete or hide any documents or data</li> <li>• refuse to supply information or documents (unless advised to do so by a lawyer)</li> <li>• volunteer any documents or information which have not been expressly requested by the inspectors</li> <li>• attempt to enter any room or open any cupboard that has been sealed by the inspectors</li> </ul>
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## The end of the dawn raid

### Before the inspectors leave

Before the inspectors leave the company's premises, a closing meeting should be held with the inspectors during which the company should seek 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?); and
- 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 of documents being taken by the inspectors 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.

## After the inspectors leave – debriefing and leniency

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 whether the business should be 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.

In some jurisdictions, the competition authority may issue a press release confirming that dawn raids have been carried out. If the fact of the dawn raid becomes public (whether as a result of a press release issued by the competition authority or otherwise), the company will need to consider whether to put out a statement in response. Publicly quoted companies should also consider their regulatory disclosure obligations.

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.

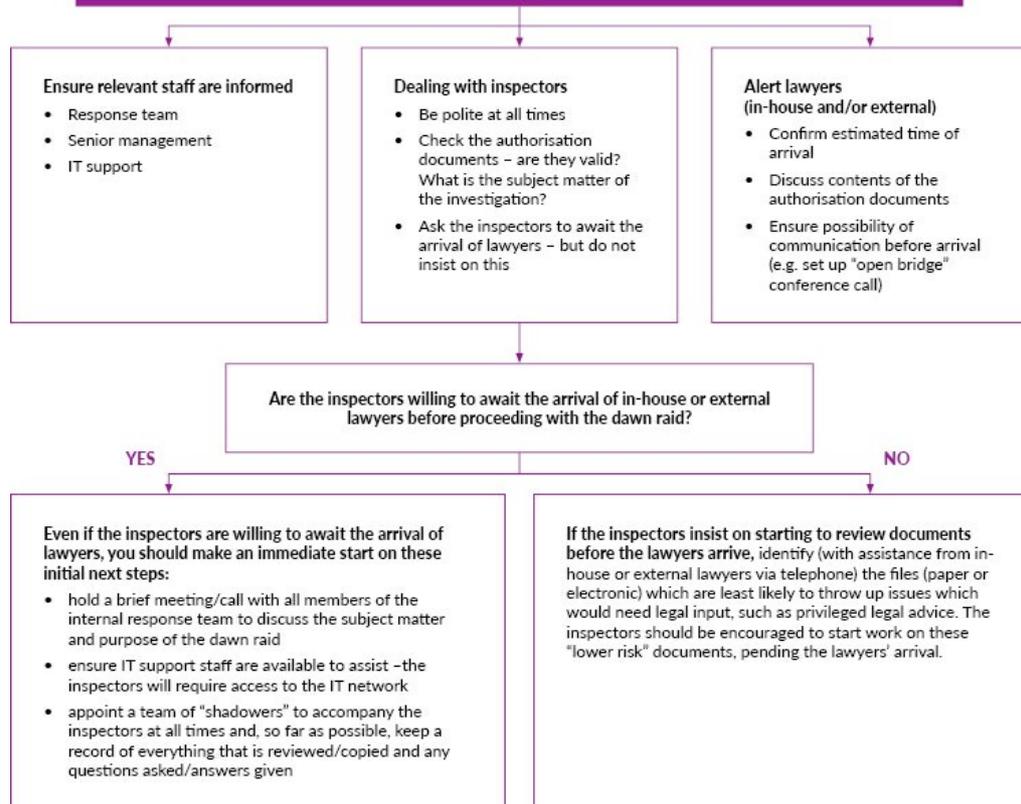
## Key points to remember

DO	DON'T
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<ul style="list-style-type: none"><li>• Seek confirmation that the company has co-operated throughout the dawn raid</li><li>• Check the list of documents that have been copied by the inspectors</li><li>• Agree a list of any further information/documents the company has undertaken to provide</li><li>• Reserve the right to challenge the authority of the inspectors to take certain documents</li><li>• Carry out a risk assessment as quickly as possible</li><li>• Consider internal and external publicity issues</li><li>• Consider whether a leniency application needs to be made</li></ul>	<ul style="list-style-type: none"><li>• Allow the inspectors to leave without holding a closing meeting with them</li><li>• Discuss the dawn raid with anyone outside the business</li></ul>
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Summary of key actions to be taken by the internal response team

## RECEPTION CALLS YOU – A DAWN RAID IS TAKING PLACE



Seek advice from in-house and/or external lawyers via telephone if in any doubt as to how to proceed.

## DURING THE DAWN RAID

### Limits on the dawn raid

**Relevance:** ensure the inspectors are not given access to documents which are not within the subject matter and purpose of the dawn raid, as set out in the authorisation documents.

**Privilege:** if possible, try to ensure legally privileged documents are identified and removed before the inspectors review the file in question (whether paper or electronic). Agree a process with the inspectors for dealing with privileged documents, and any disputes.

**Self-incrimination:** check whether the privilege against self-incrimination applies under the relevant procedural rules. If it does, object to any questions where the answer could be self-incriminating, i.e. amounting to an admission of infringement.

**Confidentiality:** the fact that a document contains business secrets does not protect it from disclosure to the inspectors.

### Managing the dawn raid

**Co-operation:** the company has a duty to co-operate actively with the inspectors.

**Shadowing:** each inspector should be accompanied by a "shadower" at all times. Shadowers should intervene if the inspectors seek to review documents which are irrelevant or privileged, and should keep a record of everything that happens, including which documents are copied (so far as it is possible to do so) and any questions asked/answers given.

**Questioning of individuals:** seek to postpone any detailed questioning until lawyers can be present, and ideally until after the dawn raid has ended. If an individual is suspected of a criminal offence, consider the need for separate legal representation.

**Seals:** seals applied by the inspectors must not be tampered with in any circumstances and the company must take all appropriate steps to prevent this.

Ensure all decisions and agreed approaches are communicated to all members of the response team as quickly as possible throughout the dawn raid

### Managing IT issues and electronic documents

**IT support:** ensure that a senior member of the IT team is available to provide support to the inspectors as requested (including temporarily disconnecting computers from the network, blocking e-mail accounts, providing access to documents, servers, e-mail accounts, etc.).

**Electronic copies:** the inspectors may wish to take electronic copies of electronic documents. If they wish to take a forensic image of an entire hard drive or similar device, consult in-house/external lawyers to confirm whether this is permissible under the applicable rules and whether to formally record an objection.

**Keyword search terms:** take a note of any forensic IT search tools used by the inspectors, including any keyword search terms (if possible).

### Managing paper documents

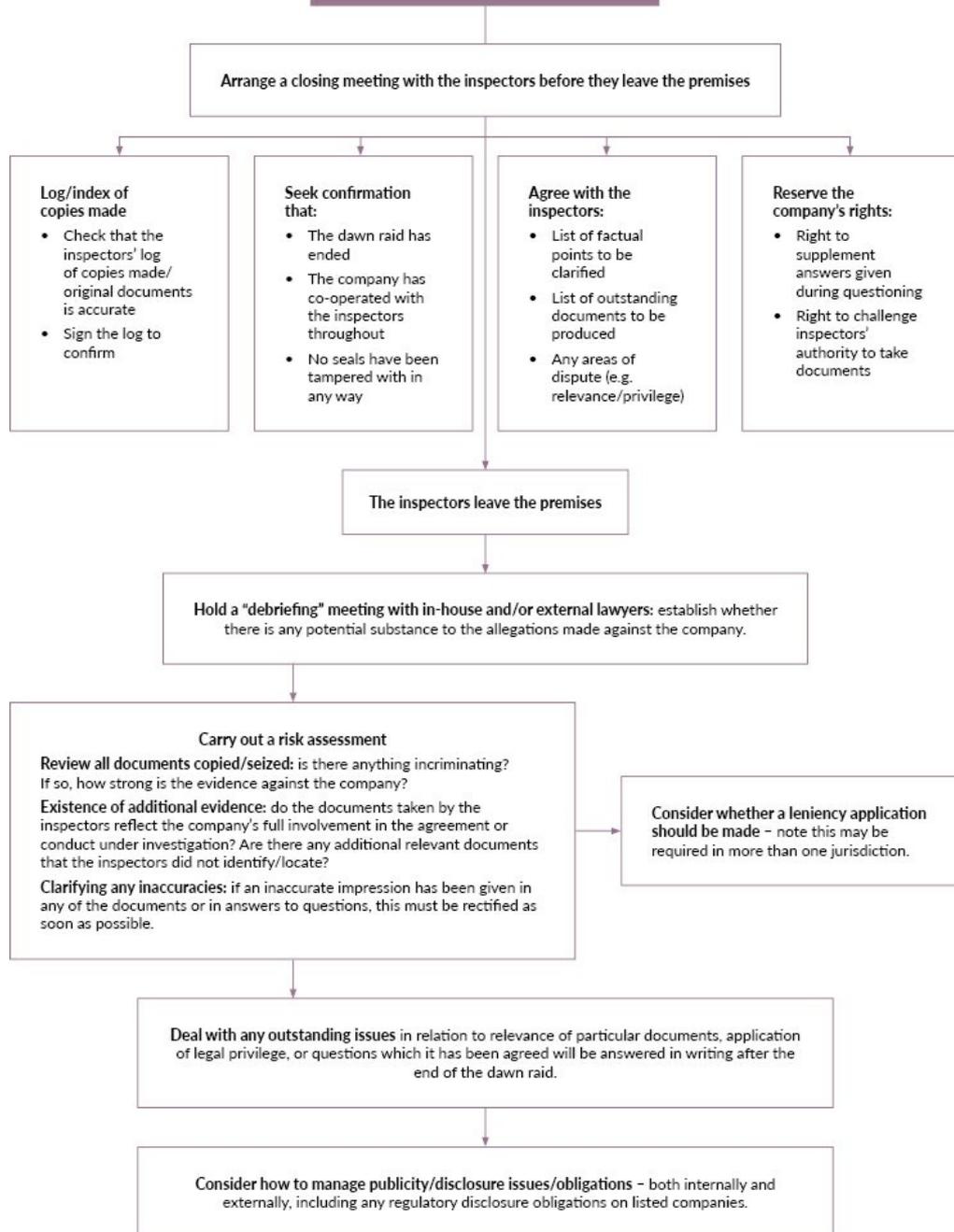
**Photocopying paper documents:** Staff should be appointed to photocopy documents for the inspectors/supervise the inspectors if they insist on doing the copying themselves. Two sets should be made of all copies (second set for the company's records).

**Seizure of originals:** in some jurisdictions, the inspectors may have powers to seize original documents. Consult in-house/external lawyers if you are unsure of the position.

**Disputed documents:** if there is a dispute as to whether the inspectors can review a particular document (e.g. on grounds of privilege or relevance), the document should be placed in a sealed envelope and not read by the inspectors pending resolution of the dispute.

Throughout the dawn raid, ensure all shadowers flag any potentially incriminating "hot documents" to the central senior team without delay - this will be key to the ongoing risk assessment and the question of whether to make a leniency application.

## THE DAWN RAID ENDS



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 below, or your usual Ashurst contact.

## Key Contacts

We bring together lawyers of the highest calibre with the technical knowledge, industry experience and regional know-how to provide the incisive advice our clients need.



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