

EU WhatsApp Deletion Fine Sends Clear Message

By **Matthew Hall** (July 29, 2024)

The European Commission considers obstruction of a dawn raid to be a serious breach of EU competition law. A large fine on any company responsible for this in the EU is inevitable.

The latest example came on June 24, when the commission announced a fine of €15.9 million (\$17.3 million) on International Flavors & Fragrances, or IFF, in a case concerning the deletion of WhatsApp messages from a mobile telephone during a raid.[1]



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An employee of IFF was found to have intentionally deleted the messages after he had been informed about the start of the raid.

The commission took into account the various factors surrounding the deletion and considered that the infringement committed by IFF was "of a very serious nature." IFF nevertheless managed to obtain a 50% reduction from the basic fine level due to its "proactive cooperation during and after the [raid]."

The commission's view on obstruction of dawn raids poses a real risk to companies that are investigated in this manner. It is important that appropriate competition law compliance training is given to all relevant staff and that if a dawn raid takes place that the process is properly managed on the day.

Wide Commission Powers

EU competition law requires companies to submit to and actively cooperate with unannounced dawn raids at business and domestic premises, formally referred to as inspections, that are validly ordered by decision of the commission.

Raids are regularly carried out to investigate and obtain evidence of suspected breaches of competition law, such as cartel activity or an abuse of dominance.

While the conduct of dawn raids can be — and regularly is — challenged, the commission has wide powers in this area, and these should not be underestimated. Companies are obliged to make available to the commission officials carrying out the raid all information relating to the subject matter of the raid.

The officials are empowered to examine and take copies of books and records related to the business, irrespective of the medium on which they are stored. This means that officials can examine data on corporate devices, including mobile phones as well as private devices when they are used also for professional purposes. This includes messages exchanged via social media apps such as WhatsApp.

Books and other records including messages of this nature must be provided in complete form during a raid.

As for notification of the decision, i.e., when the officials turn up at a company's premises, companies are also required to act with diligence and take all appropriate measures to preserve the evidence available to them.

The commission can impose a fine of up to 1% of the total turnover of a company when it produces — intentionally or negligently — the required books or other records related to the business in incomplete form during a dawn raid. Any subsequent restoration of the data does not undo an initial incomplete production.

Wrong Decision by Employee

In the case of the IFF dawn raid, the inspectors made the standard request to review the mobile phones of some of IFF's employees who were at the company's premises.

When reviewing the phones, the inspectors found that a senior IFF employee had deleted WhatsApp messages exchanged with a competitor. The deletion was detected by the forensic IT experts the commission brings to raids. These individuals use cutting-edge software tools to detect any deletion or manipulation of electronic information during raids.

The commission team found evidence that the data had been deleted from the phone after IFF had been notified of the raid. The team was able to recover the deleted messages, which were found to contain business-related information.

The full circumstances surrounding the decision by the individual to delete his messages are not in the public domain. However, it is known that the messages were not self-deleting, although if that setting had been activated, it should have been turned off when the raid started.

First Fine for WhatsApp Deletion

The IFF case is the first time the commission has imposed a fine for the deletion of messages exchanged via social media apps on a mobile phone during a dawn raid. However, it is not a first in the EU, as the Netherlands competition authority imposed a fine for such behavior in 2019,^[2] as did the Polish competition authority in 2023.^[3]

The commission has consistently taken a hard line against obstruction issues generally, imposing fines for breaching seals, accessing a blocked email account and diverting incoming emails during a raid. In other cases, obstruction during a raid was considered as an aggravating circumstance and triggered an increase of the fine imposed for the anticompetitive conduct itself.

Fine Was Inevitable

The commission considers its dawn raid powers to be an important part of its armory when investigating potentially anticompetitive behavior in the EU. A significant fine is therefore inevitable when a raid is obstructed in any way, and in particular when documents or data are only produced in incomplete form or not at all.

In setting the fine in such a case, the commission will take into account a number of factors. These include the specific nature of the infringement, whether the conduct was intentional, the type of information deleted, and the position held by the employee who committed the deletion. The commission also considers that any fine must act as a deterrent to others.

The commission viewed the IFF case as an example of tampering with electronic records and was particularly concerned because "the special nature of electronic records makes the risk of manipulation particularly high."

The commission considered that the level of the fine was needed to act as a deterrent. Companies might take the risk of a procedural fine in order potentially to avoid a high fine for a breach of the substantive law hidden by the tampering.

In any event, the fine needed to be high enough to act as a deterrent against any tampering with business records during a commission raid.

The particular facts of the IFF case were also important. The infringement was considered to have been committed intentionally and it was by a senior employee of the inspected company who was a specific target person of the commission's investigation.

Further, the commission was not informed of the data deletion, but instead its officials had to detect it themselves after the phone was submitted for review.

However, IFF managed to obtain a 50% fine reduction due to its broad and proactive cooperation, which helped the commission to complete its investigation of this procedural infringement and reach a decision more quickly than normal, although still over a year after the raid.

IFF immediately and on the spot acknowledged the facts and proactively cooperated with the commission during and after the raid. With IFF's help, the commission was able to recover the deleted data within four hours.

IFF also accepted its liability for the infringement and agreed a maximum fine suggested by the commission. Following the reduction, IFF was ultimately fined €15.9 million for this serious infringement of EU law.

The maximum fine was agreed pursuant to an unwritten cooperation procedure that can be used by the commission. Under this, a company must acknowledge its liability for an infringement.

The IFF case is the first time that the procedure has been adopted in a procedural infringement case, which perhaps reflects the clear nature of the infringement.

Conclusion

Competition law compliance training needs to cover dawn raid issues, and one of the basic messages is that companies should never obstruct the raid. Obstruction includes destroying documents or data, electronic or hard copy.

The commission takes a hard line if obstruction occurs and accordingly companies must act with a high level of diligence, including taking all appropriate measures to preserve evidence stored on any electronic devices.

The commission is particularly focused on electronic material generally and considers the use of WhatsApp and similar platforms specifically to be a problem for its enforcement of competition law. This is particularly so given the high risk of deletion, which can be done instantaneously and from anywhere.

The commission has significant capabilities to detect deletion or manipulation of electronic information during raids and deletion is therefore very unlikely to go undetected.

A company will also have other, wider, considerations in this situation. Tobias Maass, a commission official, commented at an American Bar Association conference last month that, illegality aside, a company may still have an interest in keeping documents because if the commission does not initially find them, they could voluntarily be turned over, which could result in a reduction in fines for the anticompetitive activity itself.[4]

Deleting messages could also prove futile because the other party to the messages, e.g., a competitor that is also raided or that volunteers information to the commission may have retained them in any event.

In the IFF case, employees had been instructed not to delete any documents during a dawn raid and the individual involved clearly did not follow instructions.

Another commission official, Maria Jaspers, stated during the same conference that she sympathized with IFF in this situation, but the high fine was necessary as it "sets the record straight" as to how seriously the commission takes this type of infringement.[5]

The fine would have been higher still had IFF not quickly and fully cooperated, showing the potential benefits of that approach, particularly where the breach of EU law is clear.

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[1] https://ec.europa.eu/commission/presscorner/detail/en/ip_24_3435; https://ec.europa.eu/commission/presscorner/detail/en/QANDA_24_3406.

[2] <https://www.acm.nl/en/publications/acm-has-imposed-fine-184-million-euros-deleting-whatsapp-chat-conversations-during-dawn-raid>.

[3] https://archiwum.uokik.gov.pl/news.php?news_id=19897&news_page=1.

[4] Tobias Maass, Deputy Head of Unit, Directorate-General for Competition, European Commission at the ABA Antitrust Law Section 2024 International Cartel Workshop, Barcelona.

[5] Maria Jaspers, Director, Cartels, Directorate-General for Competition, European Commission at the 2024 International Cartel Workshop, Barcelona.