



# Concurrences

ANTITRUST PUBLICATIONS & EVENTS

## Competition Inspections under EU Law

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### A Practitioner's Guide

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Nathalie Jalabert-Doury

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Foreword by Cecilio Madero Villarejo

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# FOREWORD

CECILIO MADERO VILLAREJO\*

Former Deputy Director General Antitrust and Cartels

*DG Competition, European Commission*

The power to conduct inspections at company premises and beyond is the furthest reaching power of investigation available to the European Commission in enforcing EU competition law. It allows the Commission to investigate cases relating to many types of infringements, such as alleged abuses of dominance or alleged collusion, and therefore its scope goes beyond cartel inspections. However, it is also true that most of the European Commission so-called “dawn raids” take place in cartel investigations, for obvious reasons. Only counting cartel cases, the Commission used dawn raids in 56 cases between 2010 and 2019, each of which took place on an average of four to five sites simultaneously. Many cartel inspections are prompted by the EU leniency programme, which since 2006 has been, I believe, a very reliable tool from the company’s perspective. The policy of zero tolerance for cartels has led the Commission to invest in other instruments of detection such as the whistle-blower tool. There is a dedicated unit staffed with computer experts and forensic intelligence capacity, working on improving data analysis, together with a centralised network of intelligence from all Commission directorates general and agencies, and other national enforcers, to provide leads and flag potential competition issues to DG Competition. Such initiatives are now delivering on over 25% of the Commission’s currently open cartel investigations started *ex officio*.

Article 20 of Council Regulation 1/2003 allows Commission inspection teams to enter any business premises, land or means of transport on the basis of an inspection decision and examine – within its scope – books and business records in any format, taking or obtaining copies or extracts thereof in any form and asking for explanations on facts or documents of any business representative or employee during the inspection. In the process, the Commission may seal business premises, books or records to secure the continuation of the inspection, either at the company’s premises or at the Commission’s premises. In that regard, the most recent case law of the European Court of Justice has confirmed that there is no right for an undertaking to force the Commission to continue an inspection on site and the Commission may decide to take forensic images of entire hard drives during an inspection for later examination and selection at Commission’s premises. The chain of custody of the documents is protected by their file path, name and unique hash value and by the fact that the images are put in a sealed envelope. The company’s lawyers or representatives are invited to be present when the review and selection takes place. In the most frequent scenario, colleagues from the relevant national

\* This text represents the author’s personal comments and does not represent the official position of the European Commission in any way.

competition authorities assist the Commission inspectors. The stakes are high for the target companies, since obstructions are severely punished and liabilities stemming from the violation of competition rules amount to substantial fines.

The complexity of the matter is compounded by the fact that other scenarios are possible. On the one hand, according to article 22 of Regulation 1/2003, the Commission can request the national competition authorities to carry out inspections on its behalf, applying their national laws. On the other hand, article 21 of Regulation 1/2003 allows the Commission to conduct inspections at other premises, including homes, when there is a reasonable suspicion that relevant business records may be found there. In such case, prior authorisation by a judge is required and the inspectors cannot seal a home or ask oral questions there. Those provisions have not been used very often, but one cannot rule out home searches gaining greater prominence, especially if remote working becomes the rule in many companies in the aftermath of the COVID-19 pandemic.

Deep in the memory of senior lawyers and officials, there is still the recollection of a time when the most important effort went into ensuring that paper files, faxes or emails were not destroyed or concealed. Back then, we used to pile up paper that was then diligently photocopied and carried back in heavy pieces of luggage. Nowadays, EU inspections have become almost paperless because inspectors make electronic copies and scans. Our inspection teams temporarily disconnect computers from the network, obtain administrator access rights to deploy sophisticated tools to transfer data to carriers, index the digital material for selection and make forensic copies of the selected items. At the core, whatever the level of sophistication of the tools and processes, the selection of the material ending up in the case file depends on the inspectors and the case team, and the challenges remain the same: ensuring the surprise effect of announced inspections, targeting the information appropriately and making sure that all the steps are taken professionally with full respect of the law. The Commission inspection leader is an experienced official acting as counterparty for the company in any discussion on the spot and dealing with matters such as legal professional privilege or possible obstruction attempts. The rest of the team combines case handlers from different backgrounds and with command of the languages necessary for the case, with inspectors specialised in information technology, including forensic IT inspectors.

The Commission systematically reviews its procedures with the aim of preserving the rights and safeguards that assist investigated companies, while expecting from them a strict compliance with article 101 of the Treaty and their duty to cooperate with an investigation. I am convinced that the number of (successful) *ex officio* investigations can only increase in the future and that the Commission will rely more and more on its own resources in order to detect new cartels, while inviting those companies with doubts over the applicable rules to take advantage of the available leniency programme, which has delivered so good results so far.

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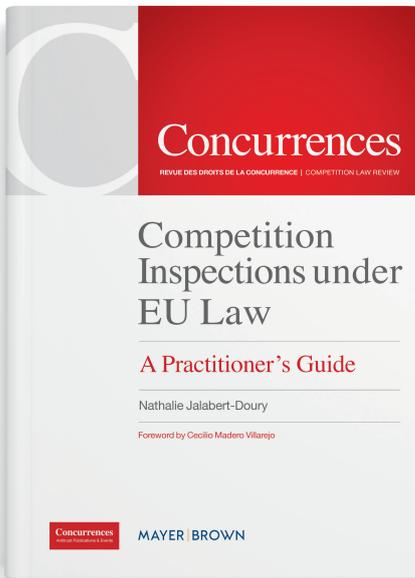
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The power to conduct inspections at companies' premises and homes constitutes one of the most powerful enforcement tools of the European Commission. Inspection can also be coordinated at the European and international levels when several authorities investigate the same international cartels, as well as when the suspected participants have their main offices abroad.

Inspections entail high risks for the companies and individuals concerned, and not only because they could ultimately lead to an infringement decision. Private life and legal privilege issues will necessarily arise and appropriate measures need to be implemented to reduce the risk of obstruction.

Against this backdrop Nathalie Jalabert-Doury presents an in-depth analysis of the legal and practical aspects of competition inspections under EU law to provide lawyers willing to prepare upstream as well as those facing such an inspection with a clear understanding of the procedures involved and steps to be taken.

The author lays out the two main regimes of antitrust enquiries under Regulation 1/2003: inspections carried out on the basis of a Commission decision (Article 20(4)), and those operated on the basis of an authorization (Article 20 (3)). For each regime, she describes the entire course of an inspection in chronological order and with extreme precision. Specific inspection procedures are also discussed separately, as well as inspections based on cooperation mechanisms through the European Competition Network.

Enriched by the author's vast experience on the topic, the book is a necessary and essential guide for competition law practitioners faced with an EU inspection. It is a must-have title for enforcers, judges, in-house counsels and lawyers alike.



**Nathalie Jalabert-Doury**

is a member of the Paris Bar and partner in charge of the competition team at Mayer Brown in Paris.

” The power to conduct inspections of undertakings is essential in order to enable the Commission to perform its task of protecting the common market from distortions of competition. Nevertheless, it is quite as essential to safeguard the rights of the concerned undertakings during such inspections. The contours and conditions of exercise of the power of inspection are thus continually affined through the Commission's practice and its scrutiny by the European Court of Justice. This book gives a comprehensive, complete and very clearly written overview of this complex issue. “

**Juliane Kokott**, Advocate General, Court of Justice of the European Union

” A practitioner's guide is a must have for in-house counsels to handle EU inspections when they occur. This one is very well-documented and practical to ensure you have access to the latest developments. “

**Ariane Oesterreicher**, Head of competition & insurance law, Veolia

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