

# WHITE PAPER

COMPETITION DAWN RAIDS



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# INTRODUCTION

**Dawn raids are a highly effective way for competition authorities to gather evidence of possible antitrust violations.**

A dawn raid can be an uncomfortable surprise for any company. If the company does not have a step-by-step plan and the employees have not been properly trained, mistakes may easily occur. Such mistakes can have far-reaching consequences and can lead to substantial fines.

Dawn raids primarily take place in companies suspected of violating antitrust regulations. Authorities can also raid a company that has not directly participated in an antitrust infringement, if there are reasonable grounds to suspect that it has documents that could serve as evidence of anticompetitive behavior. Therefore, all companies must take adequate measures to prepare for dawn raids.

Because antitrust authorities in Austria have relied more heavily on dawn raids in recent years, resulting in a considerable increase in demand for advice, we have published a book on the subject: [Die Hausdurchsuchung im Kartellrecht](#) (Competition Dawn Raids, publisher: MANZ). It contains comprehensive information about dawn raids conducted by the Austrian Federal Competition Authority (FCA) and the European Commission, as well as numerous practical tips.

This white paper summarizes the dawn raid process. It does not thoroughly detail the differences between dawn raids conducted by the FCA as opposed to the European Commission, but we have included an overview of the main differences for your reference. For more information on dawn raids, please contact us directly.

## **The white paper consists of the following sections:**

**Section 1:** Before a dawn raid: Preparation is everything!

**Section 2:** During a dawn raid: What are the rules?

**Section 3:** After a dawn raid: Dealing with the antitrust authority.

**Section 4:** FCA vs. European Commission dawn raids in a nutshell.



# 1. BEFORE A DAWN RAID

## PREPARATION IS EVERYTHING!

The commonplace maxim „Preparation is everything!“ applies to dawn raids as well. A company that sufficiently prepares for a dawn raid can minimize risks and avoid unnecessary fines.

Experience has shown us that having an emergency plan in place and providing regular employee training can prevent costly errors during dawn raids. In order to be effective, the emergency plan must be comprehensive,

even including instructions for dealing with employees who are so new they have not been trained yet. Training must occur on a regular basis to keep the information fresh in the minds of employees.



## THE EMERGENCY PLAN

Companies should create an emergency plan containing instructions and rules in the event of a dawn raid. Committing these rules to paper can help guide employees' actions when the situation gets stressful.

The emergency plan should list important internal and external contacts (such as the company management and external lawyers), designate a room for the kick-off meeting, and detail the communication strategy to be used with officials and internally among employees.

Most importantly, the emergency plan should designate employees to personally accompany, or „shadow,“ the authorities throughout the raid. The shadows' job is to closely monitor the conduct of the officials and record it in a protocol, so that a comprehensive internal report can be drafted afterwards. The protocol should list the offices visited, records viewed or copied, disagreements on the object and scope of the search or the powers of

officials, questions and answers from staff, and the duration of the various official activities.

Each company needs an emergency plan which is specifically tailored to its particularities and sector. In our experience, general templates from books or the internet fail to make the grade. Some companies outsource their IT management, while others have an internal IT department. Some companies still rely on paper archives, while others have shifted to electronic storage. Because different companies face different challenges in preparing for a dawn raid, we recommend engaging an experienced antitrust lawyer to provide specialized legal advice in advance of and during a dawn raid.



# 1. BEFORE A DAWN RAID

## TRAINING

In addition to creating an emergency plan, we strongly recommend that companies regularly train their employees on proper conduct in the event of a dawn raid.

Employees absolutely must not hinder officials during the search by:

- » denying or restricting access to the premises,
- » destroying documents or deleting electronic data, or
- » opening sealed premises or lockers. The company should train personnel to guard sealed premises at all times.

It is important for employees to understand that their misconduct during a dawn raid could harm the company financially. For example, the European Commission can fine a company up to 1% of the prior year's sales if an employee breaks one of their seals or provides incomplete, incorrect, or misleading information du-

ring the search. In Austria, obstructing an investigation may be considered an aggravating factor and precipitate a larger fine.

The largest fine ever imposed for obstructing an inspection by breaking a seal was EUR 38 million, imposed by the European Commission (and confirmed by the European Court of Justice) on the German energy company E.ON.

Whether dawn raid training should occur as part of a general training on antitrust regulations, or separately, is an individual decision for each company. Because the authorities are likely to scrutinize the IT department during a dawn raid, the company should also train their IT staff.





## 2. DURING A DAWN RAID: WHAT ARE THE RULES?

### ARRIVAL

Dawn raids take place unannounced. When the officials arrive and state the purpose of their visit, the first point of contact (usually the reception) should notify the management and lawyers as specified in the emergency plan, and make a copy of the search warrant.

External lawyers should supervise the entire dawn raid to ensure that all parties behave in an orderly and professional manner, and that the rights of the company are protected.

It is acceptable to ask the officials to wait in a meeting room until the management and/or the legal department

and external lawyers arrive. However, the employees must allow the officials to access the entire company premises if they refuse to wait. If the search begins before the external lawyers arrive, lawyers should monitor activities telephonically until their arrival.

Employees must not leak any information about the dawn raid, because it could interfere with parallel or future searches of other companies, and they should discuss any communication (internal and external) with the officials. The most important thing is to stay calm. A company that has diligently trained its employees has already substantially reduced its risk level.



### KICK-OFF MEETING

Before the officials begin their search, they usually hold a „kick-off meeting“ with the company’s management, legal department, and external lawyers to discuss the subject matter of the dawn raid, and to determine whose offices and data will be searched. The kick-off meeting is an opportunity for the lawyers to narrow the scope of the investigation to the stated subject matter of the search warrant.

After the meeting, it is critical to make sure that each shadow fully understands the subject matter and scope of the dawn raid. Every official must be accompanied by a shadow during the entire search.

## 2. DURING A DAWN RAID: WHAT ARE THE RULES?

### OFFICIAL POWERS

The search warrant specifies the object and scope of the dawn raid, which in turn determines the powers of the officials. Thus, the exact wording of the warrant is of great importance.

**Within the parameters of the search warrant, the officials are empowered to:**

- » enter not only business premises, but also private homes and vehicles,
- » ask where relevant documents are located (paper documents and electronic files, including password-protected files, external hard drives, cloud storage, etc.),
- » search the areas where documents are located,
- » review and copy relevant documents and take the copies with them (including paper documents and electronic files),
- » seal areas of the premises,
- » freeze e-mail accounts and put other temporary IT measures in place, and
- » request and record explanations regarding facts and documents relating to the subject matter and purpose of the inspection.



#### No fishing expedition

The officials are limited to the subject matter of the dawn raid as specified in the search warrant, and are therefore not entitled to raid the company premises in general. However, they may briefly review documents that the company considers to be out of scope in order to confirm their irrelevancy. Before refusing to produce any documents, the company should consult legal counsel.



## 2. DURING A DAWN RAID: WHAT ARE THE RULES?

### ELECTRONIC DATA

The officials are primarily interested in electronic data. They use forensic software to search the data they collect from employees who may be involved in anti-competitive behaviour. It is important for the shadow to write down all search terms used by the official they are accompanying.

The company must immediately inform all IT personnel if the officials freeze email accounts or implement other IT measures. Just like all other employees, the IT staff absolutely must not delete records or deny the officials access to data.

The company should provide printers for the officials and thoroughly document their backup process. In order to keep track of the information gathered by the search, it is critical to match their process step-by-step, making an extra copy of each document they copy or print.

This will assist the lawyers in preparing a defence strategy, because it provides an insight into the nature and depth of the competition authority's suspicions.

### PROTOCOL

**At the end of the dawn raid, representatives of the company must sign the official record of the search. The following objections, if present, should be included in this protocol:**

1. The protocol contains inaccurate information stating that the company did not cooperate with the search when, in fact, full cooperation was provided.
2. The officials copied information that exceeded the scope of the search warrant.
3. Other objections to the content of the protocol, missing information regarding disputes during the search, or inappropriate conduct by the officials.





# 3. AFTER A DAWN RAID

## INTERNAL ANALYSES

Once the company has collected the individual reports from the „shadows,“ it can use them to produce a complete review of the dawn raid.

The company must ascertain the seriousness and specificity of the competition authority's suspicions as quickly as possible by reviewing the documents and data that were targeted in the search. If resources allow, this

process can begin even before the search has concluded, although a complete picture of the event cannot be assessed until all employees involved in the search have been interviewed.

Before issuing any press releases or other external communications, the company should consult the competition authority.

## COOPERATION OR DEFENCE STRATEGY?

If the authorities suspect numerous competitors of participating in a cartel, the company must decide quickly whether to cooperate with the investigation. Only the first company that can provide the required amount of information on the antitrust infringement acquires full immunity, pursuant to the Leniency Notices of both the FCA and the European Commission. The second, third,

etc., can only benefit through a reduction in their fine. If the company's competitors have also been raided and will also likely be considering cooperation, time is of the essence.

Whether or not to apply for leniency is a difficult decision for any company. They must consider the chances

## APPEAL/COMPLAINT

It may be necessary to appeal the search warrant or file a complaint against actions taken during the dawn raid. For this reason, and to reiterate, it is critical to document all aspects of the search thoroughly.



## 4. DIFFERENCES BETWEEN DAWN RAIDS BY THE FCA AND THE EUROPEAN COMMISSION

### IN A NUTSHELL

	Federal Competition Authority (FCA)	European Commission (the Commission)
<b>Legal professional privilege</b>	Legal privilege is not explicitly addressed by Austrian antitrust law. The FCA does not officially recognise the legal professional privilege, but in practice they will consider it.	Legal privilege is recognised in the case law of the European Court of Justice and the Commission respects it.
<b>Seizure</b>	Seizure is only permitted in exceptional cases where it is the only way to obtain the necessary evidence.	The Commission is not entitled to seize. As mentioned above, officials may make and take copies of documents, but not originals.
<b>Authorisation of a dawn raid</b>	The FCA files an application for a dawn raid with the Cartel Court, which issues the search warrant.	The Commission approves the dawn raid and issues the warrant.
<b>Private premises</b>	Within the parameters of the search warrant, the officials are also empowered to search private premises.	If the Commission has a reasonable suspicion (that evidence is located on private premises), they may raid it, but (in Austria) only with approval from the Austrian Cartel Court.
<b>Legal protection</b>	A company may appeal a search warrant and/or file a complaint in case the officials have exceeded their powers.	A company may file an action before the General Court to annul the warrant and/or bring an action for unlawful conduct during the dawn raid against the Commission's final decision imposing the fine.
<b>Seals</b>	Officials may seal the premises during the dawn raid to the necessary extent.	Officials may seal documents, books, and the company premises during the dawn raid if necessary.
<b>Use of force</b>	Only security forces (the police) may use force to enter the premises or access locked areas.	Force may only be used in the presence of FCA officials and security forces.
<b>Penalty payments</b>	The Cartel Court may (upon request of the FCA) impose penalty payments on a company in order to force the company to provide access to evidence that can be accessed electronically on the searched premises during a dawn raid.	The Commission is empowered to impose a penalty for any obstruction to the investigation.



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Dieter Thalhammer is a partner in our Vienna office and head of our competition law practice group. Dieter is one of the leading Austrian experts in national and European competition law and represents national and international clients in merger control proceedings, cartel, and abuse of dominance cases, as well as in cartel damages proceedings (private enforcement). He also has extensive experience conducting internal investigations and implementing antitrust compliance programs.

Under his guidance, our competition law practice group has grown into one of the leading teams in Austria. Dieter represents clients from diverse industries such as transport, automotive, media, energy, postal services, telecommunications, chemical, real estate, finance, health care, food, and electronic engineering.

His accomplishments include defending charges against an alleged Austrian freight-forwarding cartel before the Austrian Supreme Court of Justice and the European Court of Justice, recently representing a transport company in cartel proceedings before the European Commission, advising an energy supply company in antitrust proceedings before the Austrian Cartel Court, and regularly counseling prominent companies in Austrian and European merger proceedings.

Dieter holds law degrees from the University of Vienna (Dr iur, Mag iur) and Saarland University (LLM Eur). He started his career as an intern at the Legal Service of the European Commission. He speaks German and English.

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Judith Feldner is a partner in our Vienna office and a member of our competition law practice group. The precautionary side of her practice involves regularly providing dawn raid trainings, implementing antitrust compliance programs, and conducting internal investigations (including electronic data assessment) for clients. On the remedial side, she works on cartel cases and coordinates leniency applications before the European Commission, the Austrian courts, and the national competition authorities. Additionally, she handles merger control proceedings, particularly coordinating multi-jurisdictional filings and structuring joint ventures.

Judith holds a law degree from the University of Graz (Mag iur) and has also studied at the Universitat Autònoma de Barcelona. After her studies, she worked at the University of Graz as a university assistant in the Department of European Law. Judith advises clients in German and English and also speaks Spanish and French.

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