

## Dawn Raids in the Defence Sector: Wake-up Call to Update Compliance Programmes



Dear Clients, Friends and Colleagues,

We are very happy to send today our new client information.

Key takeaways:

- The EU Commission recently carried out an unannounced antitrust investigation in a company active in the defence sector.
- The need for a common security and defence policy within the EU implies enhanced cooperation between defence companies across Europe. This may lead to higher risks of anticompetitive behaviour.
- Companies are well advised to implement or update dawn raid guidelines and compliance programmes to minimise antitrust risks.

We hope you enjoy the reading. Please do not hesitate to reach out to us with any questions.

Yours sincerely,

**Dr Andrea Pomana**

Rechtsanwältin

[Email](#)



# Dawn Raids in the Defence Sector: Wake-up Call to Update Compliance Programmes

On 23 November 2021, the EU Commission ("Commission") carried out an [unannounced antitrust inspection](#) (so-called dawn raid) on the premises of a company active in the defence sector. The Commission suspects the company may have violated EU antitrust rules prohibiting cartels and restrictive business practices (Art. 101 of the Treaty on the Functioning of the European Union, "TFEU").

## 1. Dawn Raids in the Defence Sector

This dawn raid seemingly marks the first time that a company active in the defence sector is visited by Commission and national competition authority officials who seize documents and electronic data. In a typical dawn raid, they may inter alia seize documents, data and records, examine IT systems and question personnel about the alleged competition law infringement. The Commission action is particularly remarkable since it likely could have seized internal documents revealing national security concerns. This is, however, an area which typically falls outside of the Commission's competence in applying EU law.

In general, EU Member States are bound by the principle of sincere cooperation laid down in Art. 4(3) of the Treaty of the EU to provide EU institutions with information they require for the performance of their tasks. The Commission specifically has an express right to request information it needs in connection with its obligations, e.g., in enforcing EU competition law matters (Art. 337 TFEU).

Nevertheless, defence matters and related sensitive information have traditionally been privileged by EU law with respect to the scope of its application. Under Art. 346(1) TFEU, Member States may address the inapplicability of EU law and refuse to disclose information that may concern essential security interests.

However, it is settled case law of the European Court of Justice that Art. 346 TFEU does not constitute a general exception in applying EU law,

and hence does not exclude all measures adopted for reasons of public security from the scope of EU law (see, e.g., Commission vs. Portugal, case C-38/06, para. 62). Instead, the application of Art. 346 TFEU must be evaluated on a case-by-case basis.

## 2. Need for Updating Compliance Programmes

The Commission's recent raid serves as a wake-up call to companies to implement or refresh the dawn raid guidelines and implement or update their compliance programmes.

Dawn raids are on the rise as the Commission is resuming its antitrust investigations that came to a halt in the last two years as a result of the pandemic. In June 2021, it carried out a dawn raid in the [garments](#) sector in Germany, and twice in October 2021 in the [wood pulp](#) sector and at the premises of a pharmaceutical company active in [animal health](#). In October 2021, Commission's Executive Vice President Margrethe Vestager, in charge of enforcing competition law, stated in a [speech](#) that this is "*just the start of a series of raids that we're planning for the months to come*". Companies should also expect dawn raids in areas that are more "novel" and less "classical", including regarding "no-poach" and wage-fixing agreements that have already been in the focus of the US authorities for several years.

## 3. Compliance Programmes Pay Off

Creating an internal culture of compliance is essential in minimising the risks for anti-competitive conduct. Implementing appropriate and effective compliance programmes pays off, not only from a prevention and detection side. Appropriate and effective compliance programmes may now also be considered, e.g., in Germany, as a mitigating factor in charging companies for antitrust infringements. Since January 2021, the amended German competition law foresees such possibility for the first time. Other competition authorities, including the Commission, do not yet consider such options. Their main argument is that the compliance programmes did not prevent companies from breaching antitrust rules to begin with.

While compliance programmes cannot guarantee the non-occurrence of illegal conduct, they may lead to the detection and reporting of such behaviour. A compliance programme needs to be well-designed, seriously

enforced by the management and operate effectively. In the event of a fine, the company must demonstrate that the programme was able to reasonably avoid and detect wrongdoings of the investigated kind. Conversely, defective, unenforced or inadequate compliance programmes ("fig leaves") will be held against a company. Therefore, companies should ensure that their compliance efforts meet very high standards.

## 4. Outlook

Companies active in the defence sector have for a long time left national borders behind them, but cooperation at the European and international level will accelerate. In the European Union, a common security and defence policy takes shape, advocated at EU level and by French president Macron, where it figures prominently in the programmes for the French EU presidency. Commission President Ursula von der Leyen has requested "*further bold steps in the next five years towards a genuine European Defence Union*" and Commissioner for Internal Market Thierry Breton stated that "*collaborating in the field of defence is essential; it is at the core of our ambition towards common defence*". Doing so implies enhanced cooperation between defence companies across Europe, leading to higher risks of anticompetitive behaviour.

It is therefore essential that employees understand the do's and don'ts in cooperations and agreements with competitors. Companies should be aware of sector-specific antitrust risks and prepare their employees for the possibility of unannounced inspections by competition authorities.

Employees should be updated *inter alia* on their obligation to cooperate and grant access to servers, passwords and business documents. Insufficient cooperation in an antitrust investigation may be fined with up to 1% of a company's turnover. In addition, the "shadow team" designated by the company should ensure that inspectors are accompanied at all times during an inspection and be able to advise on the limits of the inspectors' powers.

In view of the growing magnitude of antitrust fines, appropriate and effective compliance policies can mitigate the risk of infringements, or lead to a reduced fine in case of sentencing.

# Authors:



**Dr Andrea Pomana**  
Rechtsanwältin

[Email](#)



**Prof. Dr Rainer Bierwagen**  
Rechtsanwalt

[Email](#)



**Marko Mirceta**  
Rechtsanwalt

[Email](#)

## EDITOR IN CHARGE:

Dr Andrea Pomana  
©Beiten Burkhardt Rechtsanwältsgeellschaft mbH



[Update Preferences](#) | [Forward](#)

### **Please note**

This publication cannot replace consultation with a trained legal professional. If you no longer wish to receive information, you can [unsubscribe](#) at any time.

© Beiten Burkhardt  
Rechtsanwaltsgesellschaft mbH  
All rights reserved 2021

### **Imprint**

This publication is issued by Beiten Burkhardt Rechtsanwaltsgesellschaft mbH  
Ganghoferstrasse 33, 80339 Munich, Germany  
Registered under HR B 155350 at the Regional Court Munich / VAT Reg. No.: DE811218811  
For more information see:  
[www.advant-beiten.com/en/imprint](http://www.advant-beiten.com/en/imprint)

Beiten Burkhardt Rechtsanwaltsgesellschaft mbH is a member of ADVANT, an association of independent law firms. Each Member Firm is a separate and legally distinct entity, and is liable only for its own acts or omissions.