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Competition Inspections in 21 Jurisdictions

A Practitioner's Guide

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Foreword by Paul Nihoul

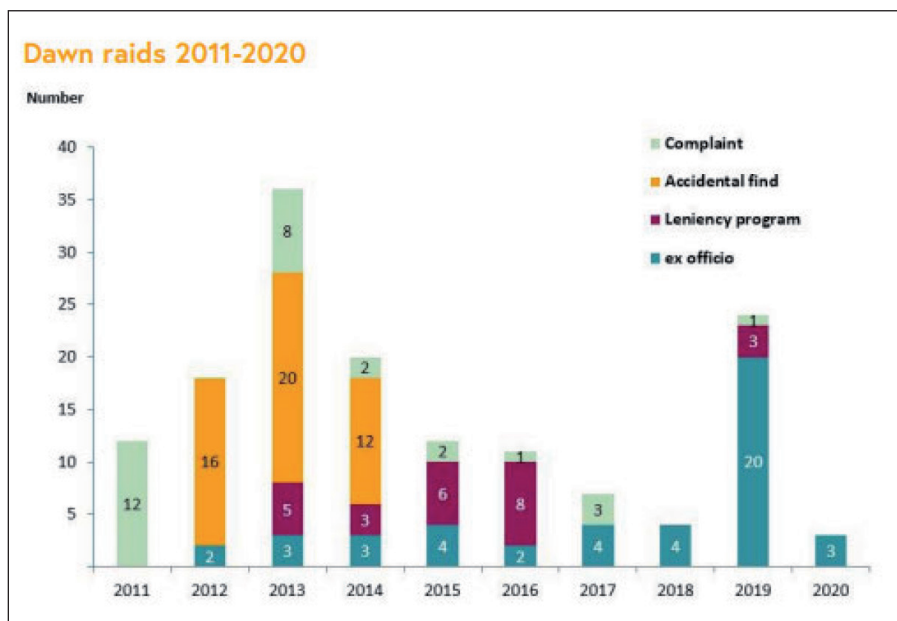
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Introduction

1. The Austrian Federal Competition Authority (“FCA”) has an impressive track record of conducting dawn raids. Over the past decade, the FCA has conducted more than 140 dawn raids in various industries, most notably in the food retail sector and in the construction sector. The table below shows the number of dawn raids conducted, broken down by trigger events.¹



2. In 2020, however, the FCA only conducted three dawn raids in the driving school sector, mainly due to the ongoing COVID-19 pandemic. Dawn raid activity was still reduced in 2021 due to the ongoing pandemic. Nevertheless, the FCA conducted dawn raids in the offices of several waste management companies at more than twenty locations in Austria. It is expected that the FCA’s dawn raid activities will soon see a significant rise again. After identifying “dawn raids” as one of its top priorities, the FCA issued a guidance paper on dawn raids in October 2017 (“FCA Guidance Paper”).²

¹ Austrian FCA, “Annual Report 2020” (June 2021) <https://www.bwb.gv.at/fileadmin/user_upload/Downloads/taetigkeitsbereich/Annual_Report_2020_BWB_final.pdf> 55.

² cf Austrian FCA, “Guidance on dawn raids” (October 2017) <https://www.bwb.gv.at/fileadmin/user_upload/Englische_PDFs/Standpoints%20and%20Handbooks/Guidance_on_dawn_raids_final.pdf>.

3. As a result of the FCA's and the European Commission's ("EU Commission's") dawn raid activities in Austria during the past decade, undertakings in Austria have started preparing for dawn raids by the FCA and the EU Commission. Some companies instruct their employees how to behave during a dawn raid as part of their competition law compliance trainings. Smaller companies often do not provide competition law compliance trainings to their employees. However, such smaller companies are increasingly asking for competition law guidelines for their employees, including overviews of the dos and don'ts during dawn raids. A compliance toolkit on dawn raids includes at the very least an overview of the dos and don'ts and the telephone number of the external competition counsel. The toolkit should be accompanied by regular training sessions and a mock dawn raid. App-based basic dawn raid assistance has become fashionable with clients.

1. Nature and Scope of Competition Inspections

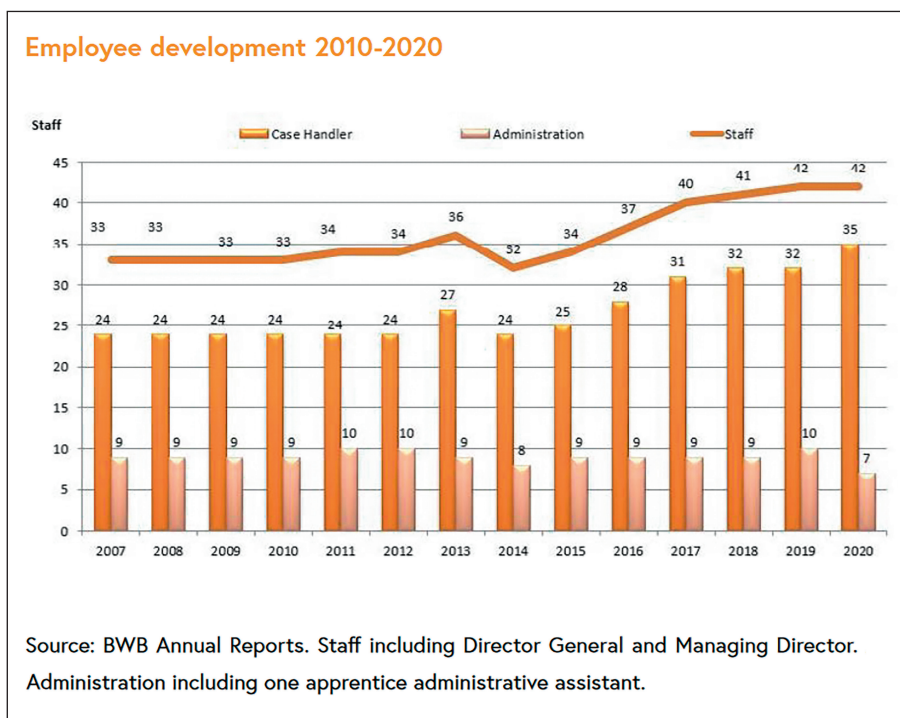
1.1. Enforcement and Investigation Powers

4. In Austria, the FCA is authorised to (i) request information from undertakings and associations of undertakings; (ii) inspect and examine business documents; and (iii) conduct dawn raids. Competition law dawn raids are conducted in Austria by the EU Commission and the FCA.
5. The FCA may only conduct a dawn raid based on a search warrant issued by the Austrian Cartel Court (Kartellgericht – "ACC") pursuant to section 12(1) of the Austrian Federal Competition Act (Wettbewerbsgesetz – "AFCA") (see section 2 for details).
6. In most cases, the trigger for a dawn raid is an application for immunity by another market participant. It should be noted that the Austrian competition law leniency programme provides for potential immunity and leniency also with respect to vertical competition law infringements. The dawn raid enables the FCA to secure evidence of the infringement. It is a preferred investigatory tool where there is otherwise a risk that evidence may be destroyed, deleted or hidden.
7. In addition, the FCA will often assist the EU Commission in conducting dawn raids in Austria. The FCA may also conduct dawn raids at the request of a competition authority of another EU Member State (so-called administrative assistance pursuant to Article 22(1) of Regulation 1/2003).
8. In the recent amendments of the Austrian Cartel Act ("ACA" – KaWeRÄG 2012, 2017 and 2021), the Austrian legislator has gradually aligned the powers of the FCA (see in detail below) with those of the EU Commission under Regulation 1/2003.³ It should be noted, however, that the procedural rules for competition law dawn raids are a part of Austrian national law that does not have to be harmonised (see, for example, the different treatment of "legal professional privilege" – "LPP").

³ cf explanatory Notes to KaWeRÄG 2012 (Erläuterung 1804 BlgNR 24. GP) 2, 4.

1.2. Competent Authorities and Agents

9. The FCA is the central national authority for competition dawn raids in Austria. As mentioned in the introduction, the FCA's track record regarding dawn raids is impressive given the size of the FCA (especially the number of case handlers). As the chart below shows, the number of case handlers at the FCA has increased between 2007 and 2020 from 24 to 35. In theory, all case handlers could assist during a dawn raid conducted by the FCA.⁴



10. As regards the FCA staff mainly dedicated to dawn raids, the Legal Service Department, which is inter alia responsible for dawn raids, currently consists of seven members, and the Forensics Unit of three members.⁵
11. FCA employees cannot access the company without the company's consent. Coercive measures are reserved to the Austrian police forces. In practice, the FCA is regularly accompanied by the police on dawn raid inspections.

⁴ "Annual Report 2020" (n 1) 14.

⁵ FCA's organisational chart is available here: <https://www.bwb.gv.at/fileadmin/user_upload/Organigramm_englisch_29.09.2021.pdf>; a chart illustrating the allocation of tasks and staff is available here: <https://www.bwb.gv.at/fileadmin/user_upload/Geschaefts-_und_Personaleinteilung_HP_03.01.2022_en.pdf>.

1.3. Nature of Inspection Powers

12. As will be discussed in more detail in section 2, the FCA may only request a search warrant if “reasonable suspicion” exists. Like the German Federal Cartel Office, the FCA investigates specific sectors (e.g. car dealerships, pharmacies) where it suspects that market forces are not working the way they should. Such sector investigations are not sufficient grounds for a dawn raid. Dawn raids are strictly limited to the suspicion of competition law violations.
13. The FCA has to serve the search warrant to the persons listed in section 11a(2) AFCA. These are the owner(s) of the company or his or her representative(s); in the case of legal persons, the bodies appointed to represent the company. The search warrant has to be served immediately or within twenty-four hours of the start of the dawn raid. In practice, the search warrant is handed over by the FCA at the beginning of the dawn raid.
14. The dawn raid may extend to private premises and/or transport vehicles. However, this requires an extension of the search warrant unless these locations have been specifically mentioned in the warrant. The FCA’s investigation is limited by the scope specified in the search warrant, which basically reflects the alleged competition law violation. The scope of the search warrant is thus limited timewise (e.g. “from 2010 onwards”), geographically (e.g. “in Austria”), and product-wise (e.g. “in the food retail sector”). The search warrant has to provide a high-level description of the investigated conduct. The FCA cannot use the search warrant to conduct general inquiries at the company. However, a company cannot prevent the cursory examination of so-called accidental discoveries, even if these have no direct link to the subject matter of the investigation. Accidental discoveries must be disregarded in the context of the investigation for which the search warrant was granted (section 11(1) AFCA). However, the FCA can and, in practice, often will initiate a new investigation and/or apply for an extension of the search warrant.⁶
15. The FCA is entitled to review and copy documents and electronic data during the dawn raid. The FCA’s right to seize evidence is limited by what is necessary to ensure the success of the investigation (section 12(4) AFCA). In principle, the seizure of documents and/or assets (such as laptops) is only possible if there is a risk that the documents would otherwise be destroyed. There can be no seizure if the company cooperates with the FCA (e.g. voluntarily surrenders a laptop). Upon request, the FCA will hand over a security protocol listing the seized documents and objects. Such a protocol should always be requested. The FCA can copy relevant documents and take these copies. In that case, the originals remain with the company. The creation and taking away of a copy does not qualify as a seizure of the documents under Austrian law. The fact that the FCA will first ask whether the company is prepared to hand evidence over voluntarily and that the creation and taking away of copies do not qualify as document seizures means that “real seizures” are relatively rare in FCA dawn raids.

⁶ cf Peter Matousek in Alexander Petsche, Franz Christof Urllesberger, Claudine Vartian (eds), *Kartellgesetz KartG* (2d ed, MANZ 2016), s 11.

1.4. Areas of Competition Enforcement Concerned

16. Based on section 12(1) AFCA, a search warrant may be issued in case of a reasoned suspicion relating to:
 - an infringement of the cartel prohibition (section 1 ACA or Article 101 of the Treaty on the Functioning of the European Union – “TFEU”);
 - an infringement of the prohibition of the abuse of a dominant market position (section 5 ACA or Article 102 TFEU);
 - an infringement of the merger control gun-jumping prohibition (section 17 ACA).
17. In addition, the government bill regarding the implementation of Directive (EU) 2019/633 on unfair trading practices in B2B relationships in the agricultural and food supply chain (“UTP Directive”) in the revised Local Supply Act enables the FCA to carry out dawn raids regarding alleged violations of section 5c FWBG (section 5g(6)).⁷

2. The Legal Basis for the Inspection

18. The FCA is only empowered to conduct a dawn raid based on an ACC court order.
19. The following conditions must be met cumulatively for a search warrant to be issued:
 - the infringement must be conclusively alleged in legal terms;
 - evidence must be presented giving rise to reasonable suspicion; and
 - it must be demonstrated that conducting a dawn raid is necessary and proportionate to substantiate the suspicion.
20. Thus, pursuant to section 12(1) AFCA, the FCA will apply for and the ACC will issue a search warrant if “reasonable suspicion” of a competition law violation exists. It is noteworthy that a search warrant may also be issued for a dawn raid on the premises of an undertaking not suspected of direct involvement in the competition law infringement, but where it may reasonably be expected that evidence of a competition law violation involving another undertaking is located.⁸
21. ACC search warrants may be appealed before the Austrian Supreme Court. The appeal does not have a suspensive effect (for more details, see section 5).
22. The FCA may ask (but not request) the company to consent to a so-called voluntary inspection. A voluntary inspection requires individual (revocable) consent from the company. The FCA records the company’s consent in writing. Voluntary inspections enable the FCA, for instance, to access premises that are not listed in the search warrant (e.g. an archive located in an adjacent building). According to the FCA’s Guidance Paper, an investigated company’s consent to a voluntary inspection may constitute a mitigating factor in the fine calculation under

⁷ cf Government Bill Faire Wettbewerbsbedingungen-Gesetz – FWBG (1167, XXVII. GP); Explanatory Notes to FWBG (1167, XXVII. GP).

⁸ cf Supreme Court of Justice, 7 November 2013, 16Ok7/13.

section 30(3) ACA. Companies should carefully consider, in consultation with their competition lawyers, whether to consent to a voluntary inspection. According to the relevant jurisprudence, legal remedies usually available in a dawn raid scenario are not available in the case of a voluntary inspection. The FCA could theoretically ask an investigated company to consent to a voluntary inspection instead of applying for a search warrant to conduct a “regular” dawn raid. However, in practice, voluntary inspections have primarily played a role when the FCA wanted to access premises not covered by the search warrant during an ongoing dawn raid.⁹

3. The Start of the Inspection

3.1. The Arrival of Inspectors and Notification of the Decision

23. The FCA’s dawn raid team usually first informs the investigated company’s reception that they would like to “serve a document from the Vienna Higher Regional Court”. They will ask for a member of the company’s management or the head of the legal department to be called down to meet them.
24. FCA search teams have a team leader who acts as the point of contact for the company and/or its legal representative(s). Any questions, for example relating to procedures, duration or type of the dawn raid, should be discussed with the team leader.¹⁰
25. Usually, the ACC instructs the FCA to hand over a copy of the warrant, including the underlying application filed by the FCA and copies of any evidence. In this way, the company is able to obtain all the information that it needs about the suspected offence while the dawn raid is being carried out without having to inspect the case files at the ACC.¹¹
26. The dawn raid will usually start with a preparatory meeting. At the meeting, the FCA team leader will clarify basic facts with the company’s representative(s) (e.g. company name, address and purpose of business) and lay out the anticipated procedure.¹²
27. The preparatory meeting is an opportunity for the company to get a sense of which employee(s)/person(s) are considered “target persons” and what type of data/documents are the focus of the dawn raid. The FCA will ask where the relevant documents are located. The FCA is usually prepared to explain the allegations levelled against the company and the basic legal categorisation of the alleged conduct laid out in the search warrant. The FCA dawn raid team often asks questions about the company’s IT infrastructure during the preparatory meeting. It, therefore, makes sense to have an IT employee of the company attend the preparatory meeting.

⁹ cf Erika Rittenauer, Diana Ionescu, “Hausdurchsuchungen durch die Bundeswettbewerbsbehörde” (2014) *ecolex* 976, 977; Supreme Court of Justice of 20 December 2011, 16 Ok 7-13/11; *see also* Florian Neumayr, The Austrian Supreme Court rules on dawn raids under Austrian Law (*Polystyrene cartel case*), 20 December 2011, e-Competitions December 2011, Art No 48581.

¹⁰ cf Guidance Paper [2].

¹¹ *ibid* [1].

¹² *ibid* [3].

28. The company has the right to call in a trusted third party (e.g. a competition lawyer) for the dawn raid. However, the FCA does not have to wait until the lawyer has arrived before starting the dawn raid. As a rule, however, the FCA usually waits approximately thirty minutes before starting the dawn raid and, during that time, only takes IT securing measures. Once thirty minutes have elapsed, the dawn raid usually starts regardless of whether the lawyer of choice (or any lawyer) has arrived.
29. Section 12(4) AFCA requires the FCA to keep disruption, commotion and disturbance to a minimum wherever possible and to protect ownership and personal rights to the extent possible. In practice, the FCA tries to be unobtrusive during the search and to interfere as little as possible in the company's operations. Depending on the individual circumstances of the case (e.g. company size, type and extent of suspicion, type of IT used), a dawn raid may take a few hours or last for several days. The FCA is not required to adhere to the company's business hours when conducting the dawn raid.
30. In practice, the following dos and don'ts are helpful for raided undertakings:
 - The company's receptionists should receive regular training, in particular to ensure they are alert and aware of the importance of contacting the designated persons (management and external lawyers) as soon as possible after FCA staff arrive on site. Full transparency must be maintained vis-à-vis the FCA. Under no circumstances should the impression be created that the company wants to warn another company of a dawn raid!
 - Once the search warrant has been served, copies should be made for (i) the management and (ii) the legal department. Relevant individuals that are not already on the company's premises when the dawn raid starts (e.g. the company's lawyers) should have the search warrant forwarded to them by fax or e-mail.
 - The preparatory meeting should take place in a meeting room that is well isolated from the company's operations and ensures the conversation remains confidential. It makes sense to choose a suitable room when discussing the procedure in the dawn raid training. It is important that someone take note of the preparatory meeting. At the end of the preparatory meeting, the company should define which employees and representatives of the supporting law firms will accompany the members of the FCA search team during their search (so-called shadowing). Every "shadow" must keep minutes of the actions taken by the search team members and potential findings.
31. Companies should note that a leniency application is possible even after a dawn raid has started.

3.2. Obligations Imposed on the Inspected Undertaking and Penalties Incurred for Obstruction or Lack of Cooperation

32. The obligations of inspected undertakings are best set against the scope of the FCA's inspection rights: The FCA is entitled to copy documents, ask the personnel of the company questions to the extent that the response would not lead to self-incrimination and may seal the inspection room(s) (see the overview of the FCA's inspection rights in section 1.3 above).

33. Dawn raids that meet resistance or obstruction can be executed by coercion, and the FCA may call in police officers for that purpose (section 14 AFCA). Also, pursuant to the newly introduced section 29(1) no 2 lit c ACA on 1 January 2022, a fine of up to 1% of the total group turnover achieved in the preceding business year can be imposed on an undertaking or an association of undertakings that intentionally or negligently refuses to submit to official acts of the FCA during a dawn raid related to an alleged infringement of Article 101 or Article 102 TFEU. Obstruction and lack of cooperation are also potential aggravating factors in the later fine calculation. However, there are no precedents where the fine has been increased explicitly because of obstruction or lack of cooperation with the FCA's dawn raid.
34. During a dawn raid, the FCA team leader acts as "session police" (*Sitzungspolizei*) and may impose administrative fines of up to EUR 726 for acts of disturbance (section 11(2) AFCA and section 34 of the Austrian General Administrative Procedures Act). The prerequisite for the imposition of the fine is a warning followed by a further warning. Only then may the administrative fine be imposed.

Key To Dos at the start of a dawn raid

Instruct employees

- Inform employees and other persons who may be the focus of an investigation of their rights and obligations during a dawn raid.
- Designate specific printers to the FCA search team during the dawn raid. It is important that these printers are not used by company employees at the same time.
- Contact lawyers!
- Assign shadows!

Keywords

- Make a note of the search terms used by the FCA during the dawn raid.
- The search term list is an important asset and enables the company to gain a better understanding of the unlawful practices of which the company is suspected of having engaged in.
- If the company chooses to cooperate, the search term list may enable the company to quickly identify additional documents.

Preparatory meeting

- Choose a meeting room that is well isolated from the company's operations and ensures the conversation remains confidential.
- Instruct someone to take note of the preparatory meeting.
- Instruct an IT employee of the company to attend the preparatory meeting.

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3.3. The Premises Subject to the Inspection

35. The AFCA does not distinguish between dawn raids on business premises and private premises, unlike Regulation 1/2003, where different rules exist for dawn raids on business premises (Article 20) and private premises (Article 21). The FCA essentially has the same powers in dawn raids that take place on business premises and private premises.

36. The addressee of the search warrant and the premises to be searched must be designated in the search warrant. If the search warrant is unclear regarding either the addressee or the premises, it will not constitute a valid basis for the dawn raid. For example, a search warrant that states the wrong entity as addressee will not constitute a valid basis for the dawn raid, even if the addressee belongs to the same group of companies. FCA search warrants often explicitly extend to company vehicles.
37. The FCA can apply to the ACC for an extension of the scope of the search warrant during an ongoing dawn raid.¹³ It is in line with case law that a search warrant can be extended in particular to those group companies located at the same site.¹⁴ The FCA may apply for the extension of the warrant (i) by telephone, (ii) by e-mail or (iii) by means of a brief written statement. The ACC may grant the initial extension orally. The extended written search warrant must be served to the investigated company within twenty-four hours of the extension.¹⁵
38. The company's representatives and/or the company's legal department (assisted by the company's external lawyers) should carefully review the search warrant. The preparatory meeting is intended to allow the attendees to ask questions about the scope and content of the investigation and the search and to request explanations from the FCA. An open discussion during the preparatory meeting may help the FCA target its inspection. For the investigated company, this has the upside that the FCA is less likely to inspect documents that exceed the scope of the investigation or the search warrant. This reduces the risk of accidental findings.
39. Any later extension of the search warrant by the ACC upon request from the FCA should be clearly marked in the search protocol. As already stated, the search warrant can be extended in a telephone call with the ACC judge. The undertaking's representatives should insist on being present during such a telephone call. The FCA should also be asked to explain exactly why the search warrant needs to be extended. If an extension of the scope of the search warrant has been approved orally, written confirmation must be provided by the FCA within twenty-four hours.
40. In order to prevent "accidental discoveries", it is important to clearly define during the preparatory meeting where documents relating to the subject matter of the investigation are located. A filing system that clearly separates projects may prove useful. It is paramount that the "shadows" are aware of the scope and subject matter of the investigation as laid out in the search warrant.

4. The Search, Review and Copy of Relevant Information

4.1. Searches and Copies of Documents and Data

41. FCA employees may inspect all business documents relating to the subject matter of the investigation. It may also copy such documents. The FCA can undertake a cursory examination of documents that are not covered by the subject matter of the

¹³ *ibid* [12].

¹⁴ cf Supreme Court of Justice, 7 November 2013, 16Ok7/13 [6].

¹⁵ cf Guidance Paper [12].

investigation. Business documents include (i) physical and electronic documents and data of all kinds (e.g. e-mail, documents relating to meetings, minutes of meetings) and (ii) business diaries. On the other hand, the FCA cannot require that certain records be produced during the search. Such information could be requested by the FCA at a later stage by means of a request for information. For private items (e.g. personal mobile items and handbags), a cursory examination must be permitted so that the FCA can satisfy itself that the content is private. The FCA can make copies of relevant documents. There will usually be no basis for the seizure of originals (on seizures, see section 12(4) AFCA and section 1.3 above).

42. At a European level, legal professional privilege has been recognised for a long time. Correspondence between the company and the company's external lawyers is protected during a dawn raid. Austria lacks clear jurisprudence and practice on legal professional privilege. Neither the ACA nor the AFCA provides rules on legal professional privilege. However, the FCA has so far respected attorney-client privilege in most cases and developed a pragmatic approach (see below regarding electronic data and the LPP).
43. Section 12(5) AFCA provides that the company may object to the examination, inspection or seizure of certain specified documents, if it has a legal duty to observe secrecy or is entitled to refuse to testify (section 157(1) nos 2–5 of the Code of Criminal Procedure – “CCP”). In such a situation, the FCA seals the concerned documents and submits them to the ACC, which then decides on the objection.¹⁶ If individual documents cannot be sealed – e.g. due to the volume of documents concerned, the FCA will, upon request (section 12(6) AFCA), seal categories of documents and keep these separate from the general case file. The FCA then grants the person concerned an appropriate time limit (at least two weeks) to inspect the documents and indicate which ones are covered by the objection. If the deadline for objections is not observed, the documents become part of the general case file.
44. For electronic data, section 14(2) AFCA provides that the Criminal Intelligence Service (Bundeskriminalamt) may support the FCA when securing documents in electronic form. It is irrelevant whether the electronic data is stored on a data carrier on the premises covered by the search warrant or at external storage locations (this also includes cloud services). It is decisive that those data carriers on which certain documents relevant to the investigation are suspected can be viewed on the premises covered by the search warrant.
45. If data carriers such as laptops or company mobile phones (smartphones) are not located on the searched premises (e.g. in the case of field staff), the FCA can demand the production of the data carriers. Such a request for the production of documents is made by the FCA as an independent administrative authority (section 11(2) AFCA in conjunction with section 19 of the Code

¹⁶ cf Supreme Court of Justice, 6 March 2014, 16 Ok 2/14; *see also* Martin Favart, The Austrian Supreme Court dismisses an appeal by a company subject to a cartel investigation against an earlier decision by the Austrian Cartel Court, 6 March 2014, e-Competitions March 2014, Art No 66970.

of Administrative Procedure – “CAP”) and not in the execution of the search warrant.

46. The use of forensic software that enables a structured search of company data is in principle permissible. The use of forensic tools has to be in line with the scope of the search warrant.¹⁷
47. The same rights of objection exist concerning electronic data as with regard to physical documents (section 12(5) and (6) AFCA). Electronic data often comes in huge volumes, and it will often not be possible for the company and its employees to object to the examination, inspection or seizure of individual documents. In case of objections, the FCA shall, upon request (section 12(6) AFCA), seal the electronic data (e.g. data located on a specific hard drive) and will store it separately from the investigation file. The FCA grants the company a reasonable period of time (but at least two weeks) within which the company may inspect the data and must individually designate the data for which it asserts the right of objection. If this deadline is not met, the electronic data will become part of the electronic working copy of the FCA file and will be evaluated in the FCA inspections.
48. The FCA may then sort the relevant data on its own premises at the end of the dawn raid. Any personal data will be deleted. By the time the data is being sorted, the dawn raid will already have ended, which means that looking into the data is, according to the FCA’s stance, an internal procedure, and no company representative(s) need be present. However, afterwards, the FCA informs the company which data it plans to include in the case file. The company may then submit a statement (section 12(6) AFCA), raising potential objections. This statement may also be used later as the basis for asserting a prohibition of exploitation. Any other data not relevant to the investigation will be irrevocably deleted by the FCA from the working copy, and the company informed accordingly. In the event of any antitrust proceedings in connection with the subject of the investigation, the sealed backup copy will be deleted after a final judgement has been received.¹⁸
49. In addition, it is the consistent practice of the FCA to set a deadline after the end of the dawn raid, even outside of section 12(5) AFCA, within which the company may inform the FCA that certain documents are not covered by the scope of the search warrant for the reasons outlined above.

4.2. Questions and Interviews

50. During the dawn raid, the FCA may question all bodies and employees of the company. In doing so, the FCA is authorised to request all explanations on facts and documents related to the investigation’s subject matter. The questions must relate to facts. The FCA must not ask for (i) opinions, (ii) value judgements, (iii) conclusions, or (iv) assumptions.

¹⁷ cf Supreme Administrative Court, 22 April 2015, Ra 2014/04/0046.

¹⁸ cf Guidance Paper [34].

51. The FCA may also question the company's staff during the dawn raid about matters that extend beyond explanations of facts or documents. However, prior to the questioning, witnesses or involved parties are informed of their rights and obligations, particularly their right to refuse to give evidence. This is a consequence of the right against self-incrimination. The FCA will take minutes, and witnesses or involved parties will usually be asked to sign them. As a rule, company representatives, such as the managing director, are questioned as an involved party, while company employees with no representative function are questioned as witnesses.¹⁹ An involved party is entitled to have his or her own lawyer present during questioning. The FCA carries out these investigations independently as an administrative authority and not in enforcement of the search warrant. In this context, the FCA has full authority pursuant to section 11(2) AFCA in conjunction with section 19 CAP.

4.3. Seals

52. The FCA is authorised under section 12(4) AFCA to seal all premises to the extent necessary for the purpose of the investigation. Such a necessity can be assumed, for example, if the dawn raid lasts longer than one day and the FCA wants to ensure that no documents are removed during the night when the search team is not present. However, in order not to disrupt ongoing business operations, the FCA must keep the use of seals to a minimum wherever possible. If a seal is affixed, care must be taken to ensure that it is only removed by officials authorised to remove it.
53. The FCA is entitled to seal rooms or individual items (such as filing cabinets or laptops). The FCA uses official seals. Damaging or removing such a seal constitutes a criminal offence and could lead to an increase in the fine in cartel proceedings.²⁰ The criminal offence refers to individuals. However, companies can also be held liable based on the Austrian statute on the responsibility of legal entities (Verbandsverantwortlichkeitsgesetz – "VbVG").
54. Companies should make their employee(s) and other personnel aware of the consequences of seal tampering and should take appropriate precautions to avoid breaking the seal (cleaners should be instructed not to go near a seal). The FCA will also point out the legal consequences of seal tampering. If the FCA becomes aware of a potential act of tampering, it is obliged to file a report (see section 272(1) of the Austrian Criminal Code – "CC").²¹ Secondly, according to section 29(1) no 2 lit c ACA, a fine of up to 1% of the total group turnover achieved in the preceding business year shall be imposed on an undertaking or an association of undertakings that intentionally or negligently damages or removes a seal affixed by the FCA during a search of premises.

¹⁹ *ibid* [21].

²⁰ cf section 272(1) CC: "Any person who damages or removes a seal that a government official has attached in the execution of his or her official duties in order to keep a thing under lock, confiscate or label a thing, and who in whole or in part renders the purpose of the seal useless is liable to imprisonment for up to six months or a fine not exceeding 360 penalty units."

²¹ cf Guidance Paper [9].

Make sure the seal cannot be broken

Surveillance

- With a view to the severe legal consequences of breaking the inspection seal, it should be ensured that a trustworthy guard who is aware of the consequences if the seal were to be broken guards the sealed premises for the duration of the raid.
- Make sure that the cleaning team does not enter the room and does not move unsupervised in the vicinity of the seal.
- Instruct the relevant employees on the risks and sanctions for seal tampering.

Photos

- It is also advisable to make photos of the seal in the presence of the inspectors and to comment (and have a written note prepared) any damage to the seal.

Precautions

- Seals may not properly adhere to certain surfaces and, in such a case, precautions should be taken by the FCA's dawn raid team to avoid situations where the company is being falsely accused of having tampered with the seal (e.g. by applying additional seals).

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4.4. Minutes

55. The FCA prepares an official record of the dawn raid. This record covers the relevant details, such as company address, contact persons within the company, time at which the warrant was served, start and end time of the raid, electronic or physical copies of company data, noteworthy incidents during the dawn raid, as well as any comments and statements made by company representatives during the dawn raid. The company should make a copy of the official record at the end of the dawn raid. The official record will subsequently be submitted to the ACC.²²
56. Further, during a final meeting (*Abschlussbesprechung*), the next steps and the procedure to be followed regarding the collected documents and electronic data and the company's potential willingness and ability to cooperate in the FCA's investigation are discussed. The final meeting is also used to review and finalise the FCA's dawn raid record. The final meeting is also usually the right moment to present objections against the details of the examination and against the inspection or seizure of certain documents.

²² ibid [17].

Some central Dos and Don'ts on dawn raids

Dawn raid protocol

- The company and the company's external lawyers should carefully review the FCA's dawn raid protocol to ensure that it reflects the company's perception.
- Any potential misunderstanding visible in the minutes must be clarified.
- It is important to ensure that the company understands and has a list of the documents and data that the FCA has made copies of.

Employees

- Employees whose offices are searched or being questioned by the FCA must understand that they absolutely must not inform anyone who does not work for or is otherwise employed by the company of the dawn raid and that they must not obstruct the inspection in any way (e.g. by deleting or otherwise destroying documents).
- They should talk as little as possible about the raid with colleagues within the firm to limit the risk of leakage. If meetings or contacts with other relevant companies are imminent, the company or their lawyers should discuss with the FCA whether the employee should attend the meeting and how he or she should behave if he or she does.

Contact with the press

- Special care should also be taken in any contact with the press. Any statement to the press should be worded very carefully, especially if the company considers cooperating with the investigation, and should be checked by the company's lawyers.
- The FCA will sometimes confirm the fact that dawn raids have been conducted in a specific sector and may issue a press release, but usually it will not disclose any details that reveal which undertakings have been searched unless that information has already been leaked.

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4.5. Continued Inspections

57. As described in section 4.1, the FCA often takes a copy of relevant electronic data, with the aim to include relevant data into the working copy of the FCA file after the dawn raid has formally ended. As outlined above, the company has two options regarding these "continued inspections". Upon request, the undertaking can, according to section 12(6) AFCA, review the copy of the electronic data within a deadline specified by the FCA and submit objections with regard to documents that, in its view, exceed the search warrant. Or, if the company does not request a procedure according to section 12(6) AFCA, the FCA reviews the data on its premises, with or without legal representatives of the company being present and then informs the undertaking which documents the FCA intends to include in the working copy of the FCA file, so that the company may raise objections at this stage.

5. Judicial Review

58. The investigated company may appeal against the search warrant issued by the ACC to the Austrian Supreme Court (acting as Cartel High Court). This appeal can be used to review the conditions of the search warrant at the time it was issued,

i.e. whether the search was lawfully ordered by the ACC. The appeal period is fourteen days from the date of service of the search warrant.²³

59. The modalities of the search cannot form the subject of an appeal to the ACC. If the FCA takes measures during the search that are obviously not covered by the search warrant, the company is entitled to lodge a complaint with the Federal Administrative Court (Bundesverwaltungsgericht – “BVwG”) pursuant to section 130(1) no 2 of the Federal Constitutional Act (Bundesverfassungsgesetz – “B-VG”). Such a complaint must be filed with the BVwG within six weeks of the company becoming aware of the disputed measure. The appeal does not have a suspensive effect.²⁴

²³ *ibid* [13].

²⁴ *ibid* [36].

Competition Inspections in 21 Jurisdictions

A Practitioner's Guide

Nathalie Jalabert-Doury

Foreword by Paul Nihoul



This is the third volume in this series. The first volume addresses inspections in France, and the second volume addresses the European Union.

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