

# Ringling twice – not always the postman

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## Introduction

## Points of interest

## Comment

### Introduction

Following some busy years conducting dawn raids in various industries – including big retailers, parts of the building industry, producers and electronics dealers – in October 2017 the Federal Cartel Authority (FCA) (with some ceremony) published guidelines regarding such searches.<sup>(1)</sup> The guidelines largely follow the European Commission's practice.

Although the guidelines contain no big surprises, as they largely reflect the law and the FCA's earlier practice, there are some interesting points – particularly as some of the Austrian legal regime deviates from European law and practice. Like other national competition authorities, not only can the FCA perform searches based on Austrian cases, but also European cases.

Some of the key points of interest are outlined below.

### Points of interest

The FCA will conduct a dawn raid based on a court order, which will be issued on the FCA's request by the Vienna Higher Regional Court, acting as the Cartel Court. The court order must be presented within 24 hours of a search at the latest. Normally, it will be provided at the beginning of the search. The court order can be appealed within two weeks following its presentation. The modalities of the search itself can be reviewed by the Federal Administrative Court. However, none of these appeals suspend the search and previous case law shows that they are unlikely to succeed.

Normally, there is a short discussion at the beginning of the search and enterprises have the right to ask for their lawyers to be present. However, the FCA will not wait to start the search until the enterprise's lawyers arrive.

The FCA has the right to search all documents or other evidence at the premises named in the court order, including electronic files. Additionally, if necessary, the FCA may seize evidence or place it under seal for the duration of the search. Breaking such seals can result in significant costs.

Any evidence found coincidentally which is not covered by the objective stated in the court order must not be used for that procedure. However, it may form the basis of an extension of the court order or a new procedure.

In practice, the FCA will focus on electronic files, which it can and will review using special tools and experts. Recently, it was clarified that files which are not physically stored on the premises, but which the enterprise can access from the premises, can be searched. The enterprise under threat of a fine must provide access to these files and the FCA will provide the enterprise with a copy of any data that it seizes.

An enterprise's right to object to the copying of physical documents or electronic data is quite limited and normally consists only of (professional) privileges of confidentiality, as provided for by

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law. However, enterprises can require the data taken to be sealed and comment on its possible confidentiality within a deadline set by the FCA.

Before and during a search, enterprises can make a leniency application, which may lead to a reduced fine or the avoidance of a fine. However, the enterprise must provide the FCA with information or evidence which can be used to prepare a statement of objections immediately.

One important point – although repeatedly raised by lawyers – has not been clarified in the guidelines: under Austrian competition law, it is unclear whether written advice from lawyers found during a search is protected against search or seizure by the authorities. The criminal procedure rules were recently amended explicitly to include the protection of such legal advice. In any case, the FCA has repeatedly vowed to abstain from searching, seizing or using such legal documents found during raids.

### **Comment**

It remains to be seen whether the FCA's extensive dawn raid activities will significantly change in light of the guidelines. In any case, the guidelines may provide some comfort to affected enterprises – to the extent that this is possible when facing an early morning knock on the door.

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### **Endnotes**

(1) [www.bwb.gv.at/Aktuell/Documents/HD\\_Leitfaden\\_finale%20Version%20Oktober%202017.pdf](http://www.bwb.gv.at/Aktuell/Documents/HD_Leitfaden_finale%20Version%20Oktober%202017.pdf).

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