Seizure of Electronic Data: European Commission Dawn Raid Inspection Guidance Revised

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In an era when the vast majority of written communications are made by electronic means, a company’s obligations to cooperate with Commission officials in an “antitrust dawn raid” extend to the granting of access to all electronically stored data. This is emphasised in the Commission’s revised guidelines on conduct of “dawn raids,” published on 18 March 2013.

Every company is subject to the possibility of an unannounced inspection (“dawn raid”) by the European Commission.

Obstruction of a dawn raid can expose a company to fines, irrespective of whether or not it was involved in an antitrust infringement. In an era when the vast majority of written communications are made by electronic means, a company’s obligations to cooperate with Commission officials extend to the granting of access to all electronically stored data. This is emphasised in the Commission’s revised “Explanatory note to an authorisation to conduct and inspection in execution of a Commission decision under Article 20(4) of Council Regulation No 1/2003” (the revised note) published on 18 March 2013.

In a thinly veiled reference to the EUR 2.5 million fine imposed recently on Energetický a průmyslový holding and EP Investment Advisors (companies active in the energy sector in the Czech Republic) which failed to secure certain of their own electronic data (Commission Decision of 28 March 2012 in Case COMP/39.793 EPH and Others), the revised note makes it clear that companies must not interfere with Commission officials gathering electronic data.

The revised note contains the following important changes:

- For the first time, it is stated explicitly that a company under investigation must make its IT staff available to assist Commission officials with, among other things, temporarily blocking email accounts, temporarily disconnecting running computers from the network, removing and re-installing hard drives from computers and providing support through “administrator access rights”.
- The revised note provides a broader list of the potential types of storage media that may be accessed and search tools that may be used during a dawn raid. It likewise makes it clear that the Commission can use a broad range of hardware, either its own or that of the company under investigation.
- The revised note clarifies that the rules apply to Commission “officials” and “other accompanying persons authorised by the Commission to conduct the inspection”, including national regulators. Since the officials and the other accompanying persons enjoy practically the same authority during inspections, these two categories are now collectively called “inspectors”. This effectively puts companies on notice that they are obliged to cooperate with both Commission and national inspectors, and their authorised IT personnel.

The revised note comes in the wake of recent judicial decisions confirming the Commission’s power to seize electronic data. It signals that the Commission will continue to take a broad approach to the seizure of electronic data, and spells out the cooperation that will be demanded from staff of the company under investigation. By updating the explanatory note, the Commission has confirmed that it will not tolerate action that could undermine
the effectiveness of its investigations.

Companies are accordingly advised strongly to take stock of these developments in connection with their own antitrust compliance and readiness for dawn raids.

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