

Kluwer Competition Law Blog

Dawn Raids: The (New) Austrian Way

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Unannounced inspections of business premises in Austria rarely occurred in the past. However, the Austrian Federal Competition Agency has clearly changed this of late. Meanwhile, it has conducted several inspections (recently, supermarkets were the focus) and has adopted a harsh approach in the conduct of searches.

Legal Background

Upon request by the Federal Competition Agency, the Austrian Cartel Court issues a search warrant (provided there is reasonable suspicion of a cartel infringement). With a search warrant, the Federal Competition Agency can, similar to the EU Commission, enter premises, search documents and computers, etc. Notably, the inspection can start without the search warrant being served on the undertaking(s) concerned; the law only provides that it must be served within 24 hours.

Dawn Raids in Practice

(1) The arrival

The Federal Competition Agency tends to appear at business premises not only with their own officers but assisted by uniformed police. In combination with the element of surprise in these inspections, this can be potentially intimidating. Undertakings are well advised to include also receptionists in their compliance/dawn raid trainings.

The Federal Competition Agency may encourage the undertaking concerned to permit what is called a voluntary inspection. However, a recent decision by the Austrian Supreme Court (sitting as Cartel Court of Appeals on 20-12-2011, 16 Ok 7/11) has made it clear that agreeing to a voluntary inspection means the loss of substantial rights of defence. In particular, the undertaking(s) concerned can no longer object to the seizure of documents (claiming that they would not fall within the scope of the inspection). Hence, it appears better to ask for the service of the search warrant.

Particularly in the case where the search warrant is not served straight away but also with the search warrant served, undertakings are well advised to ask the leading officer for an explanation of the subject and scope of the investigation.

At least one of the officers should be asked for an ID and the undertaking concerned should have

an overview of how many officers are to conduct the search.

(2) “Shadowing”

Once the actual inspection starts, it appears advisable to have each officer accompanied by a “shadow” from the undertaking or an advising law firm. The shadow must not inhibit the search but may, for example, point out that certain documents/folders are clearly not within the scope. Any conflict should be avoided and the shadow clearly instructed to inform a person in charge in case any matter may escalate.

(3) Copying of documents

Ideally before any copying of documents starts, an understanding with the Federal Competition Agency should be reached as to how this process shall evolve. This is firstly to avoid misunderstandings that any permission for a document to be copied could be seen as waiving any rights related thereto (in particular, later protesting that the document is not covered by the subject of the inspection and the search warrant). Secondly, it can help to ensure that the undertaking also gets a copy of the respective document.

(4) Documents outside the scope

If there are discrepancies as to whether or not certain documents or indeed entire hard drives are covered by the search warrant, the undertaking must resolve on the spot whether it wants those sealed and sent to the Cartel Court, which then decides the matter. If it finds for the Federal Competition Agency, there may also arise an issue of not duly collaborating with the inspection.

It should also be noted that the Federal Competition Agency has expressed the opinion that there is no legal privilege under Austrian law. Hence, if an undertaking does not want to disclose correspondence with an attorney, it would also have to have the document sealed and sent to the Cartel Court.

There is no settled jurisprudence yet, on how the Cartel Court is to decide such matters.

(5) Interviews

While the Federal Competition Agency may ask questions about the whereabouts of certain documents, etc, it can, under the current law, only formally interrogate legal representatives of an undertaking. However, the Federal Competition Agency can also serve summons for interviews to other employees and it may well do so during the inspection.

(6) Duration

Typically, inspections last more than one day. One should be aware that the Federal Competition Agency also performs “round-the-clock-inspections”, during which it searches business premises non-stop without any break (it actually did so in the past for an entire week). This is linked to the fact that the Federal Competition Agency does, under the current law, not have the same possibilities to seal locations as the European Commission.

Approval of Certain Practices by Recent Court Decisions

In two recent cases, the Supreme Court (sitting as Cartel Court of Appeals on 9-11-2011 and

20-12-2011, respectively, 16 Ok 5/11 and 16 Ok 7/11 to 13/11) considered several aspects of dawn raids. The following appears particularly noteworthy:

(1) No hierarchical order of investigative powers

It was held that there is no hierarchical order of the investigative powers vested in the Federal Competition Agency. Hence, a search warrant may be issued right away (without any prior request for information). Further, there is no necessity to apply the same measures vis-à-vis all alleged cartel members. Thus, the Federal Competition Agency has the right to request a search warrant only for a specific cartel member while not for others.

(2) Necessity of the inspection irrespective of prior evidence

According to the Supreme Court, a measure is necessary if it allows for a better assessment of the alleged cartel infringement. Even if evidence already exists, the authorities have the right to collect further evidence in order to specify the behaviour and its circumstances.

(3) Proportionality

While the law requires measures to comply with the principle of proportionality, this principle was held to be fulfilled in case of the danger of suppression of evidence. Even if the cartel participants are willing to cooperate, this fact does not render an inspection disproportional.

(4) Right to issue the search warrant for non-cartel members

The Supreme Court also confirmed that the addressee of a search warrant must not be directly involved in the cartel, but search warrants may also be issued against any third parties, where relevant business records may be found.

(5) No deadline for a search warrant

The law does not provide for an express expiry date or the like for a search warrant. Consequently, the Supreme Court found that two months and three weeks between the issuance of the warrant and the actual performance of the search were not too long.

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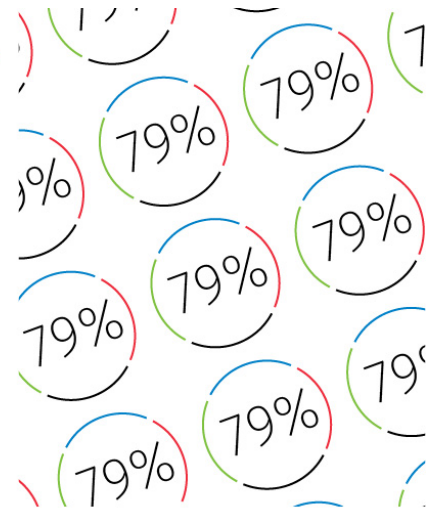
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