

Robin Hood, the Magna Carta and the European Convention on Human Rights

EU law takes precedence over national law in EU member states. This makes companies vulnerable to EU competition investigations without notice or any evidence of wrongdoing. How can intellectual asset managers become proactive to change the law?

By **Sherry M Knowles, Brent R Bellows** and **Matthew J Higgins**

What do Robin Hood, the Magna Carta and the European Convention on Human Rights have in common and why is this important to intellectual asset managers and IP companies?

We are all familiar with the infamous early-morning synchronised entry on 15th January 2008 by representatives of the European Commission into 43 innovator and 27 generic pharmaceutical companies to carry out a sector inquiry. In a press conference held on 16th January 2008, then Commissioner for Competition Policy Neelie Kroes stated: "Please bear in mind that a sector inquiry is different from a competition case. It does not investigate particular companies or cases. It is not based on specific evidence of wrongdoing. Rather it looks at the sector as a whole, finds out what all the companies in a particular sector are doing, finds out how the sector works. Or doesn't work. Only then does it draw conclusions as to whether action under the competition rules is necessary. Today's inspections are therefore not targeting companies suspected of wrong-doing. The inspections are just the starting point of a broad inquiry, a starting

point that will ensure that the Commission has immediate access to the information it needs to guide its next steps."

As the chief patent counsel at GlaxoSmithKline (GSK) at the time, co-author Sherry Knowles was involved in this matter. The commission demanded immediate access to a wide range of information, including computers, employee laptops, networks, hard drives, emails and documents from employees in the IP group. The commission also asked to speak with employees on the spot. The requests for massive quantities of confidential business information continued for over a year, disrupting and alarming employees. (Curious EU officials are advised that neither GSK nor any other pharmaceutical company participated in this article.)

The European Commission observed in subsequent memos that "the use of intellectual property rights, litigation and settlement agreements, is by its nature information that companies tend to consider highly confidential. Such information may also be easily withheld, concealed or destroyed. That is why we decided that inspections were necessary". It further stated that it was "keen to have immediate access to all such company information and ha[d] therefore ordered unannounced inspections".

Investigations span from sector inquiries, which are not based on any specific evidence of wrongdoing, to those based on specific probable cause that a crime has been committed. However, it remains the case that the European Competition Commission acts as its own authorising agent for the raid, so there is no objective third-party review prior to action. And national courts are not allowed to second-guess the decision.

European Commission dawn raids are



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 EC Competition Commissioner 2004-2009
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not limited to pharmaceutical company IP inquiries. Just this year, the commission has made unannounced inspections of companies involved in European publishing (March 2011), container liner shipping (May 2011) and natural gas supply (October 2011).

Violation of the Magna Carta

As Americans, the authors had a keen curiosity about how government officials from the European Union have the legal right to investigate and take evidence involuntarily regarding the daily business conduct of IP matters without any evidence of wrongdoing or a warrant issued by an independent court. In the United States, a search and seizure of this type would be a violation of the Fourth Amendment to the Constitution and unthinkable. A US company faced with such a request would simply lock the doors and tell the officers to go away in the absence of an independently issued court order. Given that most major companies and institutions have a presence in Europe, this issue remains crucial to all IP managers. Our goal is to understand better how this situation came about historically and identify the lessons that can be learned. Ultimately, an understanding of the law and how the situation evolved allows us to identify ways to try to fix the problem.

The tale of Robin Hood is not just another entertaining legend about historic England. It is a story that portrayed the basis for the Magna Carta, that hard-fought concession forced on an overreaching government to limit the excessive powers of the king. After the Crusades and the death of King Richard the Lionheart, his ineffectual brother King John and his army had cavalierly entered homes to take high taxes and possessions. Years of civil oppression, death, damage and disagreement with his barons forced King John in 1215 to promise that “we will not deny or defer to any man either Justice or Right”, and to agree to the requirement for proper evidence before a lawful judgment. In *Semayne’s Case* in 1604, the Magna Carta was interpreted to mean that “the house of everyone is to him as his castle and fortress”. And from there, the protection against search and seizure without probable cause was born. It became embedded law in every major country in Europe, and was the basis for the Fourth Amendment to the US Constitution.

The European Commission’s actions on 15th January 2008 would have been considered a violation of the Magna Carta in the very country where it was created.

The commission used evidence and information obtained without a warrant or cause to produce a preliminary report on the pharmaceutical industry which was highly controversial, debated and rejected by many key opinion leaders. To top it off, after all that, the final report was what Brits might refer to as a “damp squib”.

This was the first time that the European Commission started a sector inquiry by dawn raids without evidence of wrongdoing. Previous inquiries into the IP activities of telecommunications, energy and financial services sectors requested materials, but not through surprise raids. The commission emphasised that in the future it would not be the case that all sector inquiries would begin with dawn raids, but it has not ruled out the possibility that this may occur, indicating that “[m]uch depends on the type of information the Commission would be looking for”. As such, intellectual asset managers and companies with core IP (as well as residences that hold business documents) are currently at risk of more such raids in Europe.

None of the raided pharmaceutical companies legally challenged the European Union’s right to conduct these searches. The commission by regulation has the power to punish companies that do not comply immediately with its warrantless raids. And, indeed, the commission opened formal proceedings against Sanofi-Aventis SA for an alleged illegal obstruction of the dawn raid at its French headquarters, which it later dropped. Sanofi’s crime? It refused to let the commission officials immediately examine and take a copy of sensitive IP litigation documents, requesting that the French authorities produce a national search warrant (which was subsequently produced). According to the commission, failure to turn over the documents immediately was in itself a failure to comply in a timely manner and an obstruction of justice, exposing the company to fines of up to 1% of its annual turnover (which in Sanofi’s case could have been up to €280 million). This matter was ultimately settled. In January 2008 the German energy company E.ON received a €38 million fine for breaking the seal on a door during the course of its dawn raid.

In June 2009, Nexans France and Prysmian appealed against a commission decision relating to dawn raids, contending that the raid was in breach of their fundamental rights, including the rights of defence, the right to a fair legal process, the privilege against self-incrimination, the presumption of innocence and the right to

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privacy, and that the commission went beyond the scope of the investigation in its execution of the decision. The case was argued to the EU General Court in Luxembourg in October 2011, where Nexan told the court that it was put in “grave uncertainty” about its defences because the dawn raid decision “lacked precision” – meaning, in essence, it was a fishing trip.

Origin and scope of commission’s power of inspection without probable cause

Articles 101 and 102 of the Treaty on the Functioning of the European Union set out the rules on competition. Article 103 allows the European Council (on a proposal from the commission and after consulting the European Parliament) to establish regulations and directives, which it did in Council Regulation (EC) No 1/2003 in December 2002.

Articles 17 to 23 of Regulation 1/2003 authorise the commission to conduct an inquiry into a particular sector of the economy if there is a suggestion that competition may be distorted. It can, by its own self-regulated decision, require companies to provide all necessary information. The commission can authorise itself to enter premises, examine books and records (and take copies), and seal business premises for a period. Companies are required to submit, and if they fail to do so, national police power can be ordered.

According to Article 21, the commission may enter “any other premises, land and means of transport, including homes of directors, managers and other members of staff” of the company if it has a reasonable suspicion that business-related records (including IP documents) that may prove a violation of the competition rules are being kept on those premises. Therefore, anyone who has taken business files home for study in Europe is subject to a surprise home search. A decision for a home inspection requires the prior authorisation of the national court; however, the national court may not call into question the necessity for the inspection or even demand that the court be provided with information in the commission’s file.

The lawfulness of the commission’s decision to inspect is currently subject to review only by the Court of Justice of the European Union (ECJ). The commission can thus use a domestic search warrant from the national courts of member states as a sword to compel the company or person to submit to a dawn raid, but does not permit the company or person to benefit from the shield of the protections typically afforded by the

Powers of the European Commission on competition

EC Regulation 1/2003 gives the European Commission a number of powers with regard to competition investigations which it is able to exercise without specific evidence of wrongdoing or an independently issued warrant:

Article 17

- To authorise itself to investigate businesses for potential infringement of Articles 81 and 82, including in broad sector inquiries, if “the rigidity of prices or other circumstances suggest that competition may be restricted or distorted”.

Article 18

- To request information relating to agreements, decisions and concerted practices that are associated with the subject matter of the inquiry.

Article 19

- To interview individuals (upon consent) for the purposes of collecting information relating to the subject matter of the inquiry.

Article 20

- To enter any premises, land and means of transport of the business and associated businesses.
- To examine the books and other records related to the business, irrespective of the medium on which they are stored.
- To take or obtain in any form copies of or extracts from such books or records.
- To seal any business premises and books or records for the period and to the extent necessary for the inspection.
- To ask any representative or member of staff of the business for explanations on facts or documents relating to the subject matter and purpose of the inspection and to record the answers.
 - Member states are compelled to provide the commission with the assistance necessary to enable them to conduct their inspection, including providing the assistance of police or an equivalent enforcement authority to ensure that the inspection takes place.
 - The lawfulness of the commission decision to investigate the business is subject to review only by the Court of Justice of the European Union.

Article 21

- To enter “any other premises, land and means of transport, including homes of directors, managers and other members of staff of the undertakings”.
 - EC must have a reasonable suspicion that business-related records that may prove a violation of the competition rules are being kept on those premises.
 - Home inspection at private premises must be based on a commission decision order and can be executed only with prior authorisation from the national judicial authority. The national judicial authority is not allowed, however, to disagree with the decision of the Commission as to the necessity or rationale for the inspection.

warrant process of the national courts. It remains to be seen whether the commission uses its power of home search to collect documents merely for a sector inquiry.

A report on the functioning of Regulation 1/2003 was published by the commission in April 2009. It reported that Regulation 1/2003 had “clarified and reinforced the Commission’s investigative powers, and that sector inquiries had become one of its key tools, identifying shortcomings in the competitive process in the gas and electricity, retail banking, business insurance and pharmaceutical sectors”. It acknowledged that the power to seal and ask questions during business inspections has been regularly employed, and that (at that time) inspections of



King John of England was forced to sign the original Magna Carta at Runnymede in 1215

non-business premises had been carried out twice.

The report maintained that the regulation had brought about a landmark change in the way that European competition law is enforced, and that it has to a large extent become “the law of the land”. It also contended that Regulation 1/2003 is an innovative model of governance for the implementation of Community law by the commission and member state authorities. Could this really be true?

EU law reigns supreme

The legislative process at the EU level is particularly complex and includes different processes of legislating, depending on the specific treaty provision underlying the intended legislation and the objectives that it is seeking to achieve.

At the time of Regulation 1/2003, EU legislation on competition law was adopted under the proposal or consultation procedure, which is often described as “the commission proposes and the Council disposes”. The process also involved some consultation with the European Parliament. The commission sent its proposal and draft legislation to the EU Council and Parliament. The measure could not have become law until the Parliament had delivered its opinion and suggested any amendments. However, the council had the final word and there was no requirement that the council actually take account of the Parliament’s opinion or give any reason for rejecting it. This procedure has been criticised as a democratic deficit in the

administration and law making of the European Union, because often the EU Council (comprised of heads of the member states) uses its appointed relevant cabinet members for specific issues; and the Parliament, which is elected by voters, has historically had no real power. The recent Treaty of Lisbon addresses this complaint and does provide the Parliament with more power and equality as compared to the council, but the outcome is yet to be seen.

Regulations are a secondary source of EU legislation and are immediately binding on member states. As such, they automatically become law in the member states once they have been issued and there is no requirement for domestic implementing legislation by the member states.

Regulation 1/2003 was thus immediately enforceable without review by the member state legislatures, and superseded national protections against search and seizure without probable cause. The same considerations applied to Regulation 17/1962 (the predecessor to Regulation 1/2003 and the original source of the commission’s dawn raid powers). For the majority of member states, Regulation 17/1962 did not require ratification, notwithstanding that all other inconsistent national legislation was inherently invalidated by the process, which is a precondition to accession and adoption of the *acquis communautaire* (ie, the full body of law of the European Union). As the UK court observed in *Stoke on Trent City Council v B&Q plc*: “Entry into the EC and its attendant partial surrender of sovereignty was more than compensated for by the advantages of membership.”

The ECJ has confirmed that EU law is the supreme law of Europe, in the landmark case of *Costa v ENEL* (1964): “The law stemming from the treaty, an independent source of law, could not, because of its special and original nature, be overridden by domestic legal provisions, however framed, without being deprived of its character as community law and without legal basis of the community itself being called into question.”

Search and seizure powers in England, France and Germany

The far-reaching powers of the European Commission empowering warrantless dawn raids represent a stark contrast to the domestic search and seizure restrictions afforded in the member states themselves. European countries still embrace the protections granted by the Magna Carta.

At the very time that the European Commission was taking an expansive and

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Timeline – from the Magna Carta onwards

<p>1215 Magna Carta is issued in England by King John. It required proper evidence, rather than mere assertion, as the basis for “lawful judgment” (clause 38 of the original text).</p> <p>1604 In <i>Semayne</i>, Sir Edward Coke of the King’s Bench holds “the house of everyone is to him as his castle and fortress”; the sheriff can enter only to execute a warrant or for an arrest, but otherwise it is a trespass.</p> <p>1789 The protection of the right to private premises was established in French law by Article 17 of the Declaration of Rights of Man and of the Citizen, which still has constitutional value.</p> <p>1791 The United States adopts the Bill of Rights, which includes the Fourth Amendment to the Constitution, prohibiting searches, arrests and seizure of property without a warrant based on probable cause that a crime has been committed.</p> <p>1849 Confirmation of the fundamental right of the domicile and premises being inviolable is included in the First German Constitution.</p> <p>1950 Convention for Protection of Human Rights and Fundamental Freedoms adopted.</p> <p>1951 Treaty of Paris creates European Coal and Steel Community.</p> <p>1952 European Court of Justice (ECJ) established as result of Treaty of Paris.</p> <p>1957 Treaty of Rome establishes European Economic Community (EEC), comprising Belgium, France, Italy, West Germany, Luxembourg and the Netherlands. Treaty gives EEC wide-ranging powers to oversee and prevent activities that could affect competition. Forms the basis for the EC Competition Directorate General.</p> <p>1964 The ECJ confirms that EEC law is the supreme law of Europe, in the landmark case of <i>Costa v ENEL</i>. This means that European law overrules national law in a conflict.</p> <p>1967 Merger Treaty creates European Community (EC) by combining European Coal and Steel Community, EEC and European Atomic Energy Community.</p> <p>1973 The United Kingdom joins the EC.</p> <p>2002 Council Regulation (EC) No 1/2003 is promulgated under authority of Articles 101 to 103 of the European Council. Gives European Competition DG wide-ranging powers to enter</p>	<p>premises without an independently issued warrant or probable cause.</p> <p>2002 The European Court of Human Rights (ECHR) in <i>Societe Colas Est v France</i> determines that a dawn raid procedure which took place without any prior warrant being issued by a judge and without a senior police officer being present was not lawful in a democratic society, as it did not provide for adequate and effective safeguards against abuse. Not binding on EU.</p> <p>2008 European Commission starts sector inquiry of 43 innovator and 27 generic pharmaceutical companies with dawn raids without warrants or evidence of wrongdoing.</p> <p>2009 Nexans France and Prysmian appeal against a commission raid arguing that it was in breach of its fundamental right to privacy and that the commission went beyond the scope of the investigation in the execution of its entry decision.</p> <p>2009 The Treaty of Lisbon amends the current EU and EC treaties to provide for a mechanism for the EU to join the European Convention on Human Rights as the 48th signatory and to place a judge on the ECHR.</p> <p>2010 The commission launches a consultation on the best practices for antitrust proceedings, with a view to providing companies with further certainty and transparency about the relationship between them and the commission during an antitrust case.</p> <p>2010 Official talks on the accession of the European Union to the European Convention on Human Rights begin.</p> <p>2010 European General Court, in <i>Conseil national de l’Ordre des pharmaciens and Ors v Commission</i>, holds that requiring the commission to substantiate its decisions to conduct dawn raids would undermine the commission’s objectives.</p> <p>2011 ECHR publishes draft agreement on accession of the European Union to the European Convention on Human Rights. Still unclear whether EU or ECHR law would take precedence in a dawn raid.</p> <p>2011 European Commission reforms antitrust procedures and expands role of hearing officer to provide more rights to parties being investigated, but does not change authority to enter without an independently issued warrant or probable cause.</p> <p>2015 800th Anniversary of Magna Carta.</p>
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bullish approach to the exercise of its search powers in the member states, there were moves in England to clarify and codify such powers to ensure the sufficiency of safeguards against arbitrary and abusive practices. In particular, a private members bill (the Powers of Entry Bill 2008) was introduced before the House of Lords by Lord Selsdon. During the course of the second reading of the bill, it was stated that: “The Bill says, ‘Look, you should not really go into people’s homes, on to their land, with or without buildings, into their property or offices and seize papers and take them away and do things with them without permission or letting them know beforehand and proving who you are!’”

Referring to the introductory passages of *Crossing the Threshold* by Professor Stone,

the House of Lords observed that: “Under English law, the citizen’s home has traditionally been regarded as a privileged space. The courts have insisted that servants of the state cannot enter a private home without the occupier’s permission unless a specific law authorises them to do so ... A number of these powers originate with European Union directives and regulations, rather than with an Act of Parliament passed by the UK’s elected legislators ... As a result of the proliferation and variety of entry powers, a citizen cannot realistically be aware of the circumstances in which his home may be entered by state officials without his consent, or what rights he has in such circumstances.”

The House of Lords further noted that there is “a conflict between existing



Viviane Reding
 Vice President of the European Commission
 Has the Charter of Fundamental Rights of
 the EU protected intellectual asset
 managers?

legislation or regulations, human rights and the EU". In a further reading of the bill on 26th June 2008, Lord Trefgarne moved to amend the bill to incorporate a clause providing that: "No person, or class of person, who is acting under the authority of another government, or as an employee of an agency of the European Union, shall have power to act as an 'authorised person' within the United Kingdom, unless Parliament has specifically so provided." He stated that, in his view, what "is wrong with the European Union is the almost untrammelled power of the [EU]. It has the power to make directives with only the most limited control, and sometimes it brings forward proposals of moderate or no wisdom". On that basis, he was "concerned that the EU may run amok if ... Bill proceeds unamended". He asked whether there are "any proposals from the UK to prevent the exercise of such powers in the future, with appropriate assurances that Parliament will not concede any such powers without an affirmative resolution of both Houses?" The proposed amendment was ultimately withdrawn and the bill has never been enacted; accordingly, the legitimate concerns remain unaddressed.

The right to enter and search private premises (including business premises) in France is strictly controlled by the French Civil Code. It requires the grant of an order of the relevant court, which must be founded on a reasonable suspicion of a wrongdoing. The protection of the right to private premises was established in French law by Article 17 of the Declaration of Rights of Man and of the Citizen, 26th August 1789, which still has constitutional value. This states: "Since property is an inviolable and sacred right, no one shall be deprived thereof except where public necessity, legally determined, shall clearly demand it, and then only on condition that the owner shall have been previously and equitably indemnified."

The powers of authorities to enter and search premises are also highly restricted under German law. Indeed, the fundamental right of the domicile and premises being inviolable has a long historical background in German constitutional law. The right was initially set out in the Prussian Constitution of 1884/1850, and was reiterated in the First German Constitution of 1849 and in the German post-World War I Constitution. Currently, this fundamental right is laid down in Article 13 of the German Basic Law (equivalent to the Constitution). Article 13 of the Basic Law states that: "(1) The domicile is inviolable;

and (2) Searches may be authorized only by a judge or, when time is of the essence, by other authorities designated by the laws, and may be carried out only in the manner therein prescribed."

European Convention on Human Rights

The European Convention on Human Rights (ECHR) is a post-World War II treaty now signed by 47 European countries which assures mutual respect for fundamental freedoms and human rights. The ECHR created the European Court of Human Rights (ECtHR), a supranational court which any citizen of a signatory state can petition to allege a violation of rights. However, neither the European Union nor its agencies are currently signatories to the ECHR.

The Treaty of Lisbon, entered into in December 2009, amends the current EU and EC treaties to provide, among other things, for a mechanism for the European Union to join the ECHR as the 48th signatory and to place a judge on the ECtHR. EU law will then have to be interpreted in light of the ECHR. However, the treaty and its protocols make clear that accession to the ECHR will not affect the European Union's competences, and that provision will be made for preserving the specific characteristics of the European Union and EU law. Many believe that the fact that the EC Treaty enshrined the principles of human rights means that in practice there will be little change from a legal perspective – only more accountability for the EU institutions. An excellent comprehensive review of the interplay between the EU/ECJ and the ECHR/ECtHR is provided in Imran Aslam and Michael Ramsden, "EC Dawn Raids: A Human Rights Violation?", *Competition Law Journal*, Volume 5 Issue 1, December 2008.

Article 8(1) of the ECHR requires that "everyone has the right to respect for his private and family life, his home and his correspondence", unless justified under Article 8(2). The ECtHR has interpreted these protections to cover corporations as legal persons. Currently, however, the ECJ is the only court that can review the legality of a commission dawn raid, which is unsatisfactory given the sanctions that the commission is able (and willing) to impose on what it perceives to be obstruction of its investigation.

Moreover, any review by the ECJ necessarily takes place after the dawn raid has occurred. This is in direct conflict with the jurisprudence of the ECtHR's *Colas* decision (*Societe Colas Est v France* (2002) ECHR 421), in which it considered whether

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the French National Competition Authority breached Article 8(1) of the ECHR when it undertook dawn raids on 56 companies and seized thousands of documents without any judicial authorisation under domestic legislation. The ECtHR determined that it did and, consequently, it was necessary to consider whether the interference was justified. While the ECtHR was satisfied that the interference was in accordance with the domestic law and pursued the legitimate aim of the economic wellbeing of the country and the prevention of crime, it did not accept that the dawn raid procedure (which took place without any prior warrant being issued by a judge and without a senior police officer being present) was necessary in a democratic society, as it did not provide for adequate and effective safeguards against abuse.

Official talks on the accession of the European Union to the ECHR started on 7th July 2010. In a press release Viviane Reding, vice president of the European Commission and commissioner for justice, fundamental rights and citizenship, curiously stated: "The European Union has an important role to play in further strengthening the Convention's system of fundamental rights. We already have our own Charter of Fundamental Rights, which represents the most modern codification of fundamental rights in the world. This is a very good precondition to a successful meeting of the minds between the negotiating partners."

A draft agreement on EU accession to the ECHR was published on 14th October 2011. After it is finalised, the agreement must be approved by the unanimous decision of the European Council and the European Parliament must give its consent. The agreement will then have to be ratified by all 47 contracting states to the ECHR, including those that are also EU member states. This process could take years to complete, and when done, there is no guarantee that the agreement will ultimately result in the protections against search and seizure missing in Regulation 1/2003. Meanwhile, intellectual asset managers remain at risk of dawn raids in Europe without a warrant issued by an independent court or any indication of wrongdoing. It will be up to all of us to make our voices heard and to become part of this process to influence the final EU accession agreement in a manner that assures the freedom against search and seizure in Europe without a court order based on clear evidence.

Preparations are now underway to celebrate the 800th year anniversary of the

Action plan



In order to establish the principles laid out in the Magna Carta at EU level, intellectual asset managers and IP-core companies should:

- Understand how the protections against search and seizure guaranteed by the Magna Carta and European national laws were superseded by EU law.
- Become familiar with the differences between the European Competition Regulation 1/2003 and protections provided by the laws of the national countries they are doing business in.
- Open discussions with European Commission representatives to change Articles 17 to 20 of EC Regulation 1/2003.
- Initiate an open dialogue to influence discussions which are ongoing about EU membership in the European Convention
- Understand there are short deadlines to bring an action to challenge a decision of the EC after it makes an unannounced inspection. Create a corporate policy in advance on whether such decisions will be challenged. Have counsel prepared with draft documents that can be quickly completed and filed before the short deadline. If a company is willing to challenge the decision, it should obtain authority in advance or create an emergency process to get authority to take appropriate action quickly.
- Motivate a 2012 revival of Robin Hood and his Merry Men and Women!

Magna Carta on 15th June 2015. The barons who forced King John to sign the Magna Carta would no doubt disagree with Reding that a system of laws that provides for surprise entry of intellectual asset-based companies and residences without any – or alternatively, an independent determination of – probable cause represents the most modern codification of fundamental rights in the world. One hopes that the EU negotiations to join the ECHR occur swiftly and result in a reinstatement of the protections against search and seizure that have long existed – albeit now superseded – in national laws. Let's celebrate the 800th anniversary by returning to the protections afforded by the Magna Carta. *iam*

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