



BRUSSELS À JOUR

You've Got Mail...Or Do You?

Markus Roehrig and
Laura Stoicescu report on
the latest developments
from the European capital
of competition law.

Raiding private homes of firms' executives – DG COMP's response to the new "working from home" world.

Ah, the perks of working from home! Especially the afternoon, when the postman rings the doorbell to deliver the smart pet bed you bought online for Suzy. Suzy can finally enjoy a temperature-controlled sleep at night! But when you open the door, the postman is not the postman, there is no parcel in sight, and some people in suits are suddenly asking questions about a cartel. In your kitchen. You are not dreaming – you have just been raided by the European Commission ("Commission").

As working from home has become commonplace in many companies, DG COMP expects to more frequently assert its powers to raid private homes to collect evidence of antitrust infringement. On April 5, the Commission announced it had "smoothly" raided (in DG COMP's Maria Jaspers' words) a private home where sensitive evidence related to a suspected cartel was allegedly held. Please refrain from speed-dialling your general counsel for a moment, while we tell you more about the background of such inspections, and provide you with some coping strategies, au cas ou.

In Search of Lost Time

The Commission's latest move comes as quite a surprise, since it renders mainstream a practice rarely used in the past, although the French competition authority got a head start, having conducted such inspections in November 2021 in relation with possible anticompetitive practices in the food retail sector. While the power to raid private homes has long been on the books, the Commission made use of that power only in a very limited number of cases such as, for example, when investigating a cartel between producers of North Sea shrimps, and previously, a cartel in the gas-insulated switchgear market.

However, the fact that this tool was scarcely used is a meagre consolation now. On the occasion of this latest raid, the Commission declared its intention of using it more frequently, in parallel to raids carried out at the business itself. Why? Maria Jaspers invoked the



Covid-backed shift to working from home, which resulted in sensitive documents ending up in private homes, inevitably. And while we are not big fans of Proust, it seems to us that by using this latest tool more often, the Commission is trying to make up for lost inspection opportunities during the height of the pandemic.

At least you may not have to worry about the Commission leaking details about Suzy's dietary requirements to the press. Jaspers noted that the Commission won't publicly announce such private premises dawn raids in order to protect the individual's privacy. While this detail might sound like a footnote, it actually is another hint that things are changing in the Commission's dawn raid rulebook – the Commission is increasingly concerned with the protection of private data, when it comes to inspections. If you are a frequent reader of our newsletter, you are already familiar with the other amendments, which we discussed in detail in our June 2021 and March 2022 issues.

By the Book

To refresh everyone's memory – Article 21 of Regulation 1/2003 affords the Commission the power to conduct on-site inspections (i.e. "dawn raid") of premises other than a company's office or production site. That includes the private homes of a company's directors, managers and other staff. While the Commission's powers are somewhat more limited when it raids private homes, they are still formidable. In particular, the Commission has the power to enter any premises, land and means of transport of companies (i.e. private homes, apartments, cars etc.), to examine the books and other records related to the business, irrespective of the medium on which they are stored, and to take or obtain in any form copies of or extracts from such books or records.

Some additional procedural safeguards apply. The Commission may adopt a decision to search private homes only if there is reasonable suspicion that books or other records related to the business and to the subject-matter of the inspection are being kept there. Moreover, the Commission cannot conduct the raid without prior authorization from the national judicial authority of the Member State in which the private home is located (i.e. essentially a judicial search warrant). Before issuing a search warrant, the national judicial authority (often a court) may confirm that the Commission decision is authentic and that the proposed inspection is neither arbitrary nor excessive in light of the alleged infringement, the importance of the evidence sought, the involvement of the company concerned and the reasonable likelihood that business books and records relating to the subject matter of the inspection are kept at the private home to be searched. However, the national judicial authority may not call into question the necessity for the inspection nor ask to be provided with information in the Commission's file.

Having said that, bear in mind that national competition authorities accompanying the Commission or acting on their own authority will often have broader powers than the Commission when it comes to raiding private premises.



Alice's Treasure Map

The nuts and bolts of conducting dawn raids are laid out in the Commission's *Explanatory note on inspections pursuant to Article 20(4) of Council Regulation No 1/2003*, which makes for a fine read, in our opinion. So, before you start stuffing documents under Suzy's old bed, let's go through some "points of wisdom" we took out of the Commission's explanatory note, in case the men in suits do show up in your kitchen.

- **How to I know that the officers have a right to raid my home?** Ask for the inspection decision (or search warrant) and their badge or service card evidencing that they are Commission officials. As an additional step, make sure you carefully examine the inspection decision (or search warrant) to determine its scope and in particular the premises, documents and objects that are the subject of the warrant.
- **Can they search my car, my garden house, etc.?** Yes. The Commission's inspection decision only needs to include the address of the premises to be searched and affords the officials the power to access all of the addressee's property, cars etc. that are located on these premises, leaving the Commission with some margin of appreciation on the ground.
- **Do I have to let them in? Do I need to cooperate?** If you don't, the Commission may (and likely will) ask the national regulator or police to force its way into your home. You will want to discuss with your company if and to what extent you should cooperate beyond opening your doors.
- **Can I call my company, my boss, our legal department? How about a lawyer?** Yes, you may and are generally well-advised to do so as soon as possible. Your company may have dawn raid guidelines that will tell you who your first point of contact should be. You may also ask the inspectors to delay (for a reasonable amount of time) the start of the inspection, until a member of the legal department (or external counsel) arrives.
- **What if I know that there are potentially incriminating documents or data in my house?** Don't destroy documents! Don't block access to or disconnect your email! Don't delete any electronic data!
- **Can they search my company's/ my private PC? How about my company/ my private mobile?** Yes. The Commission's explanatory note explicitly states that its IT experts may search private devices and media that are used for professional reasons (Bring Your Own Device - BYOD) "when they are found on the premises" (of the raided company – in this case, your home office).
- **Can they seize my computer/ communication devices?** That will be a "no". The Commission generally does not have the power to seize evidence, only to make copies.
- **Do I have to answer questions that the Commission asks during the raid?** There is no legal obligation to answer questions that the Commission asks when raiding a private home. However, you are well-advised to consult your company as to if and to what extent you should cooperate.
- **Can they seal rooms or my desk?** No, the Commission's power to seal rooms is limited to dawn raids conducted at the company's premises.



These are only some of the – often tricky – questions that an individual might encounter if the Commission raids its private home. Companies are well-advised to educate their executives and other staff about how to respond if their private homes are raided. A separate handout covering (at least) these points as a Christmas gift may come handy. We are sure they will not return this one to the store.

And before we go – Suzy has nothing to do with the dawn raid, scout's word. If you don't believe us, just ask her.

In the meantime, don't forget to follow us on LinkedIn for more updates on your favourite EU competition law topics!

Contact



Markus Röhrig
Partner

T +32 2 7885 525
markus.roehrig@hengeler.com



Laura Stoicescu
Associate

T +32 2 7885 528
laura.stoicescu@hengeler.com

➤ www.hengeler.com



Don't miss any edition of our Brussels à Jour Newsletter.

You can simply follow the hashtag #Brusselsajour on LinkedIn to make sure you receive our updates in your feed.