

The European Commission knocking at the door? Prepare and beware!

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The EU General Court recently confirmed the European Commission's broad investigative powers when conducting a dawn raid. The Court clarified that these dawn raid powers are neither restricted by earlier investigations from national competition authorities into the same conduct, nor by a requirement for the European Commission to prove that electronic data was – negligently or intentionally – manipulated or deleted before imposing a fine for obstructing its inspection. According to the Court, it is for the company to ensure that the persons acting on its behalf act in accordance with the Commission's instructions. Companies cannot sit back and relax once a national competition authority has investigated their conduct, but need to actively prepare their employees for possible subsequent dawn raids by the European Commission.

The [General Court](#) considered that the European Commission was right to carry out an inspection at the offices of telecommunications company Orange to investigate a possible violation of [Article 102 TFEU](#) (the prohibition to abuse a dominant position), even though the French competition authority had investigated the same conduct earlier without finding an abuse of dominance. According to the Court, the Commission is entitled to adopt individual decisions under Article 102 TFEU at any time, even where they conflict with a national court or competition authority's decision. [Article 5](#) of Regulation 1/2003 limits the national competition authority's power to deciding that there are no grounds for action. In contrast, the [General Court](#) clarified in a different ruling that the European Commission can reject a company's complaint regarding Article 102 TFEU where a national competition authority is already investigating the same infringement in the same market and within the same timeframe as referred to in the complaint. As a result, companies cannot always rely on a national decision to argue against the necessity of a Commission dawn raid, nor can they force the European Commission to take up a complaint already under investigation by a national competition authority. All the more reason for companies to take all measures necessary to prepare for a Commission dawn raid.

That preparatory measures are indeed necessary is clear from the recently [upheld](#) fine on two Czech energy companies for failing to cooperate with an inspection. During the Commission's inspection, IT staff, unaware of the Commission's instructions, allowed an employee to access an e-mail account which had previously been blocked at the Commission's request. In addition, incoming e-mails were intentionally diverted to a server instead of having them arrive in another blocked e-mail account. The General Court agreed with the Commission that, once the Commission inspectors have notified the inspection decision and explanatory note to the company's authorised persons, it is up to the company to inform the relevant employees of their duties, as

well as to take all necessary measures to ensure that the Commission's instructions are implemented. It is not necessary for the Commission to prove that the data in the blocked e-mail account had actually been manipulated or deleted, nor is it necessary for the Commission to inform each person concerned of his duties in the particular circumstances of each case.

Companies would be wise to not only have dawn raid instructions in place for their key personnel, but also to prep IT staff on their responsibilities during a Commission inspection, and to set up clear communication lines between relevant persons. Reading the [Commission's explanatory note](#) is a good start in understanding a company's rights and obligations during a Commission inspection.