

Kluwer Competition Law Blog

New Explanatory Notice on Dawn Raids in Switzerland

David Mamane (Schellenberg Wittmer) · Thursday, January 14th, 2016

On January 6, 2016, the Secretariat of the Swiss Competition Commission (the investigative body of the Swiss Competition Commission; the “Secretariat”) issued a “[Notice on investigation instruments](#)“, i.e. on the conduct of dawn raids, seizing of evidence, and interviews (the “Notice”). The 12-page Notice replaces an earlier notice, which mainly described the process of dawn raids by the Secretariat. While much of the Notice concerns organizational aspects of the dawn raid, there are several statements of broader interest:

- **Personal scope of legal professional privilege (LPP):** The Secretariat states that the communication with in-house counsel (with or without admission to the bar) is not protected by the LPP. Only communications with lawyers (i) registered with the Swiss cantonal bar register, or with lawyers (ii) registered in member states of the EU or EEA, and which are entitled to act as lawyers in their country of origin, are protected. This implies that the Secretariat takes the view that communications with lawyers from other countries are not protected by the LPP. Whether lawyers from outside of Switzerland, the EU and the EEA are protected by the LPP has been controversial for some time. The statement by the Secretariat has to date not yet been confirmed by any courts and is questionable.
- **Activities protected by LPP:** The notice indicates that only communications in the course of lawyer-specific activities are protected. Communications that do not pertain to such professional activities (e.g. activities normally associated with banking services, trustee services, asset management, mediation, business management or debt collection) are – according to the Secretariat – not subject to the LPP.
- **Documents covered by the LPP:** According to the Notice, the LPP covers not only correspondence (letters and emails) but also notes, legal memoranda, strategy papers, draft contracts or settlement agreements. The Secretariat considers it to be relevant whether these documents reflect the communication falling into the protected relationship of confidence between lawyers and clients. Pre-existing, genuine evidentiary documents that have not been drafted on behalf of an external lawyer are not protected. Therefore, the LPP will not extend to forwarding or sending such pre-existing documents.
- **Organization of the dawn raid:** The Secretariat explains the process of its investigation, as well as the relevant roles of its case handlers. The Swiss competition authority will present itself to the business manager of the investigated company or to the person with the highest hierarchical function and will hand over a copy of the search order, a statement of the initiation of the investigation, an instruction of the right to appeal, as well as a form for a leniency application. According to the practice of Swiss competition authority, it is still possible to make a leniency application during a dawn raid. The Swiss competition authority will not wait for external

lawyers, but will collect separately all relevant documents, in order to discuss them once the external lawyer has arrived. The company has no duty to cooperate, except for providing access to the premises. Potentially relevant documents can be seized and if a company wants to object, they can be sealed in order to have a court decision on the legality of the seizure. While the Secretariat is authorized to seize the original document, they will in practice generally take paper or electronic copies.

- **Seizing electronic documents:** Electronic data will not be searched on the spot, but will be copied. The company has the obligation to provide access to the computer system, which includes providing the relevant passwords. In its Notice, the Secretariat opines that its investigation power allows it to copy all data to which access is possible out of the searched premises. This addresses the question, whether data located on servers outside of Switzerland is within the reach of the Swiss competition authority during a dawn raid. Insofar as employees at the searched premises have access to this data, the Secretariat will therefore request to have access as well, even though there will be an extraterritorial effect of such a search.
- **Reviewing electronic documents:** The copied data (e.g. copies from server data, as well as mirror images of hard drives and USB devices, etc.) is searched at the premises of the Secretariat using forensic software. The company or its lawyers can assist such review of the electronic data. They can also request a pre-screening of the data, during which external lawyers can review the data together with employees of the authority who are not members of the relevant case team. Such pre-screening should allow excluding documents that are protected by the LPP. The lawyers of the investigated companies can thereafter also assist the actual data review and also object if certain problematic documents should be reviewed. At the end of the data analysis, the relevant documents are transferred into the investigation file, at which time the investigated company can again raise concerns and/or request redaction of business secrets.
- **Interrogations:** For the interrogation by the Swiss competition authority it is relevant, whether a person is interrogated as a party, or as a witness. Parties do not have any duty to reply or to provide information, while witnesses are obliged to provide truthful answers. According to the Notice, the role as a party or witness is decided on the basis whether a person is by law or *de facto* a representative of the investigated company. Such representatives are interrogated as parties, while the Secretariat wants to interrogate employees of lower ranks or former employees as witnesses. During the interrogation, the interrogated person has the right to be accompanied by a lawyer. However, the Notice states that the lawyer of the investigated company may not be at the same time the lawyer of a witness. Interrogations can also be held during a dawn raid and are recorded in a transcript.

While the Notice provides for a general summary of the current practice of the Swiss competition authority, it must be noted that some of its details have never been reviewed by the courts, and may therefore be challenged. In particular, the question whether lawyers from outside of Switzerland, the EU or the EEA are not protected by the LPP, as well as the extraterritorial reach of the search on servers outside of Switzerland, may be challenged in future investigations. Nevertheless, the Notice is a helpful tool when adapting a company's dawn raid guidelines to the specific national situation in Switzerland.

To make sure you do not miss out on regular updates from the *Kluwer Competition Law Blog*, please subscribe [here](#).

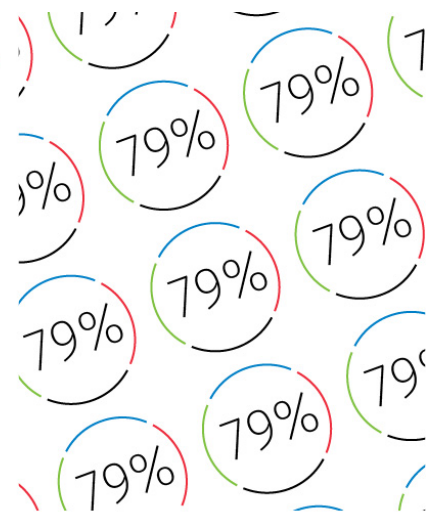
Kluwer Competition Law

The **2022 Future Ready Lawyer survey** showed that 79% of lawyers are coping with increased volume & complexity of information. Kluwer Competition Law enables you to make more informed decisions, more quickly from every preferred location. Are you, as a competition lawyer, ready for the future?

Learn how **Kluwer Competition Law** can support you.

79% of the lawyers experience significant impact on their work as they are coping with increased volume & complexity of information.

Discover how Kluwer Competition Law can help you.
Speed, Accuracy & Superior advice all in one.



2022 SURVEY REPORT
The Wolters Kluwer Future Ready Lawyer
Leading change

This entry was posted on Thursday, January 14th, 2016 at 9:54 am and is filed under [Source: OECD](#) > [Cartels](#)

You can follow any responses to this entry through the [Comments \(RSS\)](#) feed. You can leave a response, or [trackback](#) from your own site.