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Antitrust dawn raids: France vs. United Kingdom

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ABSTRACT

This article provides a comparison between the French and English systems for competition law dawn raids. We set out the practical differences concerning the authorization regimes, the investigation and the applicable appeals procedures.

Cet article se propose de présenter de façon pratique les différences entre les systèmes français et anglais concernant les opérations de visites et saisies en droit de la concurrence. Il revient notamment sur les conditions de l'autorisation de visites et saisies et son déroulement, mais également les différents recours.

Antitrust dawn raids: France vs. United Kingdom*

1. Given the invasive nature and often extensive aftermaths of dawn raids, it is interesting to compare the way in which dawn raids are conducted under French and UK competition law as well as the extent to which the powers of the relevant national competition authorities differ in this regard.
2. We set out below a comparison of how dawn raids are conducted in France and the UK, and note in particular the following important practical differences:

- In France, the judge's authorisation contains a detailed description of the object of the investigation and the presumptions of anti-competitive practices, as well as a list of all the different premises to be visited (i.e., including the premises of the other cartelists). This is far more extensive than the brief description provided in a warrant in the UK (one or two lines long) of the nature and scope of the investigation, and the warrant also makes no mention of other cartelists being simultaneously raided (nor does the authority when carrying out the raid).
- To challenge the conduct of a dawn raid (i.e., the way in which the authority's agents/officers exercised their powers), in France parties have only ten days from the notification of the authorisation of the judge; however the UK legal system allows parties to make such a challenge for up to three months from the date on which the warrant was issued. ■

*Article written within the framework of the ADAJ (the Friends of the AFEC Jeunes).

	FRENCH SYSTEM	UK SYSTEM
How are investigations initiated?	<ul style="list-style-type: none"> - Market competition regulation: focus on sensitive sectors. - Complaints from cartel victims (firms, consumer associations) before the French Competition Authority (FCA) or the General Directorate for Competition Policy, Consumer affairs and Fraud control (the DGCCRF). - Indications of anti-competitive practices identified by the FCA or by the DGCCRF. - Leniency applications.¹ 	<ul style="list-style-type: none"> - The Competition and Markets Authority (CMA) receives complaints from individuals and businesses via its website and the cartels hotline, as well as directly from whistle-blowers. - The CMA also carries out its own research and market intelligence, and receives relevant information from other government departments or public authorities, such as the Serious Fraud Office (SFO). - Leniency applications.²
Who can initiate and conduct an investigation?	<ul style="list-style-type: none"> - The FCA, which is an independent authority that supervises anti-competitive practices, analyses and regulates the functioning of competition on markets, and reviews mergers. - The DGCCRF, which is a directorate of the Ministry of Economy and in charge of controlling compliance with competition and consumer rules. The DGCCRF has a central administration in Paris, 96 departmental entities (DDPP) which deal with consumer affairs and 13 regional entities (DIRECCTE) which investigate cartels and abuse of dominance conduct in liaison with the FCA. 	<ul style="list-style-type: none"> - The CMA. - Certain sectoral regulators (e.g., the Financial Conduct Authority) also have concurrent powers to apply and enforce certain provisions of the Competition Act 1998 (CA98) and the Treaty on the Functioning of the European Union (TFEU). - The CMA's powers of investigation in respect of the criminal cartel offence under the Enterprise Act 2002 are also shared with the SFO.
	<p>Note: The European Commission (Commission) also conducts investigations under the provisions of the TFEU. In the context of dawn raids, Commission officials are usually assisted by officials from the relevant national competition authority (e.g., the FCA/ DGCCRF or CMA).</p>	

¹ Art. L. 464-2, IV of the Commercial Code.

² Parties who have been involved in anti-competitive conduct can disclose details of their involvement and cooperate with the CMA in exchange for lenient treatment.

	FRENCH SYSTEM	UK SYSTEM
<p>What type of entry and search powers do the authorities have?</p>	<p>Ordinary investigations by French agents³</p> <ul style="list-style-type: none"> - Agents can visit the premises between 08:00 and 20:00 (and beyond these slots when the premises is open to the public or when production, manufacturing, processing, packaging, transport or marketing activities are in progress). - Agents can request copies of all professional documents (invoices, organisation charts, etc.). - Agents can request explanations of documents during the visit or afterwards on request. - They can also hear the parties and/or employees of the parties subject to the investigation and draft an official minute ("<i>procès-verbal</i>"). - BUT agents cannot search the premises. <p>Extraordinary investigations with prior authorisation by a judge of the high civil courts ("<i>tribunal de grande instance</i>")⁴</p> <ul style="list-style-type: none"> - Agents can visit and search all types of premises (professional or domestic if expressly authorised, subject to certain exceptions, e.g., press/national defence) and seize proof of anti-competitive practices; however they cannot refuse to allow the searched party to retain copies of any material seized. - Agents can request explanations of documents. - Visits can only start between 6:00 and 21:00 but can carry on after this time if necessary. 	<p>Entering business premises without a warrant⁵</p> <ul style="list-style-type: none"> - The CMA can enter business premises (usually during business hours) without a warrant after providing at least two working days written notice (there are, however, certain circumstances where notice is not required). - Officers can require relevant documents to be produced and ask for explanations of documents. - However, the CMA is not empowered to search the premises. <p>Entering business and domestic premises with a warrant (issued by the High Court) and searching⁶</p> <ul style="list-style-type: none"> - The CMA can enter business or domestic premises between 09:30 and 17:30 Monday to Friday (unless otherwise ordered by the court) subject to a warrant issued by the High Court (or Competition Appeal Tribunal (CAT), although in practice the CMA usually applies to the High Court). - Officers can require relevant documents to be produced, take copies of documents and search the premises. - The CMA will usually seek a warrant to search premises where it suspects that the information relevant to the investigation may be destroyed or interfered with if otherwise requested.

3 Article L. 450-3 of the Commercial Code.

4 Article L. 450-4 of the Commercial Code.

5 Section 27 CA98.

6 Section 28 CA98.

	FRENCH SYSTEM	UK SYSTEM
<p>What is required for a dawn raid in which the authority is empowered to search the premises?</p>	<ul style="list-style-type: none"> - The DGCCRF or the FCA should request a prior authorisation of the judge ("<i>juge des libertés et de la détention</i>") of the local high civil court. - The judge is required to check that the request is well-founded and justifies a breach of Article 8 of the ECHR (right to respect for one's private and family life). - The dawn raid takes place under the control of the judge, who can suspend or stop it. - Dawn raids are carried out by investigators, accompanied by police officers, in the presence of the occupant of the premises or his/her representative. - There is no obligation for agents to wait for the occupant's lawyer before starting the visit. - Before starting the investigation, the FCA or the DGCCRF agents should disclose the authorisation of the judge to the occupant of the premises or to his/her representative. - The authorisation contains details of the object of the investigation, a list of all the different premises to be visited (including premises of other firms) and the presumptions of anti-competitive practices (details of which are more extensive than in the UK). - The authorisation contains a time limit for execution of the dawn raid. 	<ul style="list-style-type: none"> - In order to carry out a search of a premises, the CMA is required to make application (without notice) to the High Court (or CAT) for a warrant.⁷ - The judge may issue a warrant if he/she is satisfied that there are reasonable grounds for suspecting that: <ul style="list-style-type: none"> • there are on any premises documents which the CMA has required to be produced using its other formal powers, and which have not been produced as required; • there are documents on the premises which the CMA has the power to require to be produced and if they were required to be produced they would not be but would be concealed, removed, tampered with or destroyed; or • a CMA officer has attempted to enter the premises using the CMA's powers of entry without a warrant and has been unable to do so. - The dawn raid is carried out by the CMA's investigating officers. The CMA may also request that the police are present when they enter a premises if there are particular concerns. - The CMA's officers are not obliged to wait for the occupier's legal advisors to arrive; however the CMA's Guidance indicates that if there is no in-house lawyer on the premises the CMA's officers may wait a reasonable time for their legal advisors to arrive. - The warrant, a copy of which is provided to the occupier of the premises, includes details of the premises, the authorised officers of the CMA, the nature and scope of the investigation and the type of documents which are relevant to the investigation (e.g., emails, tender documents, mobile phones). It is valid for one month beginning on the day it is issued.

⁷ This section focuses on a dawn raid carried out subject to a warrant obtained under Section 28 CA98.

	FRENCH SYSTEM	UK SYSTEM
<p>What powers do the agents/officers have in the context of dawn raids?</p>	<ul style="list-style-type: none"> - Agents can seize documents (hard-copy documents, notebooks, files on computer) to the extent that they fall within the scope of the authorisation. - Agents cannot seize documents covered by legal privilege, business secrets, prescription or which fall outside the scope of the authorisation. - Agents may interview the occupant of the premises or his/her representative in order to gather information or explanations useful to the investigation. It is, however, not possible to force a person to answer any self-incriminating questions. 	<ul style="list-style-type: none"> - A warrant authorises the CMA's officers to: <ul style="list-style-type: none"> • enter the premises using force as reasonably necessary; • search the premises; • take copies of or extracts from any relevant documents (i.e., which fall within the scope of the warrant); • take possession of relevant documents in certain circumstances; • take any other steps necessary for preserving the relevant documents or preventing interference with them; • require any person to provide an explanation of any document produced or to tell the CMA where relevant document may be found; • in relation to relevant documents held in a computer and accessible from the premises (e.g., stored on the cloud), require that such information be produced in a form in which it can be taken away and in which it is visible and legible. - The CMA cannot use its powers of investigation to: <ul style="list-style-type: none"> • require anyone to produce or disclose documents protected by legal professional privilege (communications with in-house lawyers are included for UK purposes); • require a business to provide answers that would require an admission that it has infringed the law; • disclose confidential information beyond the extent permitted.

	FRENCH SYSTEM	UK SYSTEM
<p>Does the authority need to carry out the entire search on the premises?</p>	<ul style="list-style-type: none"> - Agents can seize documents “partly useful” to the investigation. - Mass and undifferentiated seizure of email inboxes has been approved by the French courts, even if some emails are covered by legal privilege, business secrets, prescription or fall outside the scope of the authorisation. Judges consider that the seizure of email inboxes is made as a whole as the French authorities consider that this document is not capable of being broken into parts and only a full copy constitutes a guarantee of its origin, since it does not modify the identification data by an entry. - A recent practice of both the DGCCRF and the FCA agents consists in putting a temporary seal on the computer files and email inboxes they wish to seize in order to allow the company to identify, within a certain timeframe, documents covered by legal privilege and to provide the authorities with this information for the purpose of discussing which documents should be excluded before proceeding with the final seizure. This practice was approved by the Paris Court of Appeal in a decision of 14 December 2016. - In practice, firms do not know the keywords used to search the email inboxes. 	<ul style="list-style-type: none"> - When conducting a dawn raid subject to a warrant obtained under the CA98, the CMA has the ability to “seize and sift” mass quantities of documents (including email inboxes) under Sections 50 and 51 of the Criminal Justice and Police Act 2001. - This enables the officers to determine later and elsewhere whether certain document/s is/are relevant, in circumstances where it is not reasonably practicable to determine this on the premises and/or where it is not reasonably practicable to separate the relevant document/s from other documents which are not relevant. - The CMA has a duty to return any items seized in this way which are subject to legal privilege and/or fall outside the scope of the warrant as soon as reasonably practicable after the seizure. - In practice, the CMA will usually seek to agree or at least share the relevant keywords used for these purposes with the party.
<p>What happens after a dawn raid?</p>	<ul style="list-style-type: none"> - Immediately after the dawn raid, agents should prepare a minute which is reviewed by the company. - An index of the documents seized is made available to the company and appended to the minute. 	<ul style="list-style-type: none"> - At the end of a dawn raid the CMA will usually provide the occupier with a record of the documents seized together with an electronic copy of each document seized.

	FRENCH SYSTEM	UK SYSTEM
<p>What are the risks of obstructing an investigation in the context of a dawn raid?</p>	<ul style="list-style-type: none"> - Obstructing an investigation conducted by the FCA or DGCCRF agents may result in up to two years' imprisonment and/or a €300,000 fine.⁸ 	<ul style="list-style-type: none"> - There are both civil and criminal sanctions for obstructing the CMA's powers of investigation by:⁹ • intentionally obstructing an officer or failing to comply with any requirement of the officers or other persons exercising their powers under the Act; • intentionally or recklessly destroying or otherwise disposing of, falsifying or concealing documents or information required to be produced, or causing or permitting that kind of interference; • knowingly or recklessly providing false or misleading information in a material particular. - However, as far as we are aware, to date there have not been any examples of the CMA imposing civil or criminal sanctions for such obstruction offences. - Civil penalties for such an offence are restricted to a fixed amount of £30,000 or £15,000 per day. - Criminal sanctions may be imprisonment of up to two years and/or a fine.

⁸ Article L. 450-8 of the Commercial Code. Please note that another kind of obstruction concerns the refusal to cooperate and respond to a request for information from the FCA. The FCA can issue an injunction to cooperate, which may include a penalty of up to 5% of the party's daily worldwide turnover per day of delay. In case of failure to respond to a request for information or providing incomplete answers, the FCA may also impose a fine of up to 1% of the worldwide turnover of the party. For example, in June 2018 Brenntag was fined €30 million as a result of failing to reply to requests for information or providing incomplete answers (Article L. 464-2 of the Commercial Code).

⁹ Sections 40, 42 to 44, 72 CA98; Section 40 Enterprise and Regulatory Reform Act 2013.

	FRENCH SYSTEM	UK SYSTEM
<p>What can be contested and how can it be contested?</p>	<p>The authorisation</p> <ul style="list-style-type: none"> - The judicial authorisation can be challenged before the “<i>premier président</i>” of the appeal court in whose jurisdiction the judge authorised the procedure (e.g., if the scope of the investigation is too broad or unjustified). <p>The conduct</p> <ul style="list-style-type: none"> - The dawn raid conduct can also be challenged before the “<i>premier président</i>” of the appeal court. For example, challenge on the basis of seizure of documents subject to legal privilege. - There is a time limit of ten days from the notification of the authorisation of the judge to file proceedings against the authorisation and/or the conduct. - The documents seized will be kept by the authorities until a final decision is reached. 	<p>The warrant¹⁰</p> <ul style="list-style-type: none"> - The occupier of the premises or person in charge of the premises may apply to the court which granted the warrant (or the CAT if granted by it) to vary or discharge the warrant. To stop the warrant from being executed, an application must be made immediately upon service of the warrant and after informing the CMA’s officers that he/she is making such an application. - The judge who issued the warrant (unless he/she is not available) will consider whether he/she is still of the view that the statutory criteria for granting the warrant are met in light of any additional evidence provided by the occupier or person in charge of the premises. For example, in the only challenge of a CMA warrant to date, Concordia argued that there were no reasonable grounds for suspecting that documents relating to certain pharmaceutical drugs would be concealed, removed, tampered with or destroyed because Concordia’s conduct during the course of those ongoing CMA investigations had demonstrated openness and co-operation. <p>The conduct</p> <ul style="list-style-type: none"> - It is also possible to challenge the CMA officers’ conduct in executing the warrant on public law grounds, by way of judicial review. For example, where an officer has exceeded his/her statutory powers and/or powers under the warrant. - A claim on this basis must be filed promptly and no later than three months after the date on which the warrant was issued.¹¹
<p>Is information on the dawn raid made public?</p>	<p>The FCA sometimes issues a press release after dawn raids, but with no mention of the names of the relevant firms (normally only the sector).</p>	<p>The CMA does not normally issue press releases about dawn raids it has conducted. However, once the CMA has formally opened an investigation (usually sometime after the raid is conducted), details of the matter (but not the raid) are published on the CMA’s website.</p>

¹⁰ This section focuses on a dawn raid carried out subject to a warrant obtained under Section 28 CA98. So far as we are aware, challenges to dawn raids are rare and there has only been one challenge of a warrant obtained under Section 28 CA98 to date.

¹¹ Civil Procedure Rules of England & Wales, r.54.5(1)(b).

	FRENCH SYSTEM	UK SYSTEM
<p>Are there any current envisaged reforms to the relevant dawn raid procedures and/or current trends?</p>	<ul style="list-style-type: none"> - There have been informal discussions contemplating centralising the judicial authorisation in the hands of a unique judge with national competence. - Limitation of the assistance of the police to one officer. - In the recent period, there has also been an increased use of criminal searches in cases which include an antitrust component. In these cases, the investigators of the DGCCRF or the FCA receive rogatory commissions (an order from a judge) from investigating judges and have extended powers (in particular, the company is not entitled to any assistance from its lawyers in these circumstances). This is a trend to watch closely. 	<ul style="list-style-type: none"> - We are not aware of any current proposed reforms to UK dawn raid procedures. - There does, however, seem to have been an increase in the number and frequency of dawn raids conducted by the CMA.

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