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## Dawn raids under Swiss antitrust law: Prevention and good preparation will pay out!

In 2004, Switzerland has enacted a stricter antitrust law. On the one hand, this allows the **direct sanctioning** of practices violating antitrust laws, such as price fixing or abuse of a dominant position. On the other hand, it has created the basis for **carrying out dawn raids**.

As the responsible authority, the Swiss Competition Commission (COMCO) has already made intensive use of the new provisions and competences: Thus, **finances in the hundreds of millions** (not yet effective) were imposed in individual cases; the COMCO has also searched company premises in numerous cases. This development will continue in the future.

The present Flash informs you about problems concerning antitrust law and dawn raids and, thereby, alerts you to them. The relevant themes are illustrated through cases investigated by the COMCO. But they are likewise valid in **other areas**, such as investigations by supervisory and regulatory authorities (e.g. Swissmedic or the Swiss Federal Banking Commission), tax authorities or criminal investigation authorities in general.

In all these cases, it is crucial for the affected enterprise to be **well prepared** in order to avoid being surprised by a dawn raid. Insufficient preparation may result in **serious impacts on business operations and reputation** of a company.

# Dawn raids under antitrust law – First experiences and lessons learned

## A new mode of investigation in Switzerland

While dawn raids under foreign antitrust laws have been standard for a long time, this is **new territory** in Switzerland: The first dawn raid took place in 2006 and concerned companies active in the air freight business. Since then, more searches were carried out at companies active in the business of door and window fittings, in the transportation and logistics sector, in the business of electrical installation, as well as, most recently, in the production sector of heating, cooling and sanitary installation components. New legal framework conditions, as also the most recent actions of the competition authorities, suggest that dawn raids under antitrust law are **being established** as a common means to initiate proceedings against illegal antitrust behaviour.

Under the antitrust law, all branches of the economy – production, trade and services – can be affected by a dawn raid. **Multinational groups, as well as local SMEs**, may get into the focus of the competition authorities. The reasons for dawn raids are quite varied: Conceivable examples are voluntary reporting of the involved company that wants to benefit from the leniency programme, a complaint by a (former) employee, or an action brought on by a supplier, customer, or competitor.

An imminent dawn raid is usually not foreseeable for the company concerned and such a measure can have **far-reaching effects on the business operations**. This should not be underestimated. Rather than letting oneself be taken by surprise by the competition authorities, there need to be clear rules of conduct within the company, in order to be prepared for an investigation and, thereby, be able to limit harm to the business. Good preparation also allows the creation of a cooperative climate with the dawn raid team of the COMCO Secretariat heading the search. When determining a possible fine, **cooperation** is in general favourably viewed.

## Definition, legal framework and conditions

The term **dawn raid** is understood to mean the unannounced visit of the COMCO Secretariat, in order to search the business premises as well as private premises, or vehicles of the employees. The search can extend over several hours or even days. It is headed by a dawn raid team, usually consisting of a supervisor of the COMCO Secretariat, several employees and IT specialists, as well as a cantonal official.

The revised **Swiss Federal Act on Cartels and Other Restraints of Competition (Cartel Act)**, having become effective on 1 April 2004, created a clear legal basis for carrying out dawn raids (Art. 42 para. 2 Cartel Act). Based on this, the COMCO Secretariat issued an information sheet on the procedures concerning dawn raids; particularly, it contains explanations in connection with the lawyer's role.

The COMCO Secretariat can conduct a dawn raid under the following **conditions**:

- There must be clear **clues** indicative of an unlawful agreement restraining competition or an abuse of a dominant position. A so-called fishing expedition, in which documents are seized randomly, is inadmissible;
- The probability of finding important **evidence** on the examined premises must be given;
- A dawn raid must abide by the principle of **proportionality**, i.e., among other things, there are to be no less severe means of achieving the COMCO's objectives;
- A dawn raid must be **ordered** by a member of the COMCO Presidency.

## Right to presence of a lawyer

The company subject to a dawn raid is entitled to **bring in a lawyer**. Initial experiences have meanwhile shown that the COMCO Secretariat does not at all wait, or at least does not wait long, for a lawyer to appear before starting the search.

It is therefore significantly important for a company to be able to count on its lawyer's services within the briefest period of time. To **prepare itself proactively**, there should be collaborations with an in-house counsel and/or external lawyer. Purely practical concerns must not be neglected, for instance, in a way that the company and the lawyer have the necessary information at their disposal (site plans, access routes, phone numbers) so that the lawyer can be immediately informed, and can duly appear on site. This presupposes prior consultation and organisation between the company and its lawyer.

## Places searched and documents seized

The search warrant must clearly set out the identity of the **concerned company** and the address of the premises subject to search measures. Inside the concerned **premises** or vehicles, the au-

thorities are particularly entitled to search offices, filing cabinets, records, as well as information systems and mobile communication means (laptops, mobile phones, PDAs). In order to be examined and seized, documents must, with a certain probability, relate to the object of the proceeding instituted. The employee to whom the documents belong must have the right to comment on the content before they are seized. When exercising this right, (s)he can be accompanied and advised by a lawyer.

The following **documents** can be searched and seized:

- **Documents in hard copy:** The COMCO Secretariat can, in principle, seize original documents. These will not be available for several days or even weeks. Making duplicates is allowed, provided however this does not hinder the progress of the search; this is often inevitable for the continuation of the business operations. For this reason, it should be ensured that the necessary copying capacities (equipment and personnel) are available in order to duplicate all documents within a useful period of time. An agreement should be arrived at as early as possible with the dawn raid team as to when and how the documents to be seized can be duplicated.



- **Electronic data:** Experience shows that, as a rule, the COMCO Secretariat collaborates with IT specialists who duplicate or mirror the electronic data, whereby deleted data can also be made readable again. If this is not possible (e.g. due to passwords that are not given out, or are not available), the competition authorities seize the data carriers themselves, which inevitably leads to considerable disruptions of business operations. For this reason, it is advisable to ensure that an IT employee, or someone who is familiar with the IT system, is on site in order to guarantee the dawn raid team access to all electronic data.

By mirroring electronic data, documents that do not relate to the investigation can make their way into the COMCO's possession. The company must therefore demand to have **seized data or data carriers sealed**. This ensures that they are not used by the competition authorities before a judge has decided on the admissibility of the seizure.

- **Documents of in-house or external counsels as special case** (e.g. a memo concerning the admissibility of a certain practice under antitrust law): Cf. the following contribution in this Flash.

### Lessons learned and summary

With the experience from previously conducted dawn raids, the following conclusions can be drawn:

- A dawn raid takes place only if the authorities have specific clues indicative of illegal behaviour. The instituting of antitrust proceedings is best

prevented if the company has an **effective internal compliance system**, in such a way that its exposure to agreements violating competition laws, or to abuses of market dominance can be reduced in the first place.

- A company can sustain serious disruptions of business operations if it is not prepared for a dawn raid. The risks can be reduced to a minimum if the company **issues guidelines for internal conduct** describing the procedures in the event of a dawn raid, and by preparing the employees for this situation (e.g. by internal training sessions and mock dawn raids).
- To benefit from the right to be assisted by a lawyer during the search, the company must organise itself in advance in such a way that it can count on the lawyer's presence within the briefest period of time. For this, it is indispensable for the company to have its **lawyers' contact information** available (addresses, phone numbers). It must be clear which lawyer is the first contact person and (s)he must be sufficiently informed of processes within the company.
- It is allowed to make duplicates of original documents that are to be seized. The company must be sufficiently organised and equipped for this. It must be ensured in particular that the **personnel and logistical capacities** for this task are available (staff, copiers, IT support).
- The company cannot hide behind the attorney-client privilege when documents are held by a non-lawyer employee. **Sensitive data must, therefore, be stored separately from other data** in such a way that only the lawyer has access to them.

## Dawn raids and attorney-client privilege – Current status

Dawn raids by the COMCO Secretariat often raise the question of whether and to what extent the communication between the investigated company and its in-house counsels and/or external lawyers can be seized. In this disputed question, the Swiss Federal Supreme Court most recently handed down an important ruling which will be further addressed here.

### Restrictive position of the COMCO

The COMCO Secretariat outlined its position in an information sheet on procedure for dawn raids (downloadable from COMCO's website [www.weko.admin.ch](http://www.weko.admin.ch)). In its opinion, within the framework of a search, only the **defence lawyer correspondence** found at the company is **exempted from seizure**. Only correspondence that is relevant to the defence in the current proceeding is considered defence lawyer correspondence. Such correspondence is typically not yet available at the time when a dawn raid is carried out, which is why this exemption hardly ever becomes relevant. In addition, the COMCO takes the view that the attorney-client privilege applies only to external lawyers, but not to in-house legal counsels.

### Legal privilege for in-house counsels as well?

Like the COMCO, the prevailing doctrine in Switzerland opposes an expansion on in-house legal counsels of the attorney-client privilege according to Art. 321 of the Criminal Code and the corresponding reflex effects of the right to refuse testimony and the surrender of documents. The **Appeals Chamber of the Federal Criminal Court** also decided pursuant to that, on 14 March 2008, in a proceeding concerning the unsealing of records seized by the COMCO. This attitude is explained, above all, in that the attorney-client privilege is allegedly not tailored to in-house counsels, because it is intended to protect particularly the communication between the client and his neutral, independent lawyer, and as an employee of the company, an in-house counsel precisely does not meet this independence requirement.

The narrow interpretation of the attorney-client privilege, practiced by the Swiss authorities, appears intrinsically problematic: The introduction of direct sanctions in Swiss antitrust law in 2004 also entails an **increased compliance obligation of the company**. However, effective compliance requires corresponding instruments. By excluding the company in-house counsels from the right to refuse testimony and surrender of documents, an unfiltered communication with the in-house lawyers regarding internal wrongs is prevented because the concerned company has to fear that the information gathered with the in-house lawyers may be seized by the COMCO. Effective compliance, which would ultimately be in the public interest as well, is thereby thwarted. In this context, one still awaits the further handling of a motion, accepted only recently by the Swiss Federal Parliament, which requires in-house counsels to be placed on equal footing with independent/external lawyers with respect to professional secrecy.



## Recent Swiss Federal Supreme Court ruling

The decision of the Federal Criminal Court was brought to appeal by the concerned companies to the Federal Supreme Court, which ruled on it on 28 October 2008 (judgment 1B\_101/2008). The Swiss Federal Supreme Court judgment is noteworthy with regard to the attorney-client privilege in two respects:

- On the one hand, the Federal Supreme Court designates as disputed in literature the question whether the attorney-client privilege also applies to in-house lawyers and whether they are, thereby, entitled to a corresponding right to refuse testimony and surrender of documents, and it leaves this question, which it previously has not had to answer, **expressly open** in the present decision as well. The desired Supreme Court clarification of this fundamental question is still awaited.
- On the other hand, the Federal Supreme Court upholds that, if at all, the only documents that may fall under the attorney-client privilege are those that are **in the custody of the (external or internal) legal counsel**, or that (s)he involuntarily lost. In contrast, the legal privilege does not cover documents that the client has kept in its possession, or has remitted to third parties. Nor does the attorney-client privilege apply to the correspondence of the legal counsel with the client, provided the correspondence is in the client's possession.

## Conclusion and recommendations

The question as to whether in-house counsels are also covered by the attorney-client privilege continues to be unresolved. However, according to the Swiss Federal Supreme Court's most recent jurisprudence, it is clear that the legal privilege can only relate to documents that are **in the sole custody of the (external or in-house) legal counsel**, and not also in the custody of the company. This results in a series of recommendations to companies with respect to possibly imminent dawn raids:

- Privileged attorney-client correspondence must be **clearly identified as such** so that it can be quickly separated out in the event of a dawn raid; a **separation of the correspondence with in-house counsels and external lawyers** is equally recommended.
- As long as there is uncertainty as to whether the communication with in-house counsels is subject to the legal privilege, one should **rely primarily on the support of external lawyers** for antitrust law clarifications and assessments.
- Communication relevant to the antitrust law with external lawyers should be stored exclusively **with them and reviewed there**. Caution is required in particular for **communication via e-mail**: Deleted e-mails can potentially be restored in case of server or hard-drive mirroring by the authorities!

## The Antitrust Law/Dawn Raids practice team introduces itself

The Antitrust Law/Dawn Raids practice team of WENGER PLATTNER can build on **profound know-how and wide experience** from its own legal consultancy activity and from former employments of individual team members at the COMCO Secretariat. The team advises SMEs and major companies in antitrust law matters. In the area of dawn raids, the team demonstrates several years of consulting activity, has organised numerous **training sessions** in various companies, and was already involved as external lawyer or representative of parties on various occasions in **investigations** conducted by the COMCO or other authorities. Its presence at the three sites, Basel, Zürich and Bern, and the teambuilding across its sites optimally ensure **geographic proximity to clients** throughout German and French-speaking Switzerland and the **ability to react rapidly** in emergencies.

The Antitrust Law/Dawn Raids practice team offers in particular the following **services**:

- Advising on substantive antitrust law (e.g. distribution agreements' compliance with antitrust law)
- Designing and implementing of antitrust law compliance programmes
- Preparing of manuals, guidelines and policies for dawn raids
- Conducting of training sessions for legal experts and management of companies
- Organising of mock dawn raids at the company on site
- Establishing of dawn raid preparedness teams with guaranteed ability to be rapidly reached in case of need
- Representation of companies in civil antitrust proceedings and in investigations and proceedings before the COMCO and other authorities

The Antitrust Law/Dawn Raids practice team is composed in particular of the following **team members** at the three sites:

- **Basel:** Gerhard Schmid, Dieter Gränicher, Roland Mathys, Regula Hinderling, Reto Vonzun
- **Zürich:** Karl Wüthrich, Brigitte Umbach, Roland Burkhalter, Oliver Künzler
- **Bern:** Jürg Rieben, Fritz Rothenbühler, Blaise Carron, Viviane Burkhardt

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