



INTERNATIONAL CRIMINAL LAW AND ENFORCEMENT

Expert Analysis

Start the Day Right: Preparing For an Overseas Dawn Raid

The sight of dozens of law enforcement agents raiding the offices of a prominent corporation would raise eyebrows in the United States. The Fourth Amendment, case law and perhaps even old-fashioned civility ensure that such searches are rare. Not so in virtually every other business region in the world. Within the European Union (EU), Asia, Latin America, and even Africa, so-called “dawn raids” of corporate offices have become a staple of international enforcement.

Restrictions on overseas dawn raids historically have ranged from lax to nonexistent. Although most foreign jurisdictions have begun to impose limits and oversight on these raids, the raids remain aggressive by U.S. standards. They are also increasing in frequency and not confined to any particular types of industries. Even the largest, most



By
Nicholas M. De Feis

By
Philip C. Patterson

respected corporations such as Amazon, Google and McDonald’s have all recently had overseas offices raided. There is a diminishing stigma

Because these raids are commonplace and potentially devastating, counsel should draft raid response plans and implement appropriate training to ensure that employees know what (and what not) to do during a raid.

to being the subject of a dawn raid and no reason not to prepare for it.

Counsel for U.S. corporations doing business overseas should be particularly concerned about these raids. Employees caught unprepared

may act in ways detrimental to both the corporation’s and their own interests. Moreover, U.S. and foreign prosecutors are increasingly sharing investigative materials. U.S. law provides only limited protections against the use of evidence seized by foreign agents, even when seized in ways that would violate U.S. law. Country-specific response plans and training can prevent unnecessary harm and be the first steps in defending potential charges.

Increasing and Aggressive

The authority of foreign agencies to conduct dawn raids varies depending on the jurisdiction, but raids are occurring in every business region in the world. In the EU, the European Commission has frequently resorted to these raids to collect evidence. A dawn raid by the commission typically will include not just EU officials, but also local investigators from the country where the raid occurs. Recent dawn raids by the commission have been notably dramatic,

NICHOLAS M. DE FEIS, is a partner at De Feis O’Connell & Rose and a former federal prosecutor. PHILIP C. PATTERSON is counsel to the firm.

with a joint commission and Austrian raid on a railway operator in 2015 including as many as 60 law enforcement personnel.

In Asia, China has commenced a widely publicized effort to prosecute corruption. This has included raids of corporate offices, including a particularly aggressive raid in 2014 when approximately 100 government agents simultaneously raided Microsoft offices in four separate cities. Dawn raids have also occurred recently in Hong Kong, Japan, Singapore, South Korea and other Asian

day. Raiding offices during off hours makes little sense because no employees are present for questioning, and the agents would have no idea where to find relevant paper or electronic documents. As a result, raids usually occur when employees are present.

Dawn raids often are the first indication that a corporation is under investigation. Unprepared employees, who are understandably alarmed by raids, may inadvertently harm the corporation and themselves. They may breach legal privileges,

by the protections of U.S. laws. The search and seizure requirements of the Fourth Amendment will not apply unless U.S. authorities were heavily involved in the raid or the conduct of foreign agents “shocked the judicial conscience.” Miranda warnings also will not apply to voluntary responses to question by overseas officials.²

Effective Raid Response Plans

Because these raids are commonplace and potentially devastating, counsel should draft raid response plans and implement appropriate training to ensure that employees know what (and what not) to do during a raid. Raid response plans should be drafted in consultation with local counsel. In many foreign countries, the legal landscape on dawn raids is new, ambiguous and evolving. In addition, some countries such as China do not have U.S.-style legal privileges. Counsel formulating response plans thus should specifically tailor them to conform to local laws.

Certain procedures, however, are generally applicable across all jurisdictions. Most importantly, cooperation with a raid is required to varying degrees in every jurisdiction. Obstructing a raid (which can even include delaying cooperation until counsel or executives are present) can result in severe penalties.

A common feature of all raids is that they start at the office door.

As soon as possible after a raid, employees should write down the questions they were asked and their responses. The response team should also request from investigators an inventory of everything seized and compare it to lists made by employees.

countries. In Africa, antitrust regulators have raided offices in Kenya, Zambia and South Africa. Raids have also occurred in Latin America, particularly Brazil.

Dawn raids also are not limited to certain industries. They occur most frequently in investigations into anti-competitive conduct. But raids have been employed in a diverse array of industries, ranging from software and railways to advertising, furniture removal and even prosthetics.

Employees Caught Off Guard

Although called “dawn raids,” raids on corporate offices typically occur at the start of the business

reveal information they are not required to reveal and even lie to investigators or obstruct the raid.

Evidence Seized

Evidence gathered in overseas raids is frequently shared with U.S. prosecutors, and U.S. law provides only limited protections against its use in domestic prosecutions. In fact, the ease with which foreign evidence can be shared with and used by U.S. prosecutors has led to the process being called the Silver Platter Doctrine.¹ Serving up foreign evidence to U.S. prosecutors on a silver platter is particularly troubling because overseas regulators are not bound

As a result, the first employees to encounter the agents are typically the administrative staff, who would be particularly distressed by the encounter. Such personnel should be included in all training on dealing with raids.

Regardless of who first encounters the investigators, employees should be instructed that the first step during a raid is to notify a designated raid response team. Employees should also politely ask the agents to wait for the team to arrive. Typically, the investigators are not required to wait, but in some instances agents in different countries have actually agreed to wait a brief period of time for executives or counsel to arrive. If the agents agree to wait, employees should also request that they wait somewhere inconspicuous, such as a conference room, to avoid unnecessary business disruption and alarm.

The response team should be made up of executives, legal counsel and IT personnel, and their contact information should be readily available. The presence of counsel is critical to ensure that the agents comply with local laws regarding the scope of the raid and any legal protections or privileges. Counsel can also attempt to document any abuses for subsequent challenges. The presence of IT personnel is also critical given that most documents today are stored electronically, and only IT personnel are

able to identify relevant materials and facilitate production as required by local law.

A raid response plan might also include an email that the response team should immediately distribute to affected employees during the raid. It should reassure employees, but also caution them that obstructing raids or destroying records is prohibited. It could also advise them of their obligations and protections under local laws and may even provide contact information for counsel. Although obligations vary by jurisdictions, employees are typically required to respond to basic questions but not required to volunteer information.

During the raid, employees should stay out of the agents' way. But efforts should be made to note what each investigator inspects and seizes. The response team should attempt to negotiate keeping originals of materials and producing copies, or at least being permitted to make and retain copies of all materials seized during the raid.

As soon as possible after a raid, employees should write down the questions they were asked and their responses. The response team should also request from investigators an inventory of everything seized and compare it to lists made by employees. A report of the raid should then be drafted for distribution to appropriate executives,

committees or boards. Members of the response team should also be prepared to address press inquiries, which may even occur during the raid.

Finally, a dawn raid plan is useless unless followed. Employees should be regularly trained on its implementation. Indeed, many international law firms have recommended that corporate counsel perform mock raid drills, perhaps a frightening prospect to counsel used to U.S. norms. But drills not only help ensure compliance, they can also serve as a means of testing whether a dawn raid would reveal any failures of record-keeping or regulatory shortcomings.

The only good news for counsel in the United States waking up to news of a dawn raid may be that she is in good company—and that she has at least done her best to prepare!



1. Nicholas M. De Feis and Philip C. Patterson, "Foreign Evidence Served on Silver Platter for U.S. Prosecutions," *NYLJ*, Oct. 24, 2013, available at <http://dorlaw.com/wp-content/uploads/2016/10/070081305DeFeis.pdf>.

2. *United States v. Yousef*, 327 F.3d 56, 146 (2d Cir. 2003); *Miranda v. Arizona*, 384 U.S. 436 (1966).