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## Antitrust Enforcement - The Revival of Dawn Raids in Europe

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After an 18-month hiatus, dawn raids are back in practice in Europe, not only by the European Commission but other competition authorities as well such as the French *Autorité de la Concurrence*.

Dawn raids are unannounced inspections of offices and/or domestic premises by competition authorities seeking to gather evidence of suspected antitrust violations, usually secret cartels. European Commission and/or national competition authority officials, accompanied by police officers, may seize/copy all documents, equipment, records, data (including confidential paper files), mobile phones (texts, WhatsApp chats), personal notebooks, laptops, etc. they find that are relevant to the investigation. In principle, they cannot take legally privileged or out-of-scope documents.

With COVID-19 pandemic health restrictions progressively receding and employees coming back to the office, inspections have picked up in the last few months. The number of raids is expected to pick up, to clear a backlog of planned inspections that has built up with the pandemic. Since June 2021, around 20 dawn raids have been reported in Europe, including four by the European Commission,<sup>1</sup> two by the *Autorité de la concurrence*,<sup>2</sup> and one by the Dutch AMC.<sup>3</sup> More are planned for the near future. Margrethe Vestager, head of the EU competition watchdog, recently made it clear that this was “*just the start of a series of raids [planned] for the months to come*”.<sup>4</sup>

Raids present new features, in reaction to the evolution of the working environment.

- We expect to see an **increase in domestic premises (homes, vehicles) searches**. While these have always been possible, they were very rare. To search homes, competition authorities need to show reasonable suspicion that incriminating evidence is kept there. Since employees have been working from home for the past two years, it has become easier to demonstrate that the conditions are met. The trend is already underway: on November 10, 2021, the *Autorité de la concurrence* raided homes of employees of several companies in the food retail sector.
- **Raids may be increasingly used in non-cartel cases**. The European Commission and the Hellenic Competition Authority have recently conducted dawn raids for suspected abuses of dominance (in the animal health sector in Belgium, and the markets for production and supply of pharmaceutical products in Greece); the Hellenic Competition Authority has also raided the premises of companies active in import/manufacturing, wholesale and retail trade of school equipment suspecting unlawful vertical agreements.
- **Raids are likely to last longer than before**, due to the need to respect health protocols and requirements for additional coordination (multiple venues to search). **Searches will increasingly target IT data and personal devices**. Work from home has sped up the

shift to all-electronic and blurred the lines between professional and personal laptops, phones or diaries. **Instant messaging apps** will be closely controlled.

- The draft EU regulation on **foreign subsidies**, which is expected to enter in force in 2022, will give the EC the power to search offices of (EU and non-EU) companies that may have received illegal public support from non-EU countries, **broadening its scope for intervention**.<sup>5</sup>

The legality of dawn raids may be challenged before the courts. Anticipation – i.e., updating dawn raid guidelines to the COVID-19 era – is of the essence to start this long-term struggle on the right foot.

The table below presents some high-level recommendations. For more guidance, the Paul Hastings Antitrust team is here to help.

Standard recommendation	COVID-19 update
<b>Ahead of time</b>	
Identify at least one internal contact point per business premises who will be trained to respond to the competition authorities' surprise visit, and will take charge of the company's response until external counsel arrives.	Identify alternative contact points, in case the main contact person is working from home on the day of the raid.  Ensure that contact points' phone numbers are available so that they may be easily contacted even if they are working from home.
Prioritize senior employees familiar with the company's IT structure and the legal department's materials.	Prioritize employees who frequently come to the office or who may quickly turn in.
Train your staff about their rights during searches (privacy, no self-incrimination, legal privilege, etc.).	Enhance trainings with: <ul style="list-style-type: none"> <li>▪ the right to privacy, considering the potential for abuse of process in domestic searches / searches of personal devices; and</li> <li>▪ health protocols – inspections shall be "<i>conducted in compliance with all coronavirus health and safety protocols to ensure the security of those involved</i>" (European Commission's new press releases). Failure to observe these requirements could become an additional tool to challenge the legality of searches.</li> </ul> <p>Conduct specific training about domestic raids for directors and heads of sales, whose homes or vehicles are the most likely to be searched, and who will most probably receive the assistance of the in-house legal team / external counsel only a few hours after the raid has</p>

	<p>begun. They should know that their homes can be raided even in their absence.</p>
	<p>Dawn raids are increasingly becoming an IT exercise – train internal IT experts to deal with the authorities’ IT experts.</p>
<p><b>On the spot</b></p>	
<p>Immediately call external counsel and ask the officers if they can wait for his/her arrival before commencing the search.</p> <p>Although officers are not legally obliged to do so, they usually accept to leave an hour for external counsel to arrive as a matter of courtesy. If you can reassure them about the safety of the data (e.g., IT is mirrored / recorded every day at 3 a.m., such that everything that has happened until then is safely backed up), they will likely be more inclined to allow for external counsel to arrive before beginning the search itself.</p>	<p>Consider that employees (directors, heads of sales) may be raided simultaneously at home.</p> <p>Employees who are raided at home can ask to call the internal contact point / legal counsel.</p>
<p>Request to review the decision authorizing the search and verify carefully the scope authorized and other details.</p>	<p>In case the employees targeted are not in the office, call them in.</p> <p>Their presence may shorten the duration of the raid as they will be able to answer the investigating officials’ factual questions rather than having the officials seal an office for a few days.</p>
<p>Do not contact third parties / competitors to inform them about the raid.</p>	
<p><b>During the raid</b></p>	
<p>Be polite and cooperative; stick to the minimum.</p> <p>Officers may conduct on-the-spot interviews – voluntarily giving more information than requested, or responding to out-of-scope questions, will not win the favor of the officers, and may backfire.</p>	<p>Be ready to:</p> <ul style="list-style-type: none"> <li>▪ Grant remote access to data stored on devices used to work from home, including personal devices, as the officers will most likely ask for it.</li> <li>▪ Set up video calls in case the officers want to interview an employee who is working from home.</li> </ul>
<p>Never leave an officer alone in a room.</p>	
<p>Identify any correspondence coming from outside counsel subject to attorney-client privilege, and isolate it from the investigation.</p>	<p>To the extent possible, apply this guideline to any IT search.</p>

<p>Do not remove, discard, or conceal anything that might be responsive to the decision authorizing the raid or related to the investigation – this could lead to separate charges for obstruction.</p>	<p>Raids may span over a longer period than previously as:</p> <ul style="list-style-type: none"> <li>▪ Officers usually ask the employee whose office is the subject of a search to identify the folders relevant for the investigation – if the person is not there, the search will be less efficient.</li> <li>▪ Due to health protocols, officers may need to spend less time in an office to air it out, and postpone the rest of the visit until the next day.</li> </ul> <p>The premises (business or domestic) will be sealed until the search resumes. Do not breach the seals, as it can lead to separate charges for obstruction.</p>
<p><b>At the end of the day</b></p>	
<p>Document everything that has happened (what the investigators did, whom they interviewed, what they are taking away with them) through minutes.</p>	<p>In case the raid spans over several days, conduct that exercise at the end of each day.</p> <p>In case the raid has been conducted in several locations, make sure to coordinate with the other internal contact points / staff members raided at home.</p>
<p><b>After the raid</b></p>	
<p>Conduct an internal investigation to retrace the raid steps and investigate the issues implicated by the raids.</p>	

Paul Hastings guidance for raids in the U.S., by the FBI, can be found here: <https://www.paulhastings.com/insights/client-alerts/u-s-criminal-antitrust-enforcement-how-to-respond-when-the-fbi-comes>



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- <sup>1</sup> The raids were conducted in the following sectors: defense (November 23, 2021, [here](#)), animal health in Belgium (October 25, 2021, [here](#)), wood pulp in several Member States (October 12, 2021, [here](#)), and manufacturing and distribution of garments in Germany (June 22, 2021, [here](#)).
  - <sup>2</sup> The raids were conducted in the following sectors: food retail (November 10, 2021, [here](#)) and collection and use of pharmacy data (July 9, 2021, [here](#)).
  - <sup>3</sup> The raid was conducted in the food-processing sector (December 1, 2021, [here](#)).
  - <sup>4</sup> Speech by Margrethe Vestager at the Italian Antitrust Association Annual Conference – “A new era of cartel enforcement”, 22 October 2021, available [here](#).
  - <sup>5</sup> Proposal for a regulation of the European Parliament and of the Council on foreign subsidies distorting the internal market, May 5, 2021, [here](#).