

Corporate Crisis Management Newsletter
Asia Newsletter**Practical Tips for Dawn Raid in Thailand****Jun Katsube, Vira Kammee, Vullope Techakasin, Pasayu Israsena Nah Ayudhaya, Jak Chokesikarin****1. Introduction**

A number of government agencies in Thailand have the power to enter premises to search for and seize material as an initial step of investigations. An unannounced inspection of a company by a regulatory or law enforcement agency (known as a “dawn raid”) may be initiated by a complaint or information learned from a whistleblower. Although such raids are not typically conducted at dawn, they often (but not always) occur at the start of the business day. The goal is to catch the target company by surprise so it has no time to conceal or dispose of key evidence deemed relevant to investigations. If a company responds to a dawn raid in the wrong manner, it can lead to a deterioration of its relationship with the government agency, and furthermore, expose the company to criminal penalties for “obstruction of an investigation”. It is therefore vital for all companies to understand the full extent of the relevant agency’s powers and to take appropriate steps under such critical circumstances to safeguard their legitimate interests.

2. Investigatory power of the authority

In addition to the Police, dawn raids may be carried out by officers from a number of agencies, such as the Department of Special Investigation (DSI), the National Anti-Corruption Commission (NACC), the Anti-Money Laundering Board (AMLB), the National Cyber Security Committee (NCSC), the Trade Competition Commission (TCC), the Securities and Exchange Commission (SEC), the Bank of Thailand (BOT), the Ministry of Finance, the Ministry of Commerce and the Ministry of Public Health, if they suspect that a company has violated a provision of any legislation under their charge. Dawn raids can be categorised in two ways: “criminal” or “regulatory”.

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A criminal dawn raid is primarily governed by the Criminal Procedure Code (CPC). The CPC prohibits an inspection of a premises without a search warrant or court order, unless it is carried out by an administrative or police officer with some credible evidence that, among other things, contraband or evidence of a crime is hidden or stored on the premises, and where he/she has reasonable grounds to believe that a delay in obtaining a search warrant would result in such contraband or evidence being removed or destroyed (CPC §92(4)). This power to carry out a criminal dawn raid without a warrant under §92(4) triggers the officer's obligation to provide the occupier of the premises with a list of material seized and a record of the inspection, including the reason for carrying out the raid. The officer leading the raid (whose name is printed in the search warrant) must be an administrative officer with a common level of 3 (or higher) or a police officer with a rank of second lieutenant (or higher) (CPC §97).

If a competent court grants a valid search warrant or an administrative or police officer has the necessary power to inspect the premises without a warrant, the power to carry out a criminal dawn raid is sweeping. The officers are entitled to inspect the subject premises or to use force to gain entry to the premises, if the occupier of the premises denies entry or refuses to cooperate with the officers (CPC §94), and seize material deemed evidential (CPC §98). Nonetheless, this power must be utilized (i.e. the raid carried out) during the daytime, unless a raid that begins in the daytime is not completed by the time the sun sets or a provision of some other legislation permits the officer to enter and search the premises at night (CPC §96), such as §24 of the Department of Special Investigation Act B.E. 2547 (2004) or §63 of the Trade Competition Act B.E. 2560 (2017). If feasible, an inspection of the premises may be conducted in the presence of the occupier or at least two persons to whom the officer called upon to witness the inspection, if the occupier is not available (CPC §102).

In addition, some agencies in Thailand have the statutory power to carry out a regulatory dawn raid to investigate suspected violation of, including but not limited to, intellectual property law,¹ business law,² banking and securities law,³ competition law,⁴ public health law,⁵ and tax law.⁶ In order to prosecute a violation of such legislation, an agency may conduct inspections of any premises and means of transport of a company under the authorisation of an agency chief or a formal decision of the full commission of the agency. In general, the legislation grants the agencies powers to enter and search premises, request document production, examine records, seize materials, freeze assets and interview employees of the company. The legislation also imposes, on the company, a duty to co-operate and, on the officers, a duty to carry out the raid during the daytime or during business operating hours of the company. Carrying out a regulatory dawn raid would, however, not allow an agency to use force to enter the premises.

3. Practical tips for dawn raid in Thailand

When officers arrive at a premises unannounced and demand immediate entry, the associated company's "frontline staff" (i.e. the receptionists or security personnel) likely will be the first to encounter them. It is crucial that such frontline staff know who to contact, how to react, and in what manner to proceed. The first impression made on the officers can have significant effect on the direction of the investigation. Once notified by reception, the contact persons (i.e. the senior executives, the in-house lawyers or the external legal counsel, etc.) must arrive on site promptly. The frontline staff should request that the officers wait until at least one of

¹ Copyright Act B.E. 2537 (1994); Trademark Act B.E. 2534 (1991)

² Public Company Limited Act B.E. 2535 (1992); Foreigners' Business Engagement Act B.E. 2542 (1999)

³ Securities and Exchanges Act B.E. 2535 (1992); Financial Institutions' Business Act B.E. 2551 (2008)

⁴ Trade Competition Act B.E. 2560 (2017)

⁵ Food Act B.E. 2522 (1797); Drug Act B.E. 2510 (1967)

⁶ Tax Code; Customs Act B.E. 2560 (2017); Excise Act B.E. 2560 (2017)

the contact persons is available to facilitate the inspection. The officers, however, are not obliged to wait for the arrival of the company's contact persons, especially if the officers are seeking to carry out a criminal dawn raid. They can however agree to wait for a short or "reasonable" period of time. The frontline staff should issue a visitor's card for each of the officers and escort them to a private meeting room that does not contain any documents or electronic devices.

While the officers are waiting, the company's responders should request, and make a copy of, the officers' mandate (i.e. the authorisation, the warrant, or the decision to open the investigation) and their professional IDs. A copy of each of these documents should be made and be ready to be e-mailed or handed to the senior executives, the in-house lawyers or the external legal counsel (whoever arrives first), who then should check the mandate and the IDs. It is advisable to do a quick internet search or make a call to the agency or the court to confirm the validity of the mandate, the authorisation of the inspection, the officers' names and positions, and the scope or subject matter of the investigation.

If the officers reject any of these requests and demand to start searching the premises immediately, it is important that all employees stay calm and cooperate with the officers, and that rejections to any of the requests are clearly noted and recorded.

At this initial stage, the company will already be under a statutory duty to cooperate. Therefore, any action taken by the company's staff which is deemed a breach of this duty, or worse an obstruction of the investigation, would result in a fine and/or imprisonment. It is an offence under the Criminal Code, if a person:

- provides incorrect or misleading information, causing damage to another person or the public (a prison sentence of 6 months or less and/or a fine of THB 10,000 or less);
- obstructs an officer of discharging his/her lawful obligation, with or without a warrant (a prison sentence of 1 year or less and/or a fine of THB 20,000 or less);
- destroys, disposes of, conceals or falsifies documents or assets seized or deemed relevant to an investigation (a prison sentence of 2 years or less and/or a fine of THB 40,000 or less);
- breaks, removes, damages or tampers with a seal put in place by an officer (a prison sentence of 2 years or less and/or a fine of THB 40,000 or less); or
- fails to comply with a lawful order given by an officer without probable cause or valid excuse (a prison sentence of 10 days or less and/or a fine of THB 5,000 or less);

(§§137, 138, 141, 142 and 368 of the Criminal Code)

It should be noted that the type and length of sentence for obstructing a criminal dawn raid, as described above, is only a starting point. The judge or adjudicator can pass a harsher or more lenient sentence – depending on the facts of each individual case, referring to applicable laws or sentencing guidelines.

Given the seriousness of the consequences of any failure to comply with a dawn raid appropriately, it is important that clear instructions from a single, authorised source are given to all staff members that until further notice no shredding of documents, deleting of electronic information, or shipment of materials is to take place.

Before the inspection starts, the company contact persons should attempt to agree on an approach with the leading officer by which the inspection will be conducted. It is highly recommended that each officer is shadowed at all times by a qualified representative of the company, and the shadows should always consult with legal counsel if in doubt.

During the course of the dawn raid, each shadow should take note of all materials copied, sealed or seized, all areas searched, and all questions asked to, and responses given by, any employee. Recording devices should not be used in the presence of the officers, except where expressly authorised by the officer to do so. When operating under time constraints, the officers may seize a large quantity of documents. In the case of seizure of original documents, a request should be made to the officer to take a photocopy of such documents in lieu of the originals. Disputes regarding whether a company's document relates to matters outside the scope of the investigation are also possible. Although the officer should not seize documents which are not relevant to the investigation, the authorities do have wide discretion to assess relevance. Because a shadow or legal counsel have the duty of identifying and locating the documents for which the officer is searching, he/she should make clarifications as to why the documents being reviewed are irrelevant, confidential or otherwise protected. Although the officer's list of documents might be given to the company at the end of the dawn raid, a separate ongoing record should be made by the company.

The officers may ask any question to any staff member and request an oral reply. Staff members should be reminded of the need to cooperate and to pass all questions that are outside their area of competence to a qualified staff member or legal counsel. All staff should keep their answers short and factual, but offer no extra information that is not explicitly requested. If a question is ambiguous or difficult to answer, legal counsel should be consulted before any answers are given, or an offer to revert to the officer in writing within a reasonable time should be made.

Once the dawn raid has come to an end, the company will need to hold an immediate emergency meeting with its employees and legal counsel. A detailed review of the documents made or received in connection with the raid will be necessary for evaluation of the risk of prosecution and financial and reputational damage. The company must identify any basis for the alleged violation of law and establish a strategy for dealing with the allegations and relevant authority. The company might also need to consider an internal or external communication strategy, as well as whether an internal probe should be conducted.



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