

Factsheet Dawn Raid

Companies can unexpectedly be confronted by a Dutch or foreign government agency knocking on their door, requesting access to collect information. This unannounced inspection of business premises is also called a dawn raid. It can take one to several days and usually marks the beginning of a long and intensive investigation by the government agency. The investigation can result in the imposition of a penalty or an order subject to a penalty, licence withdrawal, or even a prison sentence. These types of sanctions will also be published in most cases – this is often even mandatory. As even just the raid itself will often lead to publicity, it is crucial to be well-prepared.

Which agencies are allowed to launch a dawn raid?

A few examples of government agencies that can launch a company dawn raid include the Netherlands Authority for Consumers and Markets (ACM), the Dutch Authority for the Financial Markets (AFM), the Dutch Central Bank (DNB), the European Commission, the Dutch Data Protection Authority, environmental services, the Netherlands Food and Consumer Product Safety Authority (NVWA), the Dutch Healthcare Authority, the Netherlands Labour Authority, the police, the Public Prosecution Service and the Fiscal Intelligence and Investigation Service (FIOD).

What government agencies can and cannot do during a dawn raid

Government agencies have far-reaching powers during a dawn raid. They can:

- enter sites (homes only with permission from the examining judge), whether or not with police assistance;
- examine and copy information, accessing, for example, an office's paper records, computers, email inboxes, cloud environments, etc.;
- interview all persons on site (employees, directors, clients, self-employed workers, third parties, etc.);
- examine vehicles and their contents;
- examine items, take samples, open packaging and confiscate equipment; and
- seal company areas and items.

If a dawn raid is launched under administrative law, the company and all persons on site will be required to cooperate in every respect within a reasonable period. In a dawn raid, a 'reasonable period' usually means 'almost immediately', for example by opening rooms or cabinets or providing access to email inboxes, cloud environments, hard drives, etc. If the government agency believes that cooperation is not provided sufficiently or fast enough, sanctions may follow. This is different in criminal law searches: cooperation is not necessary, but the search must be allowed.

Information must not quickly be disposed of by being thrown away, shredded, deleted, etc.

Government agencies' authority has several limits:

- **Scope of the investigation:** the scope of the investigation generally defines the limits of the government agency's powers. Upon entry, the government agency will often hand the company a letter stating the purpose and scope of the investigation. This may mean that the government agency will not be allowed to examine certain information if the information is in no way related to the investigation's scope.
- **Cooperation in providing access vs let the agency conduct a search:** criminal investigation agencies such as the Public Prosecution Service, the FIOD and the police are permitted to actually carry out their own search during a raid. Other government agencies (the supervisory authorities governed by administrative law) do not have this power. They will

always need to request access to a specific room, cabinet or digital environment, with which request the company may or may not cooperate. Many government agencies can launch a dawn raid in both an administrative law and a criminal law context. In every raid, it is therefore essential to determine the capacity in which the agency is operating and the company's role in the investigation (suspect/offender or third party).

- **Right to remain silent (in certain circumstances):** directors of the company under investigation have the right to remain silent if there is a criminal charge. A criminal charge exists from the moment that the government agency performs an act reasonably giving this person reason to conclude that criminal proceedings will be brought against them or a punitive administrative sanction (for example, an administrative penalty) will be imposed. The government agency will then also have to inform the person being questioned about this right to remain silent (the caution). If there does not yet seem to be a punitive sanction, but 'only' a remedial sanction such as an order subject to a penalty, the right to remain silent does not yet apply and everyone will be required to cooperate. Persons being questioned can ask the government agency to clarify this before answering its questions.
- **Information from professionals bound by a duty of confidentiality (lawyers or civil-law notaries):** government agencies are not allowed to examine a lawyer's or civil-law notary's client confidential information. Also referred to as privileged information, this includes, for example, emails that the lawyer has sent to the company (or vice versa) or a lawyer's memos. In practice, if a physical document is concerned, the government agency will only 'scan' the information to see if it actually does contain privileged information. In the case of digital information (emails, for example), the government agency will copy it. The company must then be given an opportunity to indicate which information is privileged and should be deleted from the copied/seized information. The company can increase the chances of privileged information being treated confidentially by internally separating it from other information, for example in secured and shielded folders.

Being in control during a dawn raid

A dawn raid is usually the first step towards the imposition of administrative measures, such as a penalty or an order subject to a penalty, or the launch of a criminal investigation. It is therefore very important to try to stay in control as much as possible during a dawn raid. Much can go wrong (or go well). For example, is cooperation being provided where required? Is no information being destroyed? Is monitoring taking place of what the government agency is seizing or copying, which persons it is questioning, and what the persons being questioned are saying? Is the government agency observing the rules? Is the government agency also seizing lawyer memos that should remain confidential? Adequate handling of all these factors requires thorough preparation and professional guidance during a raid.

Houthoff has extensive experience with unannounced inspections by various government agencies and can travel immediately to the business premises in question.



Vincent Affourtit
Attorney-at-law | Managing Partner
T +31 20 605 69 36
M +31 6 2240 0840
v.affourtit@houthoff.com



Frank Mattheijer
Attorney-at-law | Counsel
T +31 20 605 69 12
M +31 6 4239 2742
f.mattheijer@houthoff.com



Marianne Bloos
Attorney-at-law | Of Counsel
T +31 20 605 62 05
M +31 6 5324 0328
m.bloos@houthoff.com



Tom Hendriks
Attorney-at-law | Senior Associate
T +31 20 605 69 16
t.hendriks@houthoff.com