

Strelia Competition Newsletter

November 2021 : Antitrust dawn raids – are you ready?

During the COVID-19 pandemic and for approximately two years, the EU Commission and the National Competition Authorities have stopped carrying out dawn raids. In the meantime, the EU Commission and the EU Courts further specified their views about what can constitute a competition restriction. Moreover, Commissioner Vestager recently announced that the dawn raids of mid-October 2021 were just the start of a series of raids that the Commission was planning for the months to come. Are the employees of your company ready for the new rules? Do they remember the Do's and Don'ts in case of dawn raids? This newsflash will recall some good practices in this respect.

1. Antitrust dawn raids

The role of a Competition Authority – such as the European Commission ('the Commission') or National Competition Authorities ('NCAs') – is to ensure the compliance with the competition law rules, and, where necessary, to find and sanction anti-competitive behaviours.

As part of their investigative powers, Competition Authorities can order dawn raids. Dawn raids are unannounced searches in which a Competition Authority seeks to identify whether its suspicions of competition law infringements are justified. The raids usually take place at the offices of the company under investigation and are often conducted with a large number of inspectors from the NCA and/or the Commission.

Furthermore, Competition Authorities also have the power to conduct searches of private (domestic) premises, including the homes of the key staff of the company (such as the senior management). However, to carry out dawn raids on these premises, Competition Authorities must have (i) prior judicial authorisation and (ii) a reasonable suspicion that documents relevant to the investigation may be found in these places.

Inspectors are empowered to review and take a copy of all documents that fall within the scope of their investigation (with the notable exception of legally privileged documents). They thus have a wide scope of action that can cover confidential physical or electronic dossiers, personal files, information on company personnel, mobile phones, encrypted data, or data stored on a cloud.

2. Revival and modernisation of dawn raids

After nearly two years of global COVID-19 pandemic, which forced the Commission and the NCAs to suspend their planned dawn raids, Competition Authorities have started to conduct inspections on company premises again.

For example, in October 2021 alone, the Commission conducted dawn raids in the wood pulp sector in several EU Member States for a potential breach of Article 101 of the Treaty on the Functioning of the European Union ('TFEU') (prohibition of cartels) and unannounced inspections in the animal health sector in Belgium for a suspected breach of Article 102 TFEU (prohibition of abuse of a dominant position).

These two dawn raids will most certainly not remain isolated inspections, as the EU Commissioner Vestager emphasised during a speech at the Italian Antitrust Association Annual Conference in October 2021 that they were *"just the start of a series of raids that we're planning for the months to come"*. At the same time, many NCAs

have also indicated their intention to resume dawn raids (for example in Belgium, France, Greece, Poland or Romania, to name a few) and have started to inspect company offices.

This resurgence of inspections amid the – still ongoing – COVID-19 pandemic is likely to present **new challenges, both to Competition Authorities and to inspected companies**. The new reality of employees working from home and the pressure to limit social contact can have various effects on the run of dawn raids, such as:

- A higher probability of inspections being conducted not only in the offices of the company but also on **domestic premises of selected employees**;
- Shorter and smaller dawn raids with a **normalisation of copies of files** that the inspectors consult only **once they are back in their offices** (keeping in mind that these files have to be consulted in the presence of an in-house counsel or of an external lawyer);
- The obligation to give inspectors remote **access to data and devices not stored or located on company premises** (for example, the computer of an employee working from home);
- **Virtual interrogation of senior management or other key employees** that are not necessarily in the offices of the company.

A few other points of attention deserve to be highlighted with respect to the clarification which has been given during the COVID-19 pandemic about **specific competition law infringements**:

- First, **regarding agreements between competitors**, Commissioner Vestager recently stated that the Commission was going to expand its cartel enforcement to labour markets, including **no-poach and wage-setting agreements**. Companies should thus expand the scope of their antitrust compliance programs to also include employee groups such as human resources personnel and any other employees involved in recruiting. In particular, companies should review their recruitment practices to determine whether their HR teams avoid recruiting or hiring from specific companies.
- Secondly, **regarding distribution agreements**, the current version of the Vertical Block Exemption Regulation ('VBER') expires on 31 May 2022, with the new one scheduled to enter into force on 1st June 2022. One of the new domains now explicitly mentioned in the future VBER (and which is not exempted in most of the cases) pertains to **online sales restrictions**, i.e., restrictions that have as their object to prevent the effective use of the internet for the purposes of selling goods or services online or to prevent the effective use of certain online advertising channels.
- Thirdly, **regarding abuse of dominance**, the conditions to prove an infringement have recently been loosened by the EU Courts with respect to **implicit refusals to supply** (such as imposing unfair/discriminatory conditions or unduly delaying or otherwise degrading the supply of the product). Referring to the Deutsche Telekom Judgement of 25 March 2021 (C-152/19), the General Court confirmed in the Google Judgement of 10 November 2021 (T-612/17) that it was no longer necessary to prove the indispensability of the product to be supplied to establish an abuse of dominance.

In view of these new realities, this newsflash is intended to serve as a guide for companies to help them establish an internal "dawn raids response strategy" and to provide them with key conducts to adopt or avoid during an inspection.

3. Is your company ready?

3.1 Do's

Before the dawn raid

- Establish an internal “dawn raid response strategy” and provide your employees with a comprehensive training on the do's and don'ts during an inspection:
 - Create guidelines for specific employee groups (such as the reception or the IT department).
 - Highlight the role of the staff to protect the company's legal rights and interests while remaining cooperative with the inspectors.
 - Underline the imperative of avoiding any obstruction, such as the destruction of physical documents or the deletion of electronic data.
 - Highlight the increased possibility of inspections on domestic premises and of virtual questioning via video conference. Provide the staff with training on how to handle such situations.
 - Develop an inspection communication strategy towards various internal or external groups, such as the company staff, auditors, insurers or journalists.
- Appoint an internal response team and clearly delimit everyone's role and responsibility during a dawn raid:
 - Appoint an “Authorised Representative” from the company's senior management that will be authorised to answer the inspectors' questions.
 - Appoint senior personnel from various company departments (legal, HR, IT, support team, etc.) that will be present during the dawn raid.
 - Define the role of the first point of contact of the inspectors when they arrive on company ground (reception, security). Make sure they know to immediately contact the response team.
- Ensure that your infrastructure and IT systems are ready and adapted to a dawn raid and to the potential requests of the inspectors:
 - Ensure that authorised senior IT personnel can be present at a moment's notice to provide access to IT files and data.
 - Establish a procedure to handle specific requests of inspectors if they need to either disable some systems (for example, company emails or phones for the personnel working from home) or remote access to devices located elsewhere (for example on domestic premises).
 - Configure your IT infrastructure to allow the inspectors access to all the relevant documentation (i.e., to bypass any internal security or confidentiality protections).

During the dawn raid

- Immediately call your in-house counsel or your external lawyer and ask the Competition Authority inspectors to wait for the lawyer's arrival.
- Inform the inspectors of the name / function of the Authorised Representative of the company that is allowed to answer all their questions and contact him informing him of the dawn raid.
- Ask for and read the dawn raid decision to establish the scope of the inspection and the information the inspectors are allowed to consult.
- Ensure that all questioning is formal and recorded in writing and keep a detailed record of everything that the inspectors consult, copy or take.
- Copy and retain an extra set of all materials taken by the inspectors.
- Ensure that each inspector is accompanied by a "shadow" at all times.
- Remain calm during the inspection and treat the inspectors in a courteous manner.

3.2 Don'ts

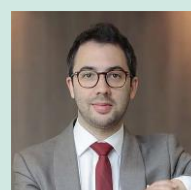
- Do not try to obstruct the inspection or the inspectors in any way (destruction or deletion of information, delays of access).
- Do not be uncooperative or aggressive towards the inspectors.
- Do not hand out information that is outside the scope of the inspection or that the inspectors have not expressly asked for.
- Do not wrongly refuse access to documents or mislead the inspectors.
- Do not let the inspectors take originals of documents.
- Do not sign any document unless instructed by your in-house counsel or your external lawyer.
- Do not mention the inspection or discuss any aspect of the raid with anyone outside the "in the know" circle of your company.

For any additional information, please do not hesitate to contact us or your usual Strelia contact person.



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