



Time to Brush up Your Dawn Raid Guideline?

10th Amendment of the ARC // New Investigative Powers of the FCO

The 10th amendment of the German Act against Restraints of Competition (ARC) is expected to enter into force early 2021. While the changes to the dominance regime are probably the most prominent, requirements of the ECN+ Directive (Directive (EU) 2019/1 of the European Parliament and of the Council of 11. December 2018) will also bring about significant changes.

The amendment extends the investigative powers of the Federal Cartel Office (FCO) on many levels. One major change concerns the FCO's powers during dawn raids, making them more comparable to EU law.

So – time to brush up your dawn raid guideline?

Status quo

Under EU Law companies are required to actively cooperate during a dawn raid, including representatives and employees having to produce documents and explain facts. Companies are however not required to provide answers which might involve an admission of an infringement.

Under German law, this is currently different: Companies are only required to tolerate the raid (while an active participation is not required, in practice, it could still be advisable to support the FCO during raids to some extent).

What's new? The FCO's "cooperation request"

Under the new rules, the FCO will be able to establish a cooperation obligation for the company and its representatives and employees. The cooperation request has to be explicit and must be documented. If it is issued (which we would expect to become a standard practice),

the company and its representatives and employees must provide explanations of facts and documents that might be relevant to the case, similar to what is already required in a dawn raid governed by EU law.

Furthermore, if obtaining relevant information otherwise is "*significantly more difficult*", individuals can be requested to disclose facts that could lead to their own or the company's prosecution of a criminal or cartel offence. This underlines a key difference to EU law, as under German law, individuals can also be held liable for competition law infringements, which is not the case in EU law.

To safeguard the constitutional privilege against self-incrimination (*nemo tenetur*), the legislator decided to provide additional protection for individuals who have been requested to cooperate with the FCO. Facts provided by an individual as a result of the obligation may only be used in criminal or antitrust proceedings against that individual (or relatives), *if the individual has given prior consent*.

The legislator points out that facts and explanations provided by an individual in this context may still be used in full against the company, as the privilege against self-incrimination only applies to individuals, not companies.

So just how far does the obligation of individuals to cooperate reach? It remains to be seen how this will play out in practice. There is some debate about the applicability of *nemo tenetur* on companies. While *nemo tenetur* for companies is not fully accepted so far, EU case law at least recognises that there are "rights of the defence" of a company which also include the right of the



company not to answer questions that would effectively be an admission of an infringement. If, under the new law, employees are required to go beyond that (as they are protected against prosecution), this could render the defence rights of the company essentially worthless.

Confession or Explanation?

So, where do the defence rights of the company begin and where does the obligation to actively cooperate and submit documents and explain facts end? In practice, this can be a very fine line. Some guidance can be drawn from EU case law. For example:

- Questions in relation to the place, the date and the participants of certain meetings have generally been seen to be acceptable.
- Generally acceptable are also questions on specific factual details concerning particular documents.
- Inacceptable and off-limits are generally questions in relation to the purpose or the objective of certain actions, measures or documents.

In sum, purely factual questions and the production of documents will most likely be within the limits while questions that requires an assessment or evaluation of said facts by the company are questionable and should be addressed during the raid.

It remains to be seen where the FCO will draw the line in new cases coming up in particular with a view to the relationship between the cooperation obligation of individuals and the defence rights of the company. Ultimately, companies will have to assess on a case by case basis how to navigate in these difficult waters.

Fines for Failure to Cooperate?

Yes. Failure to cooperate correctly, completely or timely may be fined (up to 1% of group turnover for companies and up to €100.000 for individuals).

Action items?

The new investigative powers of the FCO are not clear-cut, but the change from "tolerating" to "actively cooperating" will be significant in any case. Things to consider:

If your company's dawn raid guideline contains details to the rights and obligations during a raid, you will need to revise this chapter to reflect that active support may be required. You should also ensure that any cooperation requirement has been made explicit and added to the protocol. Also, consider what active cooperation means for individuals in terms of incentives and their individual fear of potentially being prosecuted. These questions should be tackled head-on and some can be addressed in your antitrust trainings, which you may also want to review on this occasion.

If this is too detailed for your company's guideline, it is always worthwhile to review the "dawn raid basics":

- In the event of a dawn raid, are the internal / external contact details up to date?
- Is the reception staff well trained to deal with the dynamics of a dawn raid? The reception staff will be the first to interact with the FCO.
- Who takes the lead internally? Is it clear for all concerned individuals who needs to communicate with whom?
- Are relevant dawn raid processes still valid and key personell aware?

Any questions? Get in touch!

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