Dawn Raids and Human Rights: Where are We Now?

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When your company is raided by an antitrust regulatory agency, what recourse do you have? At first, the answer from the ECJ and the European Court of Human Rights (ECtHR) was "not much", as companies were not afforded the right to privacy. Over time, though, both courts have come to recognise that safeguards must be put in place to protect corporate entities from arbitrary or disproportionate government intrusion. With its *Deutsche Bahn* judgment, the ECJ has now brought to an end suggestion by some – including the ECtHR itself – that the regulatory framework underpinning dawn raids by the European Commission is violative of the right to privacy, and the right to a fair trial. Unfortunately, the ECJ's reasoning was superficial and underwhelming.

The ECtHR has determined that a raid on a company's place of business implicates Article 6 ECHR (the right to a fair trial), and Article 8 ECHR (the right to privacy). In order to satisfy Article 6, judicial review of the dawn raid must be held in a reasonable period of time after the raid. Leaving review of its legality until the accused appeals a finding of antitrust liability is insufficient in this regard, as (i) it may take several years for the investigation to reach the liability and appeal stage; and (ii) if the authority does not end up finding the company to be liable, there will be no appeal and therefore no proceedings in which to raise the privacy violations (*Primagaz v France*).

Similarly, governments may comply with Article 8 ECHR by obtaining judicial authorisation for a raid before executing the search warrant, and by ensuring the availability of ongoing judicial scrutiny. Many jurisdictions do not require pre-raid authorisation, but its absence will not fall foul of Article 8 if *ex post facto* judicial review is available. Such review must specifically consider allegations that the documents seized are privileged or outside the scope of the investigation (*Vinci v France*), and provide for appropriate redress, including the destruction or return of improperly seized material (*Delta Pekárny v Czech Republic*). In the latter case, the Czech Republic, in defence of its dawn raid regime, pointed to its similarity to Regulation 1/2003, the EU's dawn raid law. Tellingly, the ECtHR appeared to accept the similarity, and struck down the Czech law nonetheless.

The General Court in *Deutsche Bahn* (confirmed by the Court of Justice) opined that Regulation 1/2003 was compatible with Article 6 ECHR (and its Charter equivalent) because of the Court's power to annul inspection decisions and award an appropriate remedy, and the Commission's inability to rely on unlawfully seized evidence. This assertion is inconsistent with the Court's own recent case law. In *Nexans v Commission*, the General Court held that Article 263 TFEU, which gives the ECJ the power to annul Commission acts, only extends to inspection decisions, decisions fining a company, and challenges to the seizure of legally privileged material; any argument concerning non-privileged items seized beyond the proper scope of an inspection decision is inadmissible until an infringement decision appeal. This falls foul of the ECtHR rule that such challenges must be available in a reasonable time, and not be deferred until the infringement appeal.

There remains the further issue of whether an appropriate remedy is truly available. The General Court considered that, among other things, the availability of interim relief and non-contractual damages cured the Article 8 ECHR problems raised by the lack of mandatory pre-raid authorisation. Again, ECJ case law shows that this procedural route (the Article 340 TFEU action for non-contractual damages) is also likely to benefit few applicants. Two roadblocks exist: the need to demonstrate actual harm in the damages action, and proof of irreparable harm required to succeed on an application for interim remedies. The Court has held that damages will not be inferred simply from a violation of fundamental rights: they must actually be proven. This will be difficult if the Commission has not divulged company secrets to competitors or the public. As for irreparable harm, the Court may step in to prevent disclosure of confidential information to the public. However, the ECJ does not view the mere reading of illegally seized documents by the Commission as sufficient to demonstrate such harm (*Pilkington v Commission*). Alarmingly, this includes the reading of potentially privileged documents in violation of Article 6 ECtHR (see the interim relief orders in *Akzo Nobel v Commission*).

Taken together, these two roadblocks prove insurmountable: an applicant generally won't be able to get interim relief because the Commission's illegal review of seized material is not considered sufficiently serious; and an applicant won't succeed on the underlying action because proving actual damages is very difficult while the Commission refrains from disseminating confidential information.

Crucially, the Court's focus on non-contractual damages misses the point: companies don't want damages, they want their documents back and copies destroyed. Refusals to grant interim relief to that effect are common, and the ECJ has consistently ruled that it does not have the power to make such orders in the context of an Article 263 action. This means that, even if a company wins an annulment action, they cannot be sure that the Commission has actually removed the illegally seized documents from its possession.

In short, neither Article 6 nor Article 8 can credibly be said to be protected by the current system. Post-raid judicial review is neither timely nor comprehensive in the remedies it offers. Thankfully, the story does not end here. Despite the ECJ's best efforts (see *Opinion 2/13*), the EU will inevitably accede to the ECHR, and final say about human rights compliance will be left to the ECtHR. Given the unambiguous string of ECtHR cases that show the deficiencies of the current EU dawn raid regime, the ECtHR is unlikely to be as supportive of Regulation 1/2003 as the ECJ was in *Deutsche Bahn*. Expect some significant changes – just don't hold your breath.

For an in-depth analysis of the human rights implications of Commission dawn raids, see the author's forthcoming article in the Journal of European Competition Law and Practice.