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Autumn dawn raid revival on the cards for European competition authorities

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This autumn, European competition authorities are likely to resume dawn raids of companies suspected of competition law infringements. This will aim to clear a backlog of planned inspections that has built up since the start of the pandemic resulting from organizational difficulties due to COVID-19 travel and social distancing restrictions. Companies should ensure that their dawn raid procedures are updated, and in particular have been adapted to address the changes in dawn raid practice following the COVID-19 pandemic and the new reality of employees working from home.

What are dawn raids?

Dawn raids are unannounced inspections to investigate suspected infringements of competition law. Dawn raids are possible at both business and domestic premises (with an appropriate court warrant). The authorities generally conduct dawn raids with a large number of inspectors from the European Commission and/or national competition authority, often at several company locations at the same time. With the exception of legally privileged documents, the inspectors are empowered to review all documents on (and accessible from) the company premises that fall within the scope of the investigation. This review can cover confidential paper files, personal notebooks or diaries of company personnel, as well as physical and electronic logs (including mobile phones, or encrypted electronic data on a drive or data stored on a cloud, such as WhatsApp chats).

Indications of the revival of dawn raids

Since the outset of the COVID-19 pandemic, most authorities have suspended dawn raids due to COVID-19 restrictions.

There are now clear signs in Europe that dawn raids are back, with a number of authorities announcing dawn raids in June and July. There will have been other dawn

raids over the summer which were not announced. The Greek competition authority over the last few months alone has launched dawn raids in as many as seven different sectors.

European Commission: Dawn raids in Germany at the premises of a company active in the manufacture and distribution of garments (22 June 2021)

French competition authority: Dawn raids on companies and a professional association active in the collection and use of pharmacy dispensary data (8 July 2021)

Greek competition authority: Dawn raids on companies active in (i) supply and retail trade of supermarket products (9 September 2021); (ii) public tenders for the provision of IT systems (7 September 2021); (iii) catering services provision (July 2021); (iv) public tenders for the construction of natural gas networks and relevant equipment and materials (14 July 2021); (v) public tenders related to energy saving and upgrades of lighting systems (8 June 2021); (vi) the import, wholesale and retail markets for power tools and garden tools (24 June 2021); (vii) wholesale and retail markets of telecommunications and teleconferencing equipment and related equipment, spare parts and software (11 June 2021)

Hungarian competition authority: Dawn raid of company suspected of abusing a dominant position in gravel production (20 July 2021)

Norwegian competition authority: Dawn raids of companies active in a health-related market over concerns around illegal exchanges of competitively sensitive information (Authority press release, 23 June 2021; dawn raids in May 2021)

Polish competition authority: Dawn raid of (i) company suspected of imposing minimum resale prices for distributors of professional cleaning equipment and systems on the internet (Authority press release, 21 July 2021; Date of raid not public); (ii) car dealers (Authority press release, 1 June 2021; date of raids not announced)

Portuguese and Spanish competition authorities: Joint raids on commercial and financial information services (2-4 June 2021)

Romanian competition authority: Dawn raids on companies suspected of bid-rigging in the document archiving sector (Authority press release, 7 July 2021; date of raids not announced)

Slovenian competition authority: Dawn raids on companies suspected of price fixing in professional training courses for drivers of dangerous goods (31 August 2021)

Senior competition authority officials have also made **public statements** indicating their intention to carry out a number of dawn raids shortly. Examples include:

European Commission: In June 2021, Maria Jaspers, the head of the EC's cartel directorate, said that although cross-border dawn raids had been difficult and complicated to organize in the past 15 months, the European Commission was starting to tackle the backlog of planned inspections, and that **raids were planned for the autumn.**

German Bundeskartellamt: At a press conference to launch its 2020/21 Annual Report, Andreas Mundt, the president of the Bundeskartellamt, stated that the German authority is likely to re-start unannounced inspections.

Focus areas for the update of dawn raid procedures

Companies should revisit their existing dawn raid procedures. Particular areas to focus on include:

Company dawn raid contacts

As there may be less staff present in the office as a result of remote working, companies should consider carefully whether they have a list of senior internal contacts who are either likely to be in the office or can arrive very quickly, as first port of call contacts (IT, legal, etc.) in the event of a raid. The guidelines should include a number of alternative contacts in case of absence.

The potential for dawn raids at homes

Since many employees are now working from home, authorities may choose to conduct dawn raids at the domestic premises of certain individuals.[1] Dawn raids of domestic premises have been rare in Europe to date, but the authorities may be tempted to use these powers more frequently in the future especially if hybrid working becomes an entrenched corporate working practice. As a result of the heightened concern about invasion of privacy in the case of a dawn raid of domestic premises, competition authorities in Europe need a judicial warrant from a national court to conduct a dawn raid of a home. To acquire a court warrant, the authorities usually need to have a reasonable suspicion that business records related to the subject matter of the dawn raid are kept at the domestic premises.

Companies should ensure that they have specific guidelines in place for dawn raids at domestic premises, and that staff are trained. Company employees working in sales and/or preparing bids in response to customer tenders should be prioritized for training. Staff should be trained to assert their rights to privacy at the raid, especially with respect to private documents and photos which have been stored on work or private devices.

Know your legal rights

The powers of the competition authorities to conduct dawn raids are not without limits. There are a number of rights which persons and companies subjected to dawn raids have, including the right of privacy, the right not to self-incriminate, and privilege. Failure to exercise these rights can lead to broader search and seizure than was authorized.

The competition authorities may not undertake a “fishing expedition”. In the *Nexans* case,[2] the EU General Court annulled a significant part of the entry decision on the basis that that the European Commission did not have reasonable grounds for ordering a dawn raid concerning certain parts of its investigation. Nexans successfully argued that the need for protection against arbitrary or disproportionate intervention by public authorities in the sphere of private activities constitutes a general principle of EU law.

Staff should be trained regarding their rights during a dawn raid, as well as the limits to these rights, as failure to comply with the law can lead to fines for obstruction.

IT searches within a hybrid working model

The focus of a dawn raid will be on electronic files and data. With a greater number of employees working from home, it is more likely than in the past that the inspectors will request remote access to data stored on devices used for business purposes at home, including personal devices. It is important that staff - including IT staff - have been adequately trained to deal with these requests.

On-the-spot questioning

As staff may be remote working, the inspectors may want to interview staff remotely through video calls, or even possibly in person at domestic premises. Dawn raid guidelines should establish protocols for this questioning, and allow for in-house and/or external lawyers to attend any questioning sessions.

Health protection

Companies should ensure that inspectors abide by all applicable COVID-19 health protection measures.^[3] If the inspectors have not abided by applicable measures, this may constitute a legal reason not to allow the dawn raid to proceed. This is of particular importance as inspectors require close monitoring during the full duration of a dawn raid, which can last as long as three days.

Continued inspections

Because of health concerns arising from in-person presence, inspectors may be tempted to shorten inspections and copy data for later review at the authorities' premises.^[4] If documents are copied for later review, companies should ensure that appropriate safeguards are put in place to ensure that only relevant documents are placed on the investigation file, and legally privileged and personal data are adequately protected. Such safeguards may involve the companies' external lawyers being present at the authorities' offices to supervise the officials as they conduct searches on the copied data set (while respecting applicable COVID-19 measures).

[1] The UK government is currently considering strengthening its powers in relation to the dawn raids of domestic premises, by giving the Competition and Markets Authority powers to "seize-and-sift" evidence when it inspects domestic premises under a search warrant. This is part of the UK Government's open consultation launched in July 2021 on "Reforming Competition and Consumer Policy". Seize-and-sift" powers allow the Competition and Markets Authority to remove material from the premises, where it is not practicable to decide on-site whether it should be seized, for subsequent review off premises. Currently, the CMA only has "seize-and-sift" powers when it is inspecting business premises under a warrant.

[2] Case T-135/09, *Nexans France SAS and Nexans SA v European Commission*.

[3] In its press release concerning its June 2021 dawn raid in the garments sector, the European Commission notes that the inspections were conducted “in compliance with all coronavirus health and safety protocols to ensure the security of those involved”.

[4] The Court of Justice of the European Union has confirmed that the European Commission may continue dawn raids at the authority’s premises, by taking copies during a raid without first examining these on the spot (Case C-606/18 P *Nexans SA v European Commission*, judgment of 16 July 2020).

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