Kluwer Competition Law Blog

Two Courts – Two Views on the Procedural Safeguards to Surround Dawn Raids

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On 9 March 2023, the Court of Justice of the European Union delivered its rulings in *Les Mousquetaires* and *Casino*, both cases dealing with the procedural safeguards that need to surround a dawn raid. Less than a month later, the European Court of Human Rights gave its view on the matter in *UAB Kesko Senukai Lithuania v. Lithuania*. The CJEU struck down on the Commission's failure to take notes of meetings with complainants and annulled the inspection decisions on that ground, once again establishing that this type of procedural irregularity may come at a high cost. However, it was not equally willing to accept the parties' arguments that they had been deprived of the right to an effective legal remedy. The Strasbourg Court's ruling just a few weeks later reveals a potential dichotomy in the two courts' view on this, as the Strasbourg Court appears to set the bar higher than the CJEU.

The Dawn Raid – A Powerful Tool to Be Handled with Care

Most competition authorities consider the dawn raid to be a prerequisite to successful competition law enforcement. The threat of a dawn raid has a deterrent effect and the evidence gathered is often key to the investigation. It is the intrusive character of the dawn raid that makes it so powerful, but this intrusiveness also entails an inherent risk that fundamental rights are not properly safeguarded. Taken by surprise and with the officials at your doorstep, you may not be in the best position to safeguard your rights.

Add to that the fact that competition authorities are adapting to the new ways of working, carrying out inspections at the homes of employees and managers. During these raids, they may search through laptops, tablets and other devices not only of the employees but also of their family members. Determining the boundaries of the authority's powers during inspections and the possibility to have any measures taken reviewed by a court are thus more important than ever.

Annulment of the Commission's Inspection Decisions in Casino and Les Mousquetaires

Suspecting the French retailers' Casino and Intermarché of an information exchange contrary to Article 101 TFEU, the European Commission ('the Commission') carried out dawn raids at their headquarters in February 2017. Copies were made of data from computers, laptops, tablets, mobile

phones and other electronic devices. Intermarché objected to the copying of certain data, arguing that it related to the private life of its employees. It later requested the Commission to return documents containing such data, and both companies brought an action against the inspection decisions before the General Court (the GC).

In support of their actions, they argued, inter alia, that the (i) limited possibilities for judicial review of any measures taken during the raids infringed both their defence rights and the right to privacy, (ii) the Commission had provided insufficient reasons for its inspection decisions, (iii) Commission had ventured out on a fishing expedition by adopting the inspection decisions without reasonable grounds, and (iv) adoption of the decision refusing to ensure protection for certain documents containing personal data violated their fundamental rights.

In its rulings, the GC found that the Commission had indeed ventured out on a fishing expedition as regards '*future commercial strategies*' and annulled the inspection decisions in this part. It also made some interesting and important statements on the seizure of documents containing personal data, declaring that such seizure may well constitute a challengeable act – just like the seizure of documents covered by legal professional privilege. As for the rest, the GC dismissed the applications.

The Court of Justice has now had its say, setting aside the GC's ruling and annulling the Commission's inspection decisions in their entirety. The reason for this? The Court did not agree with the GC that Article 19 of Regulation 1/2003 and the obligation to record meetings only applies after the Commission has formally initiated an investigation, that is after the dawn raid. In the case at hand, the Commission had not properly recorded interviews held with 13 complainants prior to the inspections. Referring to its ruling in *Intel*, the Court found this to be contrary to Article 19 and established that the inspection decisions could not be based on information gathered during these interviews. As this information had formed the basis for the inspection decisions, the Court established that the GC had erred in law when declaring that the Commission had had reasonable grounds for carrying out dawn raids.

The Right to an Effective Legal Remedy – The View of the CJEU

While the inspection decisions were annulled, it is still worthwhile to discuss the Court's finding that the procedural safeguards surrounding the right to an effective legal remedy were adequate.

Noting that Article 47 of the EU Charter should ensure the same standard of protection as its ECHR equivalent, it acknowledged that Article 6(1) ECHR requires that (i) targeted companies have a right to have not only the inspection decision but also any measures taken on its basis reviewed by a court, and (ii) the possibility for such review should be both certain and take place within a reasonable time. Examining the EU system, it found that it did meet the ECHR standard in this respect.

The Court declared that an overall assessment needs to be made. The EU system does not require the inspection decision to be adopted by a court. Nor does it allow parties to challenge measures taken during the inspection unless they bring about a distinct change in their legal position. Implementing measures, such as the copying of material during an inspection, is not considered to bring about such change. That said, the Court identified other ways which, taken together, were considered to ensure an effective legal remedy.

First, it noted that, in addition to turning to the Hearing Officer, targeted companies may challenge the inspection decision. Second, the lawfulness of any measures taken may be reviewed when the final decision in the underlying competition case is challenged. Third, the parties have the option to obstruct during the raid and challenge the Commission's decision to sanction the obstruction. Fourth, certain measures, such as the seizure of privileged documents, could be challenged directly. Fifth, the parties could apply for interim measures, and finally, there is the possibility to bring an action in non-contractual liability against the Commission. While the different routes may not in and of themselves provide adequate procedural safeguards, taken together they do, the Court concluded.

The Strasbourg court appears to take a somewhat different view in its ruling on the remedies available under Lithuanian law.

The Right to an Effective Legal Remedy – The View of the Strasbourg Court

In June 2018, the Lithuanian Competition Council (the LCC) carried out dawn raids at the premises of several companies, including UAB Kesko Senukai Lithuania (Kesko). During the raid at Kesko's, the officials made copies of documents found at the offices of five employees and searched and examined their computers as well as the mobile phone of one of them, copying over 250 gigabytes of data.

Kesko complained against the way the inspection had been carried out, arguing, inter alia, that the officials had seized and copied large amounts of information in an indiscriminate manner without even attempting to assess whether certain documents were related to the investigation. They had, for example, copied the entire mailbox contents from the computers of the five employees in question. The LCC dismissed the application and the case moved its way up to the Supreme Administrative Court which did the same. While acknowledging that targeted companies had a right to lodge a complaint against the actions and decisions of the LCC, it found that this only applied to actions or decisions that gave rise to legal consequences. Finding that (i) the applicants' rights and obligations would not change if the court was to allow the complaint, (ii) the measures taken could be assessed after the LCC had completed the investigation and issued a final decision, and (iii) there was a possibility to lodge a civil claim for damages against the state, it was satisfied that the LCC's refusal to examine the complaint had not deprived Kesko of access to the court.

Having exhausted all national remedies, Kesko turned to Strasbourg. The Strasbourg court acknowledged that dawn raids carried out at company premises interfere with the rights protected by Article 8 ECHR, and more specifically the company's right to respect its '*home*' and '*correspondence*'. To comply with Article 8 ECHR, domestic legislation and practice must afford adequate procedural safeguards against abuse and arbitrariness. Here, it noted that national legislation provided several safeguards. To name a few, inspection decisions were adopted by the courts and limits were set to the types of information that officials could seize or copy. The applicants had not complained of the adequacy of the legal framework as such but of the measures actually taken, arguing that the officials had overstepped the boundaries provided.

The Strasbourg court noted that during the period 2012-2020, the Supreme Administrative Court had examined six complaints against the LCC's seizure of information and that this was the only one where the decision to seize or copy documents had not been found to give rise to any legal

consequences. The Government argued that the case distinguished itself from the others in that Kesko had failed to precisely indicate which documents were irrelevant to the investigation. The Strasbourg court did not agree to declare that, given the very large amount of information seized during the inspection, placing the task of examining each document on Kesko was not proportionate. It further noted that the Government had not argued that the availability of judicial review would have any negative effects on the cartel investigation. Finally, it found that the need for a judicial review of the measures taken was rendered all the more important by the fact that the LCC's investigation against Kesko had been discontinued. As a result, no proceedings were brought against the LCC's final decision in the underlying cartel case, and it was therefore never assessed by an independent and impartial tribunal whether all the documents seized had been relevant to the investigation. An infringement of Article 8 ECHR was thus established.

Two Courts – Two Diverging Views on Adequate Procedural Safeguards?

While the Strasbourg court's rulings are case-specific, determining whether the rights of the applicants have been infringed in each individual case, they are not entirely without general application. Article 52(3) of the EU Charter requires the EU standard of protection to meet or exceed the ECHR standard. Thus, the EU is required to ensure that companies targeted by a Commission inspection will not end up in a situation like that in *Kesko*.

In *Kesko*, one must assume that the parties had a right to challenge the inspection decision, although it should be noted that this usually requires that there is something wrong with the decision as such – not the measures taken on its basis. It is not unlikely that the applicants could also apply for interim measures or face sanctions if they decided to obstruct the investigation. We know that they had a right to have the measures assessed when challenging the final decision and that there was a possibility to claim damages from the Lithuanian state. In addition to the ex-ante review carried out by the Lithuanian court, at least three of the six procedural safeguards listed by the CJEU in *Casino* and *Les Mousquetaires* were thus available. Yet, the Strasbourg court did not find these to be adequate.

Should Companies Feel Safe in the Hands of the Commission?

For many years, the Commission's leniency programme worked well, often providing the Commission with solid evidence against the cartel members even before the dawn raids had been carried out. Today, the situation has changed.

As a result of the uptick in cartel damages claims, the leniency programme seems to be losing attraction at the same pace as the private enforcement system is picking up speed. It can therefore be assumed that inspection decisions are adopted on weaker grounds than earlier and that we, just as in *Kesko*, will witness an increase in the number of investigations that are discontinued. Furthermore, to rely on the fact that targeted companies could obstruct the investigation and then challenge any decision to impose fines seems unsatisfactory. While this is indeed a viable route, companies should not have to fear being hit with substantial fines when trying to safeguard their rights.

Add to that the fact that the Commission, when proposing new legislation, routinely suggests that

the supervisory authorities are vested with far-reaching investigatory powers. As a result, the Digital Markets Act and the Foreign Subsidies Regulation both allow the Commission to carry out unannounced inspections when it finds it necessary. Increased use of the dawn raid tool calls for even stricter procedural safeguards. Hopefully, the ongoing revision of Regulation 1/2003 will not leave this question unattended, ensuring adequate procedural safeguards in future antitrust investigations.

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