

# DAWN RAIDS UNDER CHALLENGE

DUE PROCESS ASPECTS ON THE  
EUROPEAN COMMISSION'S DAWN  
RAID PRACTICES

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**Helene Andersson**

## DAWN RAIDS UNDER CHALLENGE

This book examines the European Commission's dawn raid practices in competition cases from a fundamental rights perspective. In recent years, the Commission has adopted a new and more aggressive enforcement policy, amid a growing awareness that cartels and abuse of market power represent an economic harm and need to be punished. In response, enforcement has been strengthened by the grant of more wide-reaching powers to competition authorities. But how does this impact on the framework of fundamental rights? This study seeks to answer that question by examining the obligations imposed by the Charter and the ECHR and the response of the Luxembourg and Strasbourg Courts. It shows that where the Strasbourg Court has managed to strike a balance between efficiency concerns and the rights of undertakings, the EU courts' judicial control is not equally balanced. This book is an essential and timely examination of this important question.

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Commission's Dawn Raid Practices

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## ABBREVIATIONS

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AG	Advocate General
COE	Council of Europe
DG COMP	Directorate-General for Competition
ECHR	European Convention on Human Rights and Fundamental Freedoms
ECJ	Court of Justice of the European Union
ECN	European Competition Network
ECSC	European Coal and Steel Community
ECtHR	European Court of Human Rights
EEC	European Economic Community
FRA	European Union Agency for Fundamental Rights
FTC	Federal Trade Commission
GATT	General Agreement on Tariffs and Trade
ICCPR	International Covenant on Civil and Political Rights
ICN	International Competition Network
ILO	International Labour Organization
IMF	International Monetary Fund
JFTC	Japan Fair Trade Commission
OECD	Organisation for Economic Co-operation and Development
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
UN	United Nations
WTO	World Trade Organization



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## Part I

# Overview



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# Introduction

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La justice sans la force est impuissante, la force sans la justice est tyrannique. Il faut donc mettre ensemble la justice et la force; et pour cela faire que ce qui est juste soit fort ou ce qui est fort soit juste.

Blaise Pascal, 1670

During the period from 2010 to 2014, the European Commission imposed fines of nearly €9 billion on companies engaging in cartel activities found to be in violation of Article 101 of the Treaty on the Functioning of the European Union (TFEU).<sup>1</sup> This is nearly three times more than the fines imposed between 2000 and 2004, and as much as 16 times more than those imposed during the period from 1990 to 1994. This new and more aggressive enforcement policy reflects the widespread understanding that cartels and abuse of market power are harmful to the economy and should be punished. Studies estimate the average gain from price-fixing to be at least 10 per cent of the selling prices.<sup>2</sup> Given both the considerable gains to be made through anti-competitive practices and the cartel's secretive nature, an effective application of the competition rules requires that competition authorities are vested with far-reaching investigatory powers. Through legislative changes in 2004, the powers of the Commission were increased; now the stakes are higher for those engaging in anti-competitive practices.

At the same time, EU fundamental rights protection has been strengthened through the Lisbon Treaty. Companies targeted by the Commission's investigations will have a legitimate interest in safeguarding these rights, forcing the Commission to ensure an effective application of the EU competition rules while navigating through an array of fundamental rights, such as the right of the defence and the right to privacy. This book examines whether it is possible to strike a balance between the interests of ensuring an effective application of the competition

<sup>1</sup> See <http://ec.europa.eu/competition/cartels/statistics/statistics.pdf>.

<sup>2</sup> The United States Sentencing Commission estimates that the average gain from price-fixing is 10 per cent of the selling prices, but this estimate is challenged by Connor and Lande, who argue that the overcharge is considerably higher than 10 per cent. See 2011 United States Federal Sentencing Guidelines Manual, Chapter 2, Part R, <http://www.ussc.gov/guidelines-manual/2011/2011-2r11>; J Connor and R Lande, 'Cartel Overcharges and Optimal Cartel Fines', 3 Issues in Competition Law and Policy, 2203, ABA Section of Antitrust Law, 2008, Chapter 88; J Connor and R Lande, 'How High Do Cartels Raise Prices? Implications for Reform of the Antitrust Sentencing Guidelines' (2005) 80 *Tulane Law Review* 513; and J Connor and R Lande, 'Cartels as Rational Business Strategy: Crime Pays' (2012) 34 *Cardozo Law Review* 427.

rules and adequate fundamental rights protection, or whether the Commission has been handed an impossible task.

## I. Scope

In most competition cases, the first formal decision made by the Commission is the decision to make an unannounced inspection—a dawn raid. Through the adoption of Council Regulation 1/2003,<sup>3</sup> this power has been extended to cover not only the premises of undertakings, but also the private dwellings of employees and company representatives.<sup>4</sup>

A successful dawn raid is often key to a successful cartel investigation. As Julian Joshua, former head of the Directorate-General for Competition's (DG COMP) cartel unit, once stated:

Unless the Commission during the first 'dawn raids' happens to find not only one smoking gun but a whole arsenal it will probably have to drop the case.<sup>5</sup>

Thus, the Commission has both strong and legitimate incentives to ensure the smooth operation of its inspections. As for the targeted companies, the measures taken by the Commission officials may have a long-lasting and adverse impact on their right of the defence, and any failure on the part of the Commission to respect fundamental rights, such as the right to privacy or legal professional privilege, may cause irreparable damage. Furthermore, as the element of surprise is a key aspect of the dawn raid, there is an inherent risk that the company, when receiving the visit from the Commission, is not in a position to safeguard its rights properly. At the same time, extending the scope of fundamental rights to go beyond what is necessary to ensure an adequate level of protection, or, in the alternative, to allow companies to unduly obstruct investigations, may influence the effectiveness of the EU's competition law regime to an extent that exceeds what is actually necessary or desired.

These factors—the crucial link between a successful dawn raid and a successful competition law investigation, and the potential harm that can be caused to a company taken by surprise, perhaps not being able to fully overlook the situation

<sup>3</sup> Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty [2003] OJ L1, 4 January, 1–25.

<sup>4</sup> Article 21 of Regulation 1/2003 provides that if a reasonable suspicion exists that books or other records related to the business and to the subject matter of the inspection, which may be relevant to prove a serious violation of Article 101 or 102 TFEU, are being kept in any other premises, land and means of transport, including the homes of directors, managers and other members of staff of the undertakings and associations of undertakings concerned, the Commission can by decision order an inspection to be conducted in such other premises, land and means of transport.

<sup>5</sup> JM Joshua, 'Attitudes to Anti-trust Enforcement in the EU and US: Dodging the Traffic Warden, or Respecting the Law?', [http://ec.europa.eu/competition/speeches/text/sp1995\\_044\\_en.html](http://ec.europa.eu/competition/speeches/text/sp1995_044_en.html).

or knowing the full extent of its rights or how to exercise them—makes this subject especially interesting from a due process perspective. There are a number of due process issues relating to dawn raids, but particular focus will be on the seven areas described below.

## A. The Right to Privacy

As will be further elaborated upon in Chapter 6 below, both the Charter<sup>6</sup> and the European Convention on Human Rights and Fundamental Freedoms (ECHR)<sup>7</sup> protect individuals from interference with their private and family life, home and correspondence. An unannounced inspection where Commission officials are empowered not only to go through but also to seal off the premises of the targeted company, to search and block computers, mobile phones etc will no doubt interfere with the targeted company's integrity. The question is whether companies may or should be able to rely on a right to privacy or whether this right is or should be reserved only to natural persons. As will be further discussed in Chapter 6, it is clear from the case law of both the Court of Justice of the European Union (hereinafter 'the Court' or 'the ECJ') and the European Court of Human Rights (hereinafter 'the ECtHR' or 'the Strasbourg Court') that companies do enjoy a right to privacy. The question is to which extent Article 7 of the Charter affords protection to companies, and whether the current order ensures a balance between the opposing interests of the Commission and the targeted companies.

## B. The Need for an Ex Ante Review of Inspection Decisions

Article 20 of Regulation 1/2003 grants the Commission the power to decide on dawn raids. It is only when a targeted company opposes the inspection and the Commission requests assistance from national authorities that a judicial authorisation may be necessary. The national court may then only verify that the Commission decision is authentic and that the measures are neither arbitrary nor excessive, having regard to the subject matter of the inspection.<sup>8</sup> In the recent case of *Deutsche Bahn*,<sup>9</sup> the companies targeted by the inspection decision challenged this order, arguing that the lack of ex ante control constituted an infringement of both the right to privacy under Article 7 of the Charter and the right to an effective legal remedy under Article 47 of the Charter. Chapter 6 examines the merits of such a claim and discusses the need for or appropriateness of an ex ante control.

<sup>6</sup> Article 7 of the Charter of Fundamental Rights of the European Union (the Charter).

<sup>7</sup> Article 8 of the ECHR.

<sup>8</sup> Article 20(8) of Regulation 1/2003.

<sup>9</sup> Joined Cases T-289/11, T-290/11 and T-521/11 *Deutsche Bahn and Others v European Commission*, EU:T:2013:404, on appeal to the ECJ, Case C-583/13 P, EU:C:2015:404.

### C. The Subject Matter and Purpose of Inspections

At the heart of this work lie questions regarding the actual scope of the Commission's inspection powers. Article 20 of Regulation 1/2003 grants the Commission the power to enter any premises of the targeted company, to examine and copy books and records, to seal off premises and to ask for explanations on facts or documents relating to the subject matter of the inspection. At the same time, it imposes an obligation on targeted companies to submit to the Commission's inspection decisions and to cooperate actively with the Commission during the course of the inspection.

It is self-evident that the Commission has an interest in keeping the scope of these powers as broad as possible to ensure the effective enforcement of the competition rules. The more intrusive the dawn raid is, the greater the likelihood of finding incriminating evidence. Furthermore, cartels are becoming ever more sophisticated, using various tools designed to minimise the risk of detection, which necessitates the Commission's use of more forceful investigatory tools.<sup>10</sup> However, from a company perspective, the wider the powers of the Commission, the greater the risk that fundamental rights—such as the right of the defence—are set aside. This book examines the actual scope of the Commission's powers and discusses issues such as the rationale behind the obligation on the part of the Commission to state the subject matter and purpose of the inspection, the degree of suspicion required in order for the Commission to be able to resort to a dawn raid, and the extent of the review to be performed by the Commission during the inspection. Closely linked to these issues is the matter of the Commission's powers to carry out dawn raids outside the scope of competition cases, such as within the framework of a sector inquiry.

### D. Information and Documents to be Covered by the Inspection

Article 20(4) of Regulation 1/2003 requires the Commission to state in the inspection decision the purpose and subject matter of its investigation. The same article explicitly limits the duty to answer questions to those related to the subject matter of the investigation. However, there is no such explicit limitation with regard to the Commission's right to examine or copy books and records (other than that they should be related to the business). Does this mean that the Commission's powers to review and copy documents and files are not restricted, and would such an order be in line with applicable fundamental rights? This and

<sup>10</sup> Commission Staff Working Document, Ten Years of Antitrust Enforcement under Regulation 1/2003, Accompanying the Communication from the Commission to the European Parliament and the Council, 'Ten Years of Antitrust Enforcement under Regulation 1/2003: Achievements and Future Perspectives' COM (2014) 453; interview with G Berger, DG COMP, Unit F-3, 15 September 2015.

related issues—such as whether the Commission has or should have a right to review material at its headquarters in Brussels—will be addressed in Chapter 8.

## E. The Privilege against Self-Incrimination

As a fundamental principle under both the ECHR and the Charter, no one suspected of a criminal offence should be forced to admit his or her guilt. This right, the privilege against self-incrimination, is not expressly laid down in either the Charter or the ECHR, but has been developed through the courts' case law. The book examines whether competition law infringements are of a criminal nature and, if so, to what extent legal persons, as opposed to natural persons, may invoke the privilege against self-incrimination. If legal persons are protected by the privilege, it will also be necessary to examine the scope of protection afforded under EU law in order to determine whether it is broad and grants a right to silence or whether it is limited to protecting persons from having to admit guilt. As will be further discussed in Chapter 9, there is also a distinction to be made between having to admit guilt during the course of an interview or an interrogation and having to hand over incriminating documents to the Commission inspectors. The scope of protection afforded under EU law will be examined and analysed to determine whether the system in place strikes a proper balance between the need for effective competition law enforcement and adequate fundamental rights protection.

## F. Legal Professional Privilege

In a civilized society, a man is entitled to feel that what passes between him and his lawyer is secure from disclosure.<sup>11</sup>

These words from Advocate General (AG) Warner in the *AM & S* case<sup>12</sup> capture the essence of what constitutes legal professional privilege under EU law. Any person should be able, without constraints, to consult a lawyer whose profession entails the giving of independent legal advice to all those in need of it. Thus, if one receives an unexpected visit from the Commission, one should not be afraid that the inspectors make copies of any documents containing legal advice relating to the competition case from one's (external) counsels.

Chapter 10 examines and assesses not only the actual scope of protection under EU law, but also the methods available to ensure that the privilege is respected in practice. As most information is stored electronically nowadays, the Commission has had to adapt its search methods. The techniques now available allow the

<sup>11</sup> Opinion of Advocate General Warner in Case 155/79 *AM & S Europe Ltd v Commission of the European Communities*, EU:C:1981:9.

<sup>12</sup> *ibid.*