ascola
Academic Society for Competition Law

CARS
Centre for Antitrust and Regulatory Studies
Centrum Studiów Antymonopolowych i Regulacyjnych
UNIWERSYTET WARSZAWSKI WYDZIAŁ ZARZĄDZANIA

9th ASCOLA Conference Warsaw 2014 on
PROCEDURAL FAIRNESS IN COMPETITION PROCEEDINGS

Fishing expeditions and subsequent electronic searches in the light of the principle of proportionality of inspections in competition law cases in Europe.

Marta Michałek

CENTRE FOR ANTITRUST AND REGULATORY STUDIES, UNIVERSITY OF WARSAW
Warsaw, 26 – 28 June 2014

ascola
Academic Society for Competition Law

CARS
Centre for Antitrust and Regulatory Studies
Centrum Studiów Antymonopolowych i Regulacyjnych
UNIWERSYTET WARSZAWSKI WYDZIAŁ ZARZĄDZANIA

9th ASCOLA Conference Warsaw 2014 on
PROCEDURAL FAIRNESS IN COMPETITION PROCEEDINGS

Fishing expeditions and subsequent electronic searches in the light of the principle of proportionality of inspections in competition law cases in Europe.

Marta Michałek

Draft Paper.
Please do not quote

CENTRE FOR ANTITRUST AND REGULATORY STUDIES, UNIVERSITY OF WARSAW
Warsaw, 26–28 June 2014

Fishing expeditions and subsequent electronic searches in the light of the principle of proportionality of inspections in competition law cases in Europe.

Marta Michałek[*]

"*It tends to be a frightening experience when — more often than not, early in the morning — European Commission inspectors turn up unannounced at the doors of an undertaking with the intention of searching its premises as part of a dawn raid aimed at determining whether that undertaking is involved in anti-competitive practices*[1]."

Abstract

The inspections carried out in competition law cases are undoubtedly an effective instrument of the competition law enforcement since they constitute an efficient mean to obtain relevant evidence. Nevertheless, this institution often leads to a serious interference with the sphere of undertaking's rights, in particular the right to defence.

Several problems may be observed when it comes to the conduct of inspections in the framework of competition law in Europe, in relation to *inter alia* the right to defence, including the privilege against self-incrimination and legal professional privilege, right to privacy, right to an effective remedy or the principle of proportionality. Most of these questions are common to various European countries since they emerge at the level of the European Union, in old and new EU Member States (e.g. Poland) as well as in the countries outside the EU (Switzerland).

Focusing on the questions of fishing expeditions and subsequent electronic searches analysed mostly in the light of the principle of proportionality, this paper presents selected controversies and developments in relation to competition authorities' powers of inspections as well as undertakings' procedural safeguards.

* PhD Student in competition law at the Univeristy of Fribourg and the University of Warsaw.

[1] Opinion of Advocate General Kokott delivered on 3 April 2014 in Case C-37/13 P *Nexans SA and Nexans France SAS vs European Commission*, para. 1.

Contents

I. Introduction

II. European Union

III. Poland

IV. Switzerland

V. Conclusions

I. Introduction

The "dawn raids", i.e. unannounced inspection conducted by competition authorities are undoubtedly an effective instrument that leads to detection of a competition law infringements committed by undertakings inspected. Inspections are said to be much more effective if carried out without a forewarning[2] since they usually allow to gather the key evidence of the conducted investigation. Thus dawn raids often constitute an significant step leading to the subsequent finding of a competition law infringement and imposition of substantial fines[3].

Nevertheless implementation of those far reaching powers of investigation of the competition authorities constitutes a significant intervention into the private sphere of undertakings concerned[4]. It has to be stressed that the inspections carried out by the inspectors are liable to interfere with several rights of undertakings, i.e. right to defence[5], including the privilege against self-incrimination and legal professional privilege, right to privacy[6], right to effective judicial protection[7] as well as with the principle of proportionality.

According to the essential legal principle of proportionality, any "interference by public authorities with the rights and freedoms of private entities is permissible only if it is in accordance with the law and is necessary in a democratic society for the protection of key interests such as public order or the rights and freedoms of others[8]". Actions of the public authorities should be deemed disproportional if the same aim that they are leading to can be achieved by less intrusive measures.

---

[2] M. Bernatt, *Powers of Inspection of the Polish Competition Authority. Question of Proportionality*, Yearbook of Antitrust and Regulatory Studies (YARS), Vol. 4(5) 2011, p. 58

[3] It is noteworthy that the level of imposed fines has been constantly increasing, mostly in the EU, due to the prevailing Commission's objective of strengthening the deterrence effect of punishment for the violations of the competition law.

[4] Regarding theirs private activities and premises.

[5] Article 6 (1) of the European Convention of Human Rights (Hereinafter: the "EConHR"); Since inspections are part of proceedings of a criminal or quasi-criminal nature.

[6] Article 8 (1) EConHR.

[7] Articles 6 and 13 EConHR (right to an effective remedy).

[8] M. Bernatt, *Powers of Inspection...*, p. 48

Therefore the obligation to specify the purpose and the subject matter of the investigation constitutes a fundamental guarantee against arbitrary or disproportionate intervention by public authorities into the private sphere of undertakings. So called "fishing expeditions", i.e. inspections based only on an unsubstantiated suspicion of a potential infringement, constitute thus an abuse committed by the competition authority. Recently the General Court, on the one hand, expressly stressed that the European Commission does not have the power to conduct fishing expeditions and annulled the inspection decision to some extent[9] and, on the other hand, dismissed the undertaking-appellant's arguments that, since the scope of the subject matter in the inspection decision was "disproportionally wide" and described generally, dawn raids amounted to fishing expeditions[10].

The second current controversial issue relates to the highly criticised but more and more common practice of coping of the entirety of digital storage mediums (such as hard drives) for subsequent review in the competition authority's office (carried out with or without presence of the undertaking concerned). Many doubts are raised due to the existing gap in this subject as neither the relevant regulations provide for specified rules of such measures nor courts rule on the legality of subsequent electronic searches. For instance, in the above-mentioned *Nexans* case the General Court avoided taking clear position on the question by stating that the contested acts of the European Commission did not constitute an actionable decision, but merely the measure implementing the inspection decision that may be challenged only in appeal from the final decision.

It would be, however, desirable to create clearer procedures with proper legal safeguards regarding taking away the forensic copies of hard drives for later review in the authority's premises, in order to ensure respect *inter alia* for the principle of proportionality.

It is indispensable therefore that undertakings inspected are "given the opportunity to seek a comprehensive and effective judicial review of the legality of both the decision ordering that investigation and the individual steps taken during the investigation[11]". In this context it is also important that the subsequent judicial control is in line with the ECtHR approach according to which any decision taken by administrative bodies which is not "tribunal" under Article 6(1) ECHR must "be subject to subsequent control by a judicial body that has full jurisdiction" over both questions, i.e. of fact and of law[12]. In the ECtHR

[9] The Judgment of the General Court of 14 November 2012 in case T-135/09 *Nexans v Commission*.
[10] The Judgment of the General Court of 6 September 2013 in case T-289/11 *Deutsche Bahn v Commission*.
[11] Opinion of AG Kokott of 29 April 2010 in case C-550/07, *Akzo Nobel Chemicals and Akcros Chemicals Ltd vs Commission*, para. 43.
[12] See the ECtHR judgment of 10 February 1983, in case *Albert and Le Compte v Belgium*, application no.

view, full jurisdiction occurs if a court is entitled to, firstly, examine all relevant facts of the case what it actually does[13] and, secondly, to quash the appealed decision in relation to all factual and legal aspects[14]. Therefore it is not sufficient, while assessing legality of the appealed decision, to verify only whether it is compatible with substantive law[15]. The court has to be entitled to set aside the impugned decision either entirely or partially, if "procedural requirements of fairness were not met in the proceedings which had led to its adoption[16]". In consequence, the court should also ponder on the question whether the principle of proportionality was observed by the competition authority[17].

Nevertheless, the CJEU control in this regard seems to be minimal. In Poland and Switzerland, there is even no legal basis for bringing an action against the inspection authorisations. This lack causes an inability of the undertaking to defend its rights, in particular since such a legal action is essential, e.g., in order to exclude the material originated from a fishing expedition (i.e. obtained outside the scope of the inspection decision) from the evidence.

Focusing on the questions of fishing expeditions and subsequent electronic searches analysed mostly in the light of the principle of proportionality, this paper presents selected controversies and developments in relation to competition authorities' powers of inspections as well as undertakings' safeguards. Since most of the relevant questions emerge at all European levels, the author analyses these issues on the examples of the EU competition law as well as the national legal orders of EU Member States (e.g. Poland) and the European countries outside the EU (Switzerland)[18]. In conclusion, some remedies are proposed.

7299/75, 7496/76, para. 29; the ECtHR judgment of 20 May 1998 in case *Gautrin and others v France*, application no. 21257/93, para. 57; the ECtHR judgment of 16 December 2008 in case *Frankowicz v Poland*, application no. 53025/99, para. 60. In relation to question of judicial control over administrative bodies see: the ECtHR judgment of 24 February 2004, in case *Bendenoun v. France*, application no. 12547/86, para. 46; the ECtHR judgment of 23 October 1995, in case *Umlauft v Austria*, application no. 15527/89, para. 37–39; the ECtHR judgment of 23 October 1995, in case *Schmautzer v Austria*, application no. 15523/89, para. 34; the ECtHR judgment of 21 May 2003, in case *Janosevic v Sweden*, application no. 34619/97, para. 81. See moreover L. Drabek, *A Fair Hearing Before EC Institutions*, European Review of Private Law 4/2001, p. 561; K. Lenaerts, J. Vanhamme, *Procedural Rights of Private Parties in the Community Administrative Process,* CMLR 34/1997, p. 561-562.

[13] *See the Schmautzer* judgment, para. 35.

[14] Ibidem *; See Janosevic* judgment, para. 81.

[15] See the ECtHR judgment of 4 October 2001, in case *Potocka and others v Poland*, application no. 33776/96, para. 55, 58; the ECtHR judgment 21 July 2011, in case *Sigma Radio Television Ltd v Cyprus,* application no. 32181/04, 35122/05,para. 153–154.

[16] See the *Potocka* judgment, para. 55.

[17] M. Bernatt, *Powers of Inspection...*, p. 63

[18] The perception of the analysed problem is different depending on whether it is discussed in the EU, in Poland or in Switzerland, in particular the accent is actually put on diverse aspects and perspectives. Therefore, the author decided to slightly differentiate each of three respective presentations, namely their scope and content emphasised, in order to reflect the particularities of relevant legal debates present in each competition law

II. European Union

In the European Union order the relevant rights and principles (right to privacy, right to fair trial, right to effective judicial protection, principle of proportionality and the privilege against self-incrimination) have to some extent been incorporated by the Court of Justice of the European Union[19] as general principles of EU Law[20], enshrined in Article 6 (3) of the Treaty on the European Union[21] and subsequently codified in the Charter of Fundamental Rights of the European Union[22]. Nevertheless, in order to guarantee full protection, it is necessary that these rights and principles should be moreover applied in conformity with the case law of the European Court of Human Rights[23]. Although the CJEU has been making frequent reference to the ECTHR case-law, at present, the CJEU is not bound by the interpretation given by the ECtHR. However, ECtHR case law will become binding once the EU accedes to the ECHR, in accordance with Article 6 (2) TEU[24].

The principle of proportionality was introduced in Article 5(4) of the TEU which emphasises that the content and form of EU actions shall not exceed what is necessary to achieve the objectives of the Treaties. Moreover in the CJEU case-law was confirmed that "the principle of proportionality (...) requires that measures adopted by Community institutions do not exceed the limits of what is appropriate and necessary in order to attain the objectives legitimately pursued by the legislation in question; when there is a choice between several appropriate measures recourse must be had to the least onerous, and the disadvantages caused must not be disproportionate to the aims pursued[25]".

Pursuant to the further EU case-law, "any intervention made by the public authorities in the sphere of private activities of any - natural or legal - person, "must have a legal basis and be justified on the grounds laid down by law" and, further, protection against arbitrary or disproportionate intervention must be guarantied under the law in all the legal systems of the Member States[26]."

---

regime.

[19] Hereinafter: the "CJEU".

[20] See for instance the CJEU judgment of 21 September 1989 in joined cases 46/87 and 227/88, *Hoechst AG v Commission*, para. 19 and the CJEU judgment in case C-133/93 *Crispoltoni v Fattoria Autonoma Tabacchi*, ECR [1994] I-4863, para. 41.

[21] OJ [2010] C 83/13; Hereinafter: the "TEU".

[22] OJ [2000] C 364/1; Hereinafter: the "CFR".

[23] Hereinafter: the " ECtHR".

[24] "The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Such accession shall not affect the Union's competences as defined in the Treaties."

[25] See the *Crispoltoni* judgment, para. 41; See also the judgment in *Case C-331/88 The Queen vs The Minister for Agriculture, Fisheries and Food and the Secretary of State for Health, ex parte: Fedesa and Others* [1990] ECR 1-4023, para. 13.

[26] The *Hoechst* judgment, para. 19

The far reaching Commission powers of inspection derive from Article 20 (2) of Regulation No 1/2003 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty[27] according to which the Commission officials authorised to conduct an inspection are empowered to:

(a) to enter any premises, land and means of transport of undertakings and associations of undertakings;

(b) to examine the books and other records related to the business, irrespective of the medium on which they are stored;

(c) to take or obtain in any form copies of or extracts from such books or records;

(d) to seal any business premises and books or records for the period and to the extent necessary for the inspection;

(e) to ask any representative or member of staff of the undertaking or association of undertakings for explanations on facts or documents relating to the subject-matter and purpose of the inspection and to record the answers[28].

The CJEU acknowledged that the competition authorities must be entitled "to search for various items of information which are not already known or fully identified[29]". Nevertheless, an unannounced inspection should be regarded/considerate as proportionate only if it is justified in the circumstances at stake[30].

To balance the above indicated powers, EU law provides for certain procedural guarantees in order to protect undertakings from disproportionate or even arbitrary entries into their premises. One of them constitutes the requirement that the inspection decision on the basis of which an inspection takes place must be properly reasoned. Indeed, in cases regarding the possible occurrence of a fishing expedition, the focus is put on the question

[27] Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, Official Journal L 1, 04.01.2003, p.1-25; Hereinafter: the "Regulation 1/2003"

[28] It is worth mentioning that the majority of these competences had been already introduced in Article 14 of the former regulation, i.e. EEC Council Regulation No 17, being the first regulation implementing Articles 85 and 86 of the Treaty, OJ 013, 21 Feb. 1962, pp. 204–2. Nevertheless amongst the new powers we should mention the power to seal premises, which enables the conduct of inspections during several days, the extension of the power to seek explanations also on "facts ... relating to the subject- matter and purpose of the inspection", which gives possibility to carry out very extensive interview during the inspection, as well as, after being granted an authorisation from the relevant national judicial authority, the power of inspection of 'other premises', for instance the private homes of undertakings concerned staff (Articles 21 and 23 (3) of Regulation1/2003), providing for a significant interference with the Article 8 EConHR protecting the private life. Moreover, the Regulation 1/2003 change the level of the periodic payments that may be imposed by the Commission in order to compel/force the undertaking to submit to an inspection, which nowadays may amount up to 5 per cent of the undertaking's daily turnover (Article 24 of Regulation 1/2003). Under Regulation No 17 periodic payments were fixed at 1000 Euro per day..

[29] The *Hoechst* judgment, para. 27.

[30] See to this effect the CJEU judgment in case 136/79, *National Panasonic vs Commission*, para. 30.

whether the statement of reasons for the inspection decision did afford a sufficient basis for such intervention[31].

The obligation to state the reasons for a European Union act derives from Article 296 Treaty on functioning of the European Union[32] and is also introduced, as part of the right to good administration, in Article 41(2)(c) of the Charter of Fundamental Rights of the European Union[33]. In accordance with settled case-law, the EU institution which adopted the measure in question has to disclose in the statement of reasons its reasoning in a clear and unequivocal way in order to provide the person concerned with a justification the undertaken measures and to enable the EU courts to exercise their power of review[34]. More specifically, Article 20(4) of Regulation 1/2003 further clarifies the required content and scope of the obligation to state the reasons for inspection decisions. Pursuant to its second sentence, decisions of this kind have to specify *inter alia* the subject-matter and purpose of the inspection in question. This provision serves to ensure that no inspection constitutes a "fishing expedition", i.e. is carried out by the Commission on a speculative basis and without any concrete suspicions[35].

As it has been held by the CJEU on many occasions, this special duty to state reasons is a fundamental requirement since it is "designed not merely to show that the proposed entry onto the premises of the undertakings concerned is justified but also to enable those undertakings to assess the scope of their duty to cooperate whilst at the same time safeguarding their rights of defence[36]".

Nevertheless, while assessing the legal requirements applicable to the statement of reasons for an inspection decision it must be taken into account that unannounced inspections normally take place at a very early stage, i.e. within the preliminary investigations[37], when

[31] Opinion of AG Kokott in case *Nexans*, para. 5.
[32] Hereinafter: the "TfEU".
[33] Opinion of AG Kokott in case *Nexans*, para. 41.
[34] See the CJEU judgment in case C-367/95 P, *Commission vs Sytraval and Brink's France,* para. 63*;* the CJEU judgment in case C-413/06 P, *Bertelsmann and Sony Corporation of America* vs *Impala*, para. 166; and the CJEU judgment in case C-439/11 P, *Ziegler* vs *Commission*, para. 115.; See also Opinion of AG Kokott in case *Nexans*, para. 42.
[35] See in this regard the Opinion of Advocate General Mischo in cases 46/87 and 227/88, *Hoechst* vs *Commission*, para. 206; and Opinion of the AG in case C-109/10 P, *Solvay* v *Commission,* para. 138.
[36] The *Hoechst* judgment, para. 29; the CJEU judgment in case 85/87 *Dow Benelux* vs *Commission*, para. 8 and 40; the CJEU judgment in joint cases 97/87 to 99/87, *Dow Chemical Ibérica and Others* vs *Commission*, paras 26 and 45; and the CJEU judgment in case C-94/00, *Roquette Frères*, para. 47. Similarly, the CJEU judgment in joint cases C-238/99 P, C-244/99 P, C-245/99 P, C-247/99 P, C-250/99 P to C-252/99 P and C-254/99 P, *Limburgse Vinyl Maatschappij and Others* vs *Commission*, para. 299. (This case-law relates to the predecessor provision of Regulation 17, however it is readily transposable to Article 20(4) of the Regulation 1/2003.) See also Opinion of AG Kokott in case *Nexans*, para. 44.
[37] Before the preparation of the Statement of Objections ; See *Commission notice on the Best Practices for the conduct of proceedings concerning Articles 101 and 102 TFEU,* OJ (2011) C 308,p. 6, para. 50; see also R.

the competition authority understandably lacks the information necessary to make a specific legal assessment[38]. Therefore, as confirmed previously by the CJEU, despite the undertakings' legitimate interest in safeguarding their rights of defence, it is not indispensable that an inspection decision contains precise legal assessments, i.e. precisely define the relevant market, set out the exact legal nature of the presumed infringement[39] or indicate the period during which the infringement at stake are said to have been committed[40]. The Commission is, however, always obliged to indicate as precisely as possible in its inspection decisions the presumed facts which the Commission intends to investigate[41], i.e. the evidence sought and the matters to which the investigation must relate[42].

Therefore, from the requirement to protect the undertakings concerned from arbitrary and disproportionate entries[43] into their premises and from the concern to safeguard their rights of defence follow that the focus should be shifted on a definition of the infringements of competition law suspected rather than on a precise description of the markets concerned[44]. The Commission has only to show "that it is in possession of information and evidence providing reasonable grounds for suspecting the infringement", nevertheless "is not required to state the evidence and indicia on which the decision is based[45]".

With reference to another significant aspect, i.e. the scope of the search conducted, pursuant to the settled CJEU case-law, the Commission is not obliged to limit itself to look for and examine only documents which it is able to identify precisely in advance since such a restriction would render nugatory its right of access to documents or files[46]. On the contrary, the right to carry out unannounced inspections implies in particular the Commission power to

---

Whish, D. Bailey, *Competition Law*, 7th ed., Oxford University Press, p. 285.

[38] See to this effect in *National Panasonic* judgment, para. 21, as well as the Opinion of AG Mischo in *Hoechst* case, para. 174; and the Opinion of AG Kokott in case *Solvay*, para. 143; Regarding the question of determination of whether an infringement of Article 101 or 102 TfEU has been committed, see the Opinion of AG Mischo in case *Hoechst*, para. 176; the Opinion of AG Kokott in case *Solvay*, para. 144 and the Opinion Of AG Kokott in case *Nexans*, para. 48

[39] It is sufficient to indicate the 'essential features' of the suspected infringements. See the General Court judgment of 8 March 2007, in case T-339/04, *France Telecom SA v Commission*, paras 58 and 59.

[40] The *Hoechst* judgment, para. 41; the *Dow Benelux* judgment, para. 10; the *Dow Chemical Ibérica* judgment, para. 45; and the *Roquette Frères* judgment, para. 82; Opinion of AG Kokott in case *Nexans*, para. 49.

[41] The *Hoechst* judgment, para. 41; the *Dow Benelux* judgment, para. 10; the *Dow Chemical Ibérica* judgment, para. 45; the Opinion of AG in case *Solvay*, para. 138.

[42] The *Roquette Frères* judgment, para. 83.

[43] See in this regard The *Hoechst* judgment, para. 19; the *Dow Benelux* judgment, para. 30; and the *Dow Chemical Ibérica* judgment, para. 16.

[44] Opinion of AG Kokott in case *Nexans*, para. 59.

[45] The FranceTélécom judgment, paras 60 and 123.

[46] The *Roquette Frères* judgment, para. 84. See also the *Hoechst* judgment, para. 27; the *Dow Benelux* judgment, para. 38; and the *Dow Chemical Ibérica* judgment, para. 24;

search for other, i.e. not already known or fully identified, sources of information [47]. Nevertheless, it is obvious that the Commission powers are limited to subject-matter of the investigations and therefore the inspectors while carrying out an unannounced inspection are entitled to search for and examine only those business records that can be relevant to the proceedings at stake[48].

In this context it is worth considering two relevant rulings of the General Court[49] that seems unfortunately to stand in, at least partial, contradiction to each other, as well as a very recent one[50] which relating in principle to information requests[51], is nevertheless of an importance to the subject of this paper. With regard to Case T-292/11, Cemex and others v Commission and related cases in relation to information requests

The first important development related to General Court's judgment in so called *Power Cable Case*[52]. In 2009 Commission officials carried out dawn raids at the premises of Nexans in France and Prysmian in Italy in relation to a suspected cartel in the power cables sector. On 7 April 2009 Nexans brought an action before the General Court that deliver its judgment of 14 November 2012.

The challenges raised by Nexans related to both the inspection decision as well as to the Commission actions undertaken during the dawn raids[53]. The undertaking contested namely the scope of the inspection decision which, being overly broad and imprecise both in terms of their product and geographic scope, in practice covered the entirety, i.e. all sectors, of it businesses. Therefore inspection amounted *de facto* to a "fishing expedition", since the Commission had not reasonable grounds to suspect an infringement of competition law that would justify the carrying out of a dawn raid in relation to all electrical cables.

In its findings the General Court confirmed that the Commission has no power to conduct fishing expeditions. An inspection must be designed to "gather the necessary documentary evidence to check the actual existence and scope of a given factual and legal

[47] Ibidem; See also Opinion of AG Kokott in case *Nexans*, para. 61.
[48] See in this regard recital 24 in the preamble to, and Article 4 of, Regulation No 1/2003. See also the *National Panasonic* judgment, paragraph 20; the CJEU judgment in case 155/79, *AM & S* vs *Commission*, para. 15; the *Hoechst* judgment, para. 25; the *Dow Benelux* judgment, para. 36; and the *Dow Chemical Ibérica* judgment, para. 22; and the *Roquette Frères* judgment, para. 42.This limitation is however not required to be expressly specified in the statement of reasons. See the Opinion of AG Kokott in case *Nexans*, para. 62.
[49] The *Nexans* judgment and the *Deutsche Bahn* judgment.
[50] I.e. the judgment of the General Court of 14 March 2014 in Case T-292/11, *Cemex and others vs Commission*.
[51] Issued under Article 18 Regulation 1/2003.
[52] The *Nexans* judgment and the judgment of the General Court of 14 November 2012 in case T-140/09, *Prysmian SpA and Prysmian Cavi e Sistemi Energia Srl v sCommission*.
[53] The issues of the contested inspection measures will be analysed in the further part of this paper relating to the problem of coping of the entirety of digital storage mediums.

situation concerning which [the authority] already possesses certain information". In order to protect the fundamental rights of undertakings, i.e. to enable the undertaking concerned to limit its cooperation to those activities in respect of which the Commission has reasonable grounds for suspecting an infringement of the competition rules, an inspection decision must at least state "essential characteristics of the suspected infringement" and "identify the sectors covered by the alleged infringement".

Moreover, in relation to the sectors covered, after having examined the evidence available to the Commission at the time of the inspection decision, the General Court held that the Commission had reasonable grounds to order dawn raids regarding only the supply of high voltage underwater and underground electrical cables (and associated materials), in relation to which it had received a leniency application. Therefore it annulled the inspection decision in part related to any other sector of electrical cables.

One has to agree with the AG Kokott emphasising that "(t)he importance of the Court's judgment in this case, from the point of view of the Commission's future administrative practice, should not be underestimated[54]."

Nevertheless another part of the General Court's approach is very questionable. The General Court namely rejected the Nexans request to order the Commission to return all documents obtained in relation the annulled parts of the inspection decisions[55]. The General Court stated that even though it is empowered to annul (entirely or partially) a Commission decisions[56], it cannot issue precise instructions in order to determine the consequences of the annulment. It is for the Commission to decide in this matter, e.g., whether it is required to return documents being outside the scope of investigation. This reasoning should be assessed negatively. Especially in the circumstances at stake it should be obvious that documents which had been obtained illegally are to be excluded from the case file and returned to the undertaking concerned.

It is noteworthy that this case is to be continued since Nexans brought an appeal on 24 January 2013 before the Court of Justice[57] claiming that *inter alia* the General Court erred in dismissing their application for the annulment of the inspection decision insofar as it was insufficiently precise, overly broad in its geographic scope and applied to any suspected agreements and/or concerted practices that "probably had a global reach". Hence, the legal debate in the appeal proceedings focuses rather on the geographical scope of the inspection

[54] Opinion of AG Kokott in case *Nexans*, para. 6.
[55] I.e. documents relating to non-high voltage cables.
[56] And the Commission is obliged to comply with the General Court's judgment.
[57] Case C-37/13 P.

decision[58]. Recently the AG Kokott delivered her official opinion in which she suggested that the Commission was justified in inspecting also non-European documents within dawn raids of power cable cartellist, including. Nexans, since taking into account the early stage at which the inspection decision is adopted, the General Court could not and had no reason to demand such a precise definition of the geographically relevant market.

The second relevant ruling concerned Deutsche Bahn[59] case in which the undertaking unsuccessfully sought relief, i.e. brought an action for annulment of the three Commission inspection decisions as well as of all measures taken as a result thereof[60] and asked for ordering the Commission to return all the copies of documents made during the contested inspection.

With reference to the facts, in March 2011, the Commission carried out dawn raids of various premises of Deutsche Bahn[61], on the ground of suspected abuse the undertaking dominant position in relation to supply of operators with electric traction by giving preferential rebates to Deutsche Bahn subsidiaries. Nevertheless, during the inspection, Commission officials came across documents indicated another possible abuse prohibited by Article 102 TFEU, i.e. application of discriminatory conditions in the railway transport sector or refuse to access to its terminals. In order to legally obtain evidence of the new infringement, the Commission adopted immediately[62] a second inspection decision. Subsequently[63], in July 2011, the Commission adopted moreover a third decision, entitling the officials to return to the undertaking's premises to search for further evidence in relation to a possible abuse in all railway transport markets.

Deutsche Bahn challenged the legality of all inspection decisions and claimed the violation of its fundamental rights. It namely contested the fact that the second and third inspections were based on information obtained illegally during the first one. Moreover, pursuant to Deutsche Bahn a judicial authoristation should have been obtained by the Commission in order to ensure that the inspection was subject to prior judicial control.

The General Court delivered its judgment on 6 September 2013. It held, firstly, that no prior court authorisation is mandatory for an inspection to be considered legal as long as

[58] The nub of the dispute relates to the question whether the Commission's reference to the "probably global" reach of the presumed infringements of competition law had sufficiently specified the subject-matter and purpose of the inspections. See the Opinion of AG Kokott in case *Nexans*, paras 22, and 45.
[59] Case T-289/11.
[60] Of the inspections which took place on the basis of those contested decisions.
[61] Since the inspection decision of 14 March 2011 covered all Deutsche Bahn subsidiaries.
[62] While the official were still at Deutsche Bahn premises.
[63] After the end of first and second inspections.

the inspection may be subject to comprehensive judicial review. In response to the Deutsche Bahn allegations that Article 20 of Regulation 1/2003 granting the Commission the power to carry out the inspections runs afoul of the EConHR and the CFR, the General Court stated that the rules on inspections set out in Regulation 1/2003 do not violate fundamental rights, since this act provides sufficient protection of the undertaking's right to defence. More specifically, the General Court pointed at five safeguards provided under Regulation 1/2003, i.e. (1) the Commission obligation to state the reasons of an inspection decision, in particular, the subject matter and purpose of the inspection[64], (2) the restrictions limiting the way in which an inspection is carried out, i.e. the obligation to respect the undertakings right to privacy, legal professional privilege, the privilege against self-incrimination as well as rule established in the Commission Inspection Explanatory Note[65], (3) the possibility of exercising fundamental rights by the undertakings concerned during an inspection[66], (4) the undertaking's right to seek an annulment of the inspection decision and to challenge any irregularity occurred during the inspection[67], and finally, (5) the possible surveillance by national authorities of respecting fundamental rights, in cases when due to opposition of the inspection by the undertaking, the Commission seeks assistance from the national authorities.

Moreover, according to the General Court, fines provided for in Article 23 and 24 of the Regulation 1/2003 may be only imposed if an undertaking either obviously obstructs or abuses its right to oppose. Therefore, in the General Court's opinion, the risk of imposition of a fine on undertaking for obstructing an inspection neither constitutes an absolute deterrent nor *de facto* deprives the undertaking of its right to oppose the inspection. Unfortunately, the General Court did not clarify what should be understood under "an obvious obstruction" or "an abusive opposition". Hence, due to the lack of any practical guidance, this judgment may unfortunately be of little practical value to inspected undertakings for which the right to oppose the competition authority inspection constitutes in practice a perilous exercise.

Subsequently, the General Court also dismissed the Deutsche Bahn allegations that the

[64] In practice, the decision has to provide: a description of the suspected infringement - indicating what market(s) could be affected, the nature of the suspected restrictions of competition, in what way the undertaking is suspected to be involved, and what is being sought.

[65] Explanatory note to an authorisation to conduct an inspection in execution of a Commission decision under Article 20(4) of Council Regulation No 1/2003.

[66] Since the undertaking inspected in entitled to consult its external counsel, to examine the inspection decision or to demand to record in minutes that any alleged irregularity arising during the inspection which cannot be regarded as opposing the inspection.

[67] If contested successfully, the Commission will be unable to use the document(s) obtained as a result of the annulled decision during the inspection in the infringement proceedings.

Commission carried out an illegally targeted search, constituting a fishing expedition, since it used the first inspection decision[68] to actually find evidence of another potential infringement, albeit in different sector[69]. The undertaking emphasised that such an evidence should not served as a basis for the further inspection decisions. The General Court held however that the Commission was allowed to "kill two birds with one stone", i.e. to promptly adopt a new inspection decision aiming at entitling its officials to legally gather documents indicating a further competition law infringement, not covered by the first decision. Nevertheless, it has to be noted that this General Court's finding was based on the careful analysis of the circumstances of uncovering additional documents. The General Court stated that Deutsche Bahn failed to demonstrate that the Commission officials had been specifically searching for further unrelated documents[70] and therefore it should be considered that the contested documents were uncovered incidentally during the search for evidence regarding the initial decision. Understandably for the General Court, the Commission should not turn a blind eye to documents potentially pointing at a competition law infringement, even if they are discovered by incident during an investigation regarding another incriminated conduct.

The General Court findings, i.e. the conformation of the dawn raids legality by upholding all three Commission's inspection decisions as well as the rejection of Deutsche Bahn arguments regarding violation of the undertaking fundamental right should be definitely subject to critics. The General Court's reasoning presented in the Deutsche Bahn judgment seems to give green light for conducting fishing expeditions and therefore contradict its position adopted previously in the *Nexans* judgment.

It is thus not surprising that Deutsche Bahn also brought[71] an appeal against the GC judgment[72] basing *inter alia* on the arguments that the General Court misinterpreted and misapplied the fundamental rights to inviolability of one's premises and to effective judicial review as well as the settled case-law of the European Court of Human Rights. Furthermore, the appellant claimed that, the General Court has incorrectly regarded the unrelated documents as being so-called "chance discoveries"; the Commission officials were prohibited from using those documents obtained illegally, i.e. outside the scope of the investigation. Finally, according to another undertaking challenge, the General Court misapplied the rules

[68] In relation to the supply of electric traction.
[69] The railway transport sector.
[70] Furthermore, during the inspections DB never formally objected, by e.g. registering its objections in the protocol, to the way they were conducted. The GC reminded that its the undertaking's legal representatives duty to formally raised objections at the very moment in which an alleged illegal act is committed.
[71] On 15 November 2013.
[72] Case C-583/13 P, *Deutsche Bahn and others vs Commission*.

regarding the burden of proof.

Finally, even though the main issue in case Cemex and others[73] related to the request for information[74], it is worth mentioning also this judgment, since the General Court dealt with the question of proportionality and notion of a reasonable suspicion of the occurrence of an infringement.

In support of the action, the undertakings concerned alleged *inter alia* (1) the infringement of Article 18 of Regulation 1/2003 on the grounds that the Commission had exceeded its powers under this article since the information requested was not necessary w within the meaning of this provision, (2) breach of the principles of proportionality, of legal certainty and of good administration, (3) a lack of justification of the decision.

In the judgment 14 March 2014 the General Court rejected the undertakings action, since in its opinion the indication of presumed infringements, even though described in very general terms[75], contained with the minimum degree of clarity and thus was consistent with the requirements of EU law. The General Court acknowledged that the protection against arbitrary or disproportionate interventions of public authorities in the sphere of private activities of a person[76] constitutes a general principle of EU law that must be respected also while making a request for information[77]. Nevertheless, However, in the General Court point of view, the workload imposed by the Commission was proportionate both in the light of the necessities of the enquiry and the presumed infringements. The General Court held further that at the preliminary investigation stage the Commission is not obliged, before making a request for information, to have already in its possession information sufficient to establish the existence of an infringement. It suffices therefore if based on the evidence a reasonable suspicion of the occurrence of an infringement can be aroused. Since the institution of request for information is much less intrusive than an inspection, a less strict interpretation of its prerequisites may be understandable[78]. Nevertheless it is important that this type of investigation powers is not used in excessive way, i.e. that it does not violate the principle of

[73] Case T-292/11, *Cemex and others vs Commission*; The Commission opened proceedings against several cement undertakings relating to presumed infringements consisting of 'restrictions on trade flows in the European Economic Area, within the framework of which, on 30 March 2011 the Commission adopted several decisions regarding the request for information, i.e. for response, in a binding format, to a questionnaire relating to the presumptions of infringements.
[74] Article 18 Regulation 1/2003.
[75] Which might well have been made more precise.
[76] Be it natural or legal.
[77] As a consequence, such a request must seek to obtain only the necessary documentation aiming at verifying the factual and legal information in relation to which the Commission already has sufficiently serious evidence consistent with the suspicion of a competition law infringement.
[78] Contrary to the case of inspection decision.

proportionality.

In relation to the question of legality of the subsequent electronic searches, pursuant to Article 20(2)b Regulation 1/2003, inspectors are entitled "to examine the books and other records related to the business, irrespective of the medium on which they are stored". The Commission, in its Explanatory note to an authorisation to conduct an inspection in execution of a Commission decision under Article 20(4) of Council Regulation No 1/2003, claims to be empowered to take forensic images of the entirety of digital storage mediums (such as hard drives) for subsequent review[79]. According to Commission[80], another option, i.e. assessing firstly on site whether the electronic data fall within the scope of the investigation and then taking only copies of the relevant documents not being covered by legal professional privilege, would lead to extending the inspection over more than one day. Nevertheless due to high and real risk of violating undertaking rights, the prolongation of the inspection duration[81] would constitute a definitely more fair and less intrusive solution than depriving undertaking from possibility to watch over the examination by the Commission of its data and allowing the Commission to seizure documents falling outside the investigation[82]. Even though the Commission commits to invite the undertaking to attend the opening of the sealed envelope containing the copy of the data at the Commission premises and to assist during its continued search, once all the data, including those covered by the legal professional privilege or related to other areas of undertakings activity not covered by the inspection decision, are in the Commission's possession, the undertakings cannot be sured that they wouldn't be used illegally against it. Especially, in the light of recent *Deutsche Bahn* judgment allowing the Commission to actually make use, e.g. initiate separate proceedings, of unrelated documents that the officials came across incidentally while exercising their inspections powers.

In this context, we may note the unfortunate avoidance of the CJEU to rule on the merits of the issue. For instance in case *Nexans*, the second part of challenges raised by the undertaking related to the measures undertaken by the commission during the dawn raids. Nexans contested the inspection measures consisting in taking away the forensic copies of computer hard drives for subsequent review at the Commission's premises and in questioning

[79] See paras 9, 10 and 14 of the Explanatory Note, according to which the Commission is entitled inter alia to take full image of server or storage media for safekeeping purposes, block individual email accounts and examine storage media.
[80] Argued for instance during the Power cable case.
[81] In particular since the Commission is not obliged to indicate the end of inspection in the inspection decision.
[82] Since due to enormous volumes of the mediums it is obvious that they contain also information falling outside the scope of investigation that the Commission is not allowed to search for nor examine.

of one of employees on site. According to the undertaking stored media contained data such as emails, addresses etc., which included those of a personal nature and protected by the right to privacy, the confidentiality of correspondence as well as the legal professional privilege. Nexans argued that measures of this kind should be challengeable since contested acts brought about a significant change in the undertaking's legal position and have seriously and irreversibly affected it fundamental rights – i.e. the right to privacy and the right to defence.

Nevertheless, with reference to the challenged inspection actions, the General Court stated that contested Commission acts did not constitute an actionable decisions, but were only the measures implementing the inspection decision. Such implementing measures can only be challenged in the appeal of the final Commission decision on the infringement or the Commission decision imposing a procedural penalty for a failure to cooperate. Thus, instead of pronouncing on the legality of contested practice, the General Court simply declared the challenges inadmissible[83].

Such an approach of the General Court only confirms that undertakings are left in a very difficult position, given (1) the Commission's willingness to fine undertakings that try to exercise their right to oppose and prevent the officials from undertaking the controversial measures during an inspection and (2) the absence of judicial control at an intermediate stage regarding those measures. On the one hand, the prevention from taking by the Commission take forensic images of the entirety of digital storage mediums during an inspection will probably lead to the imposition of an immediate fine for obstruction or to an relevant increase of the final fine[84]. On the other hand, allowing the Commission to made the copies and conduct subsequent electronic search, violates undertakings right to defence and to privacy and make them wait for a final infringement decision, in order to be eventually entitled to raise challenges in relation to the evidence seized illegally during the dawn raid.

In this context another still pending case, i.e. *Energeticky a prumyslovy*[85] related to fine imposed due to the failure to provide access to electronic documents should be mentioned.

In their action brought on 12 June 2012 the undertakings in question pointed at irregularities in the conduct of the inspection that led to adoption of the contested decision, in violation of essential procedural requirements, in particular, right to defence and

[83] The General Court, however, noted that an undertaking is entitled to file an action in tort against the Commission if its unlawful act inflicted damage on the undertaking inspected. Unfortunately, the General Court did not precise what should be understood under the notion of "damage" in this context.
[84] See for instance Commission decision of March 28, 2012 in Case COMP/39793 – *EPH and others.*
[85] Case T-272/12, *Energeticky a prumyslovy and EP Investment Advisors vs Commission.*

"presumption of innocence" principle. According to the applicant the Commission, firstly, failed to properly inform relevant individuals of their duties as well as of the consequences of non compliance and, secondly, was negatively predisposed against the applicants. Moreover, the undertakings alleged that the Commission's finding about applicants' refuse to submit to the inspection was unfounded and disproportionate. Finally, undertakings alternatively[86] argued that the Commission committed an error in law as well as infringed the principles of proportionality during the determination the fine. Given the arguments raised we may expect that the General Court will take opportunity to clarify inspectors duties in relation to inspections, on the one hand, and, the scope as well as conditions of undertakings right to oppose, on the other hand.

The controversies over Commission powers highlight the need of effective judicial protection. There is no doubt that, in order to determine whether the principle of proportionality was respected, i.e. the Commission had sufficient grounds to support the initial suspicion of a serious infringement of competition law and thus to justify the ordered investigative measures, every inspection decision should be subject to *ex post* judicial review[87]. The principle of effective judicial protection, recognised as a general principle and enshrining in Articles 6 (1) and 13 EConHR, was finally introduced in Article 47 (1) of the CFR. It is namely within the proceedings before the competent courts,[88] that the Commission is obliged to specify the information on the basis of which it justifies the undertaken search of the undertakings premises[89]. The illegality of a decision authorizing an inspection, including its disproportional character, should prevents the Commission from using[90] any evidence which has been obtained in the course of that investigation. Otherwise, it constitutes a ground for annulment of the final infringement decision by EU Courts in so far as it was based on such illegal evidence[91]. Even though such *ex post* judicial review of an inspection decision is said to be in principle sufficient to ensure appropriate protection for the fundamental rights

[86] If General Court decides not to annul the contested decision in its entirety.
[87] The *Roquette Frères* judgment, paras 49 and 50, and — implicitly — the *Dow Chemical Ibérica* judgment, para. 52.; Opinion of AG Kokott in case *Nexans*, para. 85.
[88] And not, e.g., already in the statement of reasons for its inspection decision. See also in this regard the CJEU judgment in case C-407/04 P, *Dalmine* vs *Commission*, para. 60, in which the Court of Justice recognised the risk that the undertakings concerned might conceal evidence if they were to discover during the first stage of the investigation what information the Commission has in its possession at that time.
[89] See the *Hoechst* judgment, para. 41; the *Dow Benelux* judgment, paras 9 and 15; the *Dow Chemical Ibérica* judgment, paras 45 and 51; and the *Roquette Frères* judgment, paras 60 to 62.
[90] For the purposes of any competition law proceedings.
[91] The *Roquette Freres* judgment, para. 49; H. Andersson, E. Legnerfalt, *Dawn raids in sector inquiries– fishing expeditions in disguise, ECLR 2008 29(8),* p. 444. See also M. Bernatt, *Powers of Inspection...*, p. 63.

of the undertakings concerned[92], some doubts arise "whether effective judicial protection with regard to Commission inspections is ensured today under EU Law[93]".

It is in particular questionable[94] whether the present judicial review regime of the Commission inspections is in line with the standards set by the ECtHR, in particular in cases *Ravon*[95] and *Primagaz*[96], for at least two reasons. Firstly, the formalistic review carried out by the CJEU may not equate to the control in fact required by the ECtHR[97]. The ex post review of the Commission decisions ordering the inspection[98], is mostly of a formal nature, since the CJEU verifies only whether the formal requirements of Article 20 (4) have been respected, *inter alia* the subject matter and purpose of the inspection[99], the date of its beginning and informations on the penalties, pursuant to Articles 23 and 24 of the Regulation No. 1/2003, and on the right to have the decision reviewed by the CJEU were indicated in the contested decision[100]. Secondly, with the notable exception of the application of the legal professional privilege[101], no review is available with respect to the way the inspection is carried out, i.e. the measures undertaken on the spot. Undertakings concerned have to wait until the final

[92] The ECtHR judgment of 7 June 2007 in case *Smirnov v. Russia*, no. 71362/01, para. 45 as well as the ECtHR judgment of 15 February 2011 in case *Harju vs Finland*, no. 56716/09, paras 40 and 44, and the ECtHR judgment of 15 February 2011 in case *Heino vs Finland*, no. 56720/09, para. 45; See also the Opinion of AG Kokott in case *Nexans*, para. 85.

[93] D. Théophile,I. Simic, *Legal Challenges to Dawn Raid Inspections under the Principles of EU, French and ECHR Law*, Journal of European Competition Law & Practice, 2012, Vol. 3, No. 6, p. 517

[94] Ibidem, p. 518

[95] The ECtHR judgment of 21 February 2008, *Ravon e.a. vs France, application no* 18497/03, in relation the French tax authorities' inspection regime. The ECtHR emphasised that the inspection decisions as well as the measures taken in their application should be subject to the effective judicial control *de facto* and *de iure (para. 28).*

[96] The ECtHR judgment of 21 December 2010, in case Primagaz application *no* 29613/08*;* In this case regarding the competition law, the ECtHR clearly stated that it is necessary to allow the undertakings inspected to rely on 'the certainty (...) to obtain effective judicial review of the contentious measure and within a reasonable time period".

[97] Especially, "no control is ever made of the Commission's interpretation of the indicia which supposedly create suspicions of infringement".

[98] Which does not result in the suspension of the contested inspection. See also the *Hoechst* judgment, para. 26.

[99] The *Hoechst* judgment, paras 40-41 and the *Dow Benelux* judgment, paras 7-8.

[100] As well as whether the *sensu largo* addressee of the decision actually existed at the date of the inspection. Nevertheless, in the recent *Nexans* judgement the General Court stressed that "Commission must identify the sectors covered by the alleged infringement with which the investigation is concerned with a degree of precision sufficient to enable the undertaking in question to limit its cooperation to its activities in the sectors in respect of which the Commission has reasonable grounds for suspecting an infringement of the competition rules, justifying interference in the undertaking's sphere of private activity"; the *Nexans* judgment, para. 45.

[101] According to settled case-law, acts adopted during the inspection "which produce binding legal effects such as to affect the interests of an applicant by bringing about a distinct change in his legal position may be the subject of an action for annulment under Article 230 EC", which was found to be the case with regard to a decision by the Commission to reject the claim to LPP made by an undertaking and to consequently take a copy of the impugned document. That decision results in the irreversible consequences since it "withholds from the undertaking the protection provided by Community law and is definitive in nature and independent of any final decision making a finding of an infringement of the competition rules. See the judgment of the General Court of 17 September 2007, in joined cases T-125/03 and T-253/03, *Akzo Nobel Chemicals Ltd and Akcros Chemicals Ltd vs Commission*, paras 46 and 47.

infringement decision to have these measures reviewed by the General Court[102]. In the General Court opinion, "a provisional measure intended to pave the way for the final decision is not (..) a challengeable act[103]." This not only lead to unreasonable delays between the carrying out of inspection and the moment its implementation stands to be reviewed[104] but is also conditional to adoption of a decision finding infringement, which may not necessarily happen[105].

Nevertheless the reasoning applicable by the actions regarding legal professional privileges, i.e. regarded exceptionally as challengeable acts, should also be applicable to other measures undertaken during the inspections which violate fundamental rights or fall beyond the scope of inspection decision, namely the seizure of documents not related to the subject matter[106]. Such actions undoubtedly adversely affect the interests of an applicant-undertaking, by bringing about a distinct change in its legal position and therefore shall constitute challengeable acts.

The need for effective remedies is strengthened by the fact that, pursuant to the Commission Notice on the rules for access to the Commission file, documents found to fall outside the scope of the subject matter of the case "*may*[107] be returned to the undertaking from which they have been obtained" and 'will no longer constitute part of the file[108]". Such approach is definitely "untenable, as the Commission had no power in the first place to take these documents. The fact that they are nonetheless in its possession does not make the situation any more legal[109]".

If the contested documents, obtained illegally, allowed the Commission to initiate an investigation regarding a new case, it is undeniable that the "irreversible consequences" have occurred[110]. It is noteworthy that, even though according to the CJEU case-law, the

[102] See the *Dow Benelux* judgment, para. 49, where it was held that "the validity of a decision cannot be affected by acts subsequent to its adoption", which thus stand to be examined later on with the infringement decision. Such situation in the former French competition regime was condemned by the ECtHR in case *Primagaz*.
[103] See the *Akzo Nobel* judgment, para. 45
[104] Often couple of years after the inspection had been carried out.
[105] See the *Akzo Nobel* judgment, para. 47; D. Théophile, I. Simic, *Legal Challenges...*, p. 519.
[106] E.g., actually no protection against self-incrimination applies to documents that were copied during inspections. Compare the CJEU judgment of 18 October 1989, in case *Orkem*, para. 34, the judgment of the Court of Justice of 29 June 2006, in case C-301/04, *SGL Carbon*, para. 41. This is not compatible with the ECtHR approach expressed inter alia in the ECtHR judgment of 25 February 1993, in case *Funke vs France*, para. 44 and the ECtHR judgment of 3 May 2001, in case *JB vs Switzerland*, paras 64 and 71.
[107] Instead of "have to".
[108] Commission Notice on the rules for access to the Commission file in cases pursuant to Articles 81 and 82 of the EC Treaty, Articles 53, 54 and 57 of the EEA Agreement and Council Regulation (EC) No 139/2004, OJ C 325, 22.12.2005, para. 9.
[109] D. Théophile,I. Simic, *Legal Challenges...*, p. 518
[110] Ibidem; See also the *Deutsche Bahn* judgment.

information and documents obtained during an inspection cannot be used for any purpose other than the one expressly specified in the inspection decision, the Commission has nevertheless been recently granted with the right to conduct a separate inspection in order to verify or to supplement the information pointing at another competition law infringement that it came across incidentally during a prior inspection related to another proceedings[111]. The lack of remedies in this field may encourage the Commission to carry out fishing expeditions aiming at incidental discoveries of evidence concerning a totally new competition law infringement.

It has to be further noted that the CJEU is not granted access to the Commission's file[112]. Therefore the crucial questions whether the Commission was actually in possession of the claimed evidence as well as whether the suspicions based on it were rightful, remain actually outside the scope of the control exercised by the CJEU[113].

Moreover, we may have a serious doubts on whether the question of proportionality is effectively taken into account during the CJEU review. Despite acknowledging that an inspection decision cannot be contrary to the principle of proportionality[114] , the General Court held however that "it is in principle for the Commission to decide whether a particular item of information is necessary to enable it to bring to light an infringement of the competition rules[115]". Consequently, the CJEU seems to simply abstain from contradicting the Commission unless there is a manifest error of assessment[116].

Finally, it is questionable whether the control of the infringement decision constitutes a full review encompassing both the facts and points of law. Even though, pursuant to the CJEU case-law the infringement decision should be subject to judicial control not only limited to the question of its legality but also to the correctness and importance of the facts established by the Commission[117], the CJEU takes for granted the Commissions assessment regarding relevant facts and evidence.

---

[111] The *Deutsche Bahn* judgment, paras 124-125.

[112] Which is often explained by the need to preserve at this early stage the confidentiality of the evidence and the anonymity of possible informants. Nevertheless it has to be noted thatcertain national authorities do give access to their files already at this stage, without any apparent harm done in relation to the conduct of their proceedings. See D. Théophile,I. Simic, *Legal Challenges...*, p. 517.

[113] Ibidem.

[114] The *FranceTélécom* judgment, para. 118.

[115] Ibidem, para. 119.

[116] If the use of inspections is proved "arbitrary" or "excessive". D. Théophile,I. Simic, *Legal Challenges...*, p. 518.

[117] The judgment of the General Court of 11 March 1999 in case T-156/94 *Siderugica Aristrain Madrid SL vs Comission*, ECR [1999] II-645, para. 115. See also A. Andreangeli, *EU Competition Enforcement and Human Rights*, Cheltenham, Northampton 2008, p. 152, and M. Bernatt, *The control of Polish courts over the infringements of procedural rules by the national competition authority. Case comment to the judgement of the Supreme Court of 19 August 2009 – Marquard Media Polska (Ref. No. III SK 5/09)*, YARS 2010, 3(3), p. 303

Thus the actual state of judicial review does not seems to meet the requirements neither from the EConHR[118] nor from the fundamental right to an effective remedy enshrined in Article 47 (1) CFREU.

III. Poland

Since the European Convention on Human Rights is binding and directly applicable in Poland[119], UOKiK President, being a Polish public authority, is obliged to observe its provisions as well as the standards of Articles 6, 8 and 13 of the EConHR must be taken into consideration by the assessment of the Polish regulation of inspections. Moreover, Poland, being a EU Member-State is bound by the relevant EU provisions, e.g. of the CFR, as well as the CJEU case-law.

The principle of proportionality is enshrined in Articles 2[120] and 31(3) of the Polish Constitution. Article 31(3)[121] stipulates that "(a)ny limitation upon the exercise of constitutional freedoms and rights may be imposed only by statute, and only when necessary in a democratic state for the protection of its security or public order, or to protect the natural environment, health or public morals, or the freedoms and rights of other persons. Such limitations shall not violate the essence of freedoms and rights". Moreover, pursuant to Article 22 "(l)imitations upon the freedom of economic activity may be imposed only by means of statute and only for important public reasons."

Thus, inspections run by the President of the Polish Office of Competition and Consumer Protection[122] that are liable to interfere with the undertakings rights, are allowed only if they meet the above-mentioned requirements. It is nevertheless questionable whether the powers of inspection granted to the UOKiK President under Articles 91 and 105a-105r of the Act of 16 July 2007 on Competition and Consumers Protection[123] entirely guarantee the observance of the principle of proportionality.

Before analysing the issue in details, one reservation has to be made. The ACCP is being nowadays modernised. The new law brings about significant changes[124], including the

[118] Requirements developed in the *Ravon* judgment, the *Primagaz* judgment , the ECtHR judgment of 21 December 2010 in case *Canal Plus*, paras 36 and 44 and the ECtHR judgment of 3 July 2012, in case *Robathin vs Austria*, Application no. 30457/06, para. 52)

[119] See Article 91(1) in conjunction with Article 9 of the Constitution of the Republic of Poland of 2 April 1997 (Journal of Laws 1997 No. 78, item 483).

[120] Being a consequence of the democratic state of law clause.

[121] Placed in the Chapter III "*The Freedoms, Rights And Obligations Of Persons And Citizens"*.

[122] Hereinafter: the "UOKiK".

[123] Journal of Laws 2007 No. 50, item 337, hereinafter: the " the ACCP";

[124] Other substantial changes relate to introduction of (1) so called "Leniency plus", (2) two-phase merger control procedure, (2) improved enforcement tools in the form of remedies and settlements of remedies, (4) settlements as well as of (5) fines for individuals (i.e. personal financial liability for executives directors or

introduction of (1) legal distinction between control and a search, (2) clarification the investigative powers of the inspection as well as of (3) right and obligations of inspected undertakings and of (4) complaint, being remedy for individuals whose rights were violated during the inspection. Since the Amendment Act is expected to be passed this year[125], this paper includes already the new amended version of the ACCP.

In Poland some problems arise in particular due to the distinction between a control[126] and a search[127] which results in differentiation of the safeguards granted to the undertakings depending on the type of inspection[128].

First of all, contrary to the case of a search, no judicial consent is needed to run a control. Moreover, the authorisation of control[129] issued by the UOKiK President is not regarded as an order[130] under Article 123 of the Code of Administrative Procedure[131]. Therefore, contrary to the solution adopted in the EU competition law[132], the undertaking concerned is simply deprived of the right to challenge before a court the legality and proportionality of the control authorisation. Such an undertaking is however obliged to cooperate with the authority inspectors during the control and has no possibility to deny access to its premises without being fined[133].

---

management members involved in certain competition law infringements).

[125] More precisely the Amendment act was approved by the Sejm (the lower chamber of the Polish Parliament) on 28 April 2014 and nowadays is on the agenda of the Senat (the higher chamber of the Polish Parliament).

[126] A control, specified in Article 105(a), takes place when the UOKiK inspectors are entitled to study only the material provided to them by the staff of the inspected undertaking. According to the SOKiK a control "is based on the voluntary and conscious cooperation of the inspected undertaking. During the simple inspection the undertaking is obliged to provide any necessary information or access to books, documents, data storage, premises and means of transport". Judgment of the Court of Competition and Consumer Protection (SOKiK) of 11 August 2003, XVII Ama 123/02, Journal of Laws of UOKiK of 2004, No. 1, item 281.

[127] A search has been defined as an inspection during which the UOKiK inspectors look for evidence of alleged infringement independently, i.e. without any cooperation or help of the representatives of the undertaking concerned. See *inter alia* the judgment of the Supreme Court of 7 May 2004, III SK 34/04, UOKiK Official Journal 2004 No. 4, item 330; the judgment of the Court of Competition and Consumer Protection (SOKiK) of 11 August 2003, XVII Ama 123/02, Journal of Laws of UOKiK of 2004, No. 1, item 281. So far, pursuant to the old Article 105c(1) the search could be conducted within a control and ordered during the latter. According to new rules, a search becomes a totally distinct type of inspection, regulated separately. New added Article 105n precises that in cases regarding practices restricting competition during the explanatory or antimonopoly proceedings in order to find and obtain information from various types of item (including the digital) possibly constituting evidence in the case, the UOKiK President is entitled to conduct a search in the undertaking's premises, if justified reasons exist to suppose that the relevant information or objects are kept in those premises.

[128] More specifically, safeguards are more limited with respect to controls than with respect to searches.

[129] Delivered to the representatives of the inspected undertaking by the UOKiK inspectors.

[130] R. Janusz, *Dostosowywanie prawa polskiego do prawa wspólnotowego w zakresie instytucji, procedur i san kcji antymonopolowych* [in:] P. Saganek, T. Skoczny (eds), *Wybrane problemy i obszary dostosowania prawa polskiego do prawa Unii*, Warszawa 1999, p. 292.

[131] Act of 14 June 1960 Code of Administrative Procedure, Journal of Laws 1960 No. 30, item 168, as amended.

[132] Which entitles inspected undertakings to challenge the inspection decision before the General Court.

[133] Article 105e of the ACCP. Entry denial or lack of cooperation can in fact cause the imposition of a fine of up to 50 000 000 Euro (Article 106(2)(3) of the ACCP). See, e.g., the UOKiK President's decision of 4 November 2010, DOK-9/2010 and the decision of 24 February 2011, DOK-1/2011. See also M. Kozak, *Simple procedural*

Secondly, it has to be stressed that the presence of the undertaking representatives in the premises inspected is not obligatory during a control[134]. Furthermore, there is no procedural safeguards to prevent such a control from becoming in practice a search. This stance may easily lead to abuse, e.g., conduct of a fishing expedition, and violation of the undertaking rights. Unfortunately, the subsequent seeking of relief before the the Court of Competition and Consumer Protection[135] may not be successful. In the Centertel case related namely to this issue the SOKiK rejected the undertaking allegations that the UOKiK inspectors were *de facto* carrying out not a control, but a search[136] and upheld the UOKiK President decision to impose a fine on an undertaking inspected for refusal to cooperate[137].

Therefore, it is important that the standards of the right to a fair trial deriving from Article 6(1) EConHR are ensured in the case of carrying out a control[138].

Under the current law[139], inspections can be carried out already during explanatory proceedings[140]. Even though this solution seems to be a common stance[141], it has both supporters[142] as well as opponents[143] in the doctrine. In the Polish context it is noteworthy

---

infraction or a serious obstruction of antitrust proceedings, are fines in the region of 30-million EURO justified? Case comment to the decisions of the President of the Office for Competition and Consumer Protection of 4 November 2010 Polska Telefonia Cyfrowa Sp. z o.o. (DOK-9/2010) and of 24 February 2011 Polkomtel SA (DOK-1/2011), YARS 2011 4(5).

[134] In the case of competition proceedings Article 80(2) and (3) of the Act of 2 July 2004 on the Freedom of Economic Activity (Journal of Laws No. 173, item 1807, as amended) provides an exception from general rule requiring the obligatory presence during a control of the representative of the undertaking.

[135] Sąd Ochrony Konkurencji i Konsumentów; Hereinafter: the "SOKiK".

[136] And therefore in order to defend its rights, Centertel refused to cooperate, i.e. did not provide computer files to the officials.

[137] Judgment of the Supreme Court of 7 May 2004, III SK 34/04 *Polskiej Telefonii Komórkowej "Centertel" Spółki z o.o vs the UOKiK President*. See also the previous judgement in this case of the Court of Competition and Consumer Protection of 11 August 2003, XVII Ama 123/02.

[138] *See* M. Bernatt, G. Materna, *Article 105a* [in:] *Ustawa o ochronie konkurencji i konsumentów, Komentarz*, T. Skoczny, A. Jurkowska, D. Miąsik (eds), *C. H. Beck*, Warszaw, forthcoming in 2014, Chapter V*; M. Bernatt, Prawo do rzetelnego procesu w sprawach konkurencji i regulacji rynku (na tle art. 6 EKPC)*, Państwo I Prawo 1(791), s. 51-63; B. Turno, 'Komentarz do Art. 105a, [in:] A. Stawicki, E. Stawicki E. (eds), *Ustawa o ochronie konkurencji i konsumentów. Komentarz*, Warszawa 2011, p. 987.

[139] Under Articles 105a(1) (a control) and 105n(1) (previously 105c(1)) (a search) of the ACCP.

[140] The ACCP distinguishes two forms of proceedings before the UOKiK President: explanatory or antimonopoly proceedings (i.e. "full" competition proceedings). Pursuant to Article 48(1) of the ACCP, explanatory proceedings may be instituted by the UOKiK President "if the circumstances indicate a possibility that the provisions of the Act have been infringed".

[141] The similar solution is adopted in the EU where the Commission is entitled to carry out inspections before the preparation of the Statement of Objections. See *Commission notice on the Best Practices for the conduct of proceedings concerning Articles 101 and 102 TFEU*, para. 50; see also R. Whish, D. Bailey, *Competition Law*, p. 285.

[142] Since, inspections may often be effective only if conducted unexpectedly, i.e. at the very beginning of the case and without a prior notification. See C. Banasiński, E. Piontek (eds), *Ustawa o ochronie konkurencji i konsumentów. Komentarz*, Warsaw 2009, p. 840; zob. też *K. Róziewicz-Ładoń*, *Postępowanie przed Prezesem Urzędu Ochrony Konkurencji I Konsumentów w zakresie przeciwdziałania praktykom ograniczającym konkurencję*, Warsaw 2011, p. 213.

[143] Since at that stage there are no parties, the undertakings concerned are not informed about the initiation of explanatory proceedings and have very limited powers to oppose unfounded controls despite the fact that it may

that since explanatory proceedings may be conducted in various aims[144], inspections may be only justified only if explanatory proceedings aims at "initially determining whether an infringement took place of the provisions of the ACCP which would justify the institution of antimonopoly proceedings" and should be excluded in other circumstances[145]. The competence of the competition authority to carry out an inspection (both controls and searches) must be excluded with respect to explanatory proceedings meant to conduct a market study[146], being solely conducted in order to determine the structure and degree of concentration thereof and initially determining whether an obligation exists to submit a notification of an intended concentration[147]. Carrying out an inspection in those two cases would undoubtedly have the character of a "fishing expedition[148]". Therefore the special caution in the use of inspections during the explanatory proceedings is required[149]. It is in particular argued that searches, due to their highly intrusive character, should be in principle carried out only during antimonopoly proceedings[150]. Unfortunately, statistics presented a different picture[151]. However this may change due to the recent ACCP amendment. The new provision regarding the search[152], specifies that, firstly, it can be order only in relation to practices restricting competition and, secondly, it is permissible within explanatory proceedings only if there is a reasonable suspicion of a serious ACCP infringement and in particularly where this a risk of the obliteration of evidence[153].

It has to be stressed that the ACCP provides for some guarantees of the proportionality of inspections First of all, a direct link[154] between a control or a search and the subject matter of the proceedings concerned is required, since both type of inspections can be carried out

---

result in charges regarding competition law infringement and the measure undertaken by the authority refer to them.

[144] Article 48(2) which numerates (not exclusively) possible objectives of explanatory proceedings indicates also a market study and initial determination of existence of the obligation to submit a notification of an intended concentration.

[145] For a contrary opinion see C. Banasiński, E. Piontek (eds), *Ustawa...*, pp. 869-870.

[146] Being solely conducted to determine the market structure and its degree of concentration.

[147] This would be contrary to the character of concentration proceedings, which are considered civil and not criminal in a light of the Article 6 of the EConHR. See B. Turno, *Komentarz...*, p. 1073, M. Bernatt, *Powers of Inspection...*, p. 59 and M. Bernatt, *Sprawiedliwość proceduralna w postępowaniu przed organem ochrony konkurencji*, Warsaw 2011, pp. 201-204.

[148] H. Andersson, E. Legnerfalt, *Dawn raids in sector inquiries...*, pp. 439–440; A. Jones, B. Sufrin, *EC Competition Law*, Oxford University Press, 2004, p. 1061; M. Bernatt, *Powers of Inspection...*, p. 57

[149] R. Janusz, *Dostosowywanie prawa polskiego...*, p. 294.

[150] M. Bernatt, *Sprawiedliwość proceduralna...*, pp. 201-204.

[151] While in 2008 and 2009 some searches, i.e. 1 out of 3 and 3 out of 5 respectively, took place within antimonopoly proceedings, in 2010 and in the first half of 2011 all searches, i.e. 5 and 6, were carried out during the explanatory proceedings. M. Bernatt, *Sprawiedliwość proceduralna...*, p. 201

[152] I.e. Article 105 n of the ACCP.

[153] New Article 105n(3).

[154] Understood as a link between the objections either alleged or already raised against the undertaking inspected and the scope of the inspection; See M. Bernatt, *Powers of Inspection...*, p. 52.

exclusively in the scope of the main proceedings[155]. In consequence and secondly, items not related to the subject matter of the proceedings concerned that inspectors come across during an inspection can be neither subsequently taken into consideration nor seized[156].

Moreover, the UOKiK President, before the issuing an authorisation, is required to have already in his possession relevant evidence supporting the need to carry out inspection[157].

Furthermore, the UOKiK inspectors are obliged to provide the representatives of the undertaking inspected with an inspection authorisation issued by the UOKiK President, in case of a control, or with a court order, in case of a search. Both acts must consists of: (1) identification of the inspecting authority; 2) indication of the legal basis; (3) date and place of its issue; (4) inspectors' identification data; (5) indication of the inspected party[158]; (6) indication of the subject and scope of inspection, including period covered[159]; (7) determination of beginning and anticipated completion date of the inspection; (8) signature of the authorising person, (9) instruction of the rights and obligations of the undertakings concerned[160].

The scope of the inspection specified in its authorisation[161] sets the limits of allowed interference of the UOKiK officials, which means that any undertaken measure cannot go beyond it[162]. It constitutes the determination the areas of undertaking's activities which the inspection relates to. The Polish Supreme Court confirmed that during an inspection of the undertaking premises, the obligation to cooperate with the inspectors includes providing access to documents[163] that are related to the subject of the inspection[164].

---

[155] I.e. the proceedings in the framework of which an inspection was initiated. See Article 105a(1) of the ACCP.
[156] Article 105g of the ACCP; See also M. Swora, *Article 105b* [in:] *Ustawa o ochronie konkurencji i konsumentów, Komentarz*, T. Skoczny, A. Jurkowska, D. Miąsik (eds), Warsaw 2009, No. 12.
[157] M. Bernatt, *Powers of Inspection...*, p. 52
[158] It is noteworthy that any undertaking, i.e. not only the one being suspected of committing a competition law infringement but also his contractor, distributor etc., can become subject to an inspection under the ACCP. According to the principle of proportionality, inspections should nevertheless firstly concern the alleged "offenders" and only in very exceptional circumstances, e.g., if proofs of the suspected infringement cannot be found at the premises of such an undertaking, an inspection may took place in the premises of other undertakings. M. Bernatt, *Powers of Inspection...*, pp. 52-53; C. Banasiński, E. Piontek (eds), *Ustawa...*, p. 841.
[159] Before the recent amendment indication of the period covered by the control was not obligatory. This solution, on the one hand, may limit the control effectiveness, since sometimes it is extremely hard to specify at the very beginning of proceedings the relevant period, but, on the other hand, it better protects undertakings from to excessive controls by restricting the level of possible interference in their business activities and minimizing the risk of fishing expeditions.
[160] Article 105a of the ACCP. All the undertaking's rights not only those related to the ACCP, but also those deriving from other relevant acts/regulations.
[161] Or in court order.
[162] Article 79a(8) of the Act on the Freedom of Economic Activity.
[163] Or providing a copy of them.
[164] Judgment of the Supreme Court of 7 May 2004, III SK 35/04, OSNP 2005, No. 7, item 103.

Therefore an autorisation[165] should, firstly, indicated the markets and the products or services covered by the investigation as well as the undertaking suspicious conduct being subject to inspection (e.g. its pricing policy, the distribution rules etc.), and, secondly, specify the alleged competition law infringement concerned[166]. With reference to the the indication of the inspection aim, the UOKiK President is required to determine, on the basis of already possessed knowledge, indicating a possible infringement of the competition rules, the facts, which he intends to establish through the control[167]. It is postulated by the doctrine that the scope of the inspection should not be indicated too vaguely, since otherwise it would allow carrying out of a control falling outside the competences of the inspectors[168]. The SOKiK, however, did not acknowledged allegations raised by controlled undertaking regarding the lack of specification in the authorisation of whether the undertaken control related to the suspected conduct consisting in anticompetitive agreement or an abuse of dominant position[169]. Such a generalisation is however liable to allow the UOKiK officials to conduct fishing expeditions.

Furthermore, pursuant to the Polish SOKiK, it is the very essence of inspection that the UOKiK inspectors may come across also information and documents not covered by the control scope[170]. Nevertheless, in such a case they are not entitled to make notes, reconstruct their content or seize them[171]. Every case of a dispute regarding the nature of the document at hand, should be noted in the control protocol[172].

With reference to the problem of taking away the forensic copies of computer hard drives for later review in the authority's premises, it has to be emphasised that Polish regulation lacks of any effective safeguards. Coping of the entirety of digital storage mediums[173] for subsequent review in the competition authority's office, has become a frequent practice of the UOKiK. Unfortunately, the Amendment Act instead of introducing necessary limitations, provides for stronger basis thereof[174]. In Poland it is specifically scandalous that the undertaking inspected, contrary to solutions adopted in the EU or

[165] Or in court order.
[166] M. Bernatt, G. Materna, Article 105a..., Chapter V, No. V. 8; A direct relation should occur between the control and the allegations regarding undertaking controlled. See also M. Bernatt, *Sprawiedliwość proceduralna...*, p. 197 and the judgment of the General court in case T-39/90, *SEP vs Commission*, para. 29.
[167] M. Bernatt, G. Materna, *Article 105a...*, Chapter V, No. I. D.
[168] C. Kosikowski, *Ustawa o swobodzie działalności gospodarczej. Komentarz*,7th Edition, Warsaw 2013, p. 519.
[169] Only general notion of "practices restricting competition" was used to indicate the object of control. See the SOKiK ruing of 14 February 2012, XVII Amz 6/12, XVII Amz 7/12, unpublished.
[170] The SOKiK judgment of 08/11/2003, XVII Ama 123/02.
[171] M. Swora, *Article 105 b....*, No. 12.
[172] M. Bernatt, G. Materna, *Article 105a...*, Chapter V, No. II. D.
[173] Such as hard drives.
[174] See the amended Article 105b(1)2.

Switzerland, has no right to be present during the subsequent search of the copied data undertaken by the inspectors in the UOKiK's office. Therefore undertaking is not aware whether inspectors examine only documents falling into the scope of investigations or whether they abuse their powers and review documents covered by privileges, of a private character or not related to the investigation at stake, but containing information that may lead to opening of a new proceedings[175]. Moreover there is no separate judicial control over such measures. This stance definitely leads to the violation of undertakings right to defence, right to privacy and right for effective judicial protection[176].

We may have serious doubts whether this stance is in line with the ECtHR approach confirmed in case *Robathin*[177], in which the ECtHR found a violation of Article 8 of the EConHR since the seizure and examination of electronic data went beyond what was necessary to achieve the legitimate aim. The ECtHR stated that such a seizure amounts to an interference with the right to privacy and therefore sufficient safeguards against arbitrary actions by the authorities must be established by relevant regulation. The ECtHR, firstly, noted that the scope and purpose of the inspection warrant had been very broad and thus procedural guaranties and remedies were required in order to counterbalance it. Even though the applicant was provided with a remedy, i.e. a court scrutinized whether the examination of the seized electronic data was permissible, pursuant to the ECtHR, the review body exercised its supervisory function incorrectly since it gave only very brief and rather general reasons when authorising the search of all the electronic data without considering the question of proportionality. It neither addressed the question whether it would be sufficient to search data limited to the scope of investigation nor gave any specific reasons for its finding that a search of all of the applicant's data was necessary for the investigation.[178] Nevertheless a seizure of electronic data raises questions of proportionality. Even if it pursued a legitimate aim, e.g. the public protection of competition[179], it is indispensable to ascertain whether the measure complained of was "necessary in a democratic society", in other words, whether the relationship between the aim sought to be achieved and the means employed can be

[175] Since in the light of recent Deutsche Bahn judgment competition authority is allowed to actually make use, e.g. initiate separate proceedings, of unrelated documents that the officials came across incidentally while exercising their inspections powers.

[176] Which is adversely affected by the fact that undertaking has to wait until the infringement decision to have possibility to challenge such inspection measures. See M. Błachucki, *Polish competition law – Commentary, case law and texts*, UOKiK, Warsaw, 2013, p. 75.

[177] During the search, copied all files from the applicant's computer were copied to discs by the officers. Since the Mr. Robatin objected to the data being examined, the discs were sealed and provided to the court that decided to approve the screening of all the data. See the *Robathin* judgment.

[178] The *Robathin* judgment, paras. 47 – 52.

[179] Judgment of the Supreme Court of 28 October 2003, I CK 179/02, not yet reported (hereinafter: "nyr")

considered proportionate[180].

Finally, with reference to the available remedies and judicial control provided in response to the UOKiK President's powers of inspection, we should list the following: (1) the right to lodge an objection in relation to the conduct of inspection; (2) right to complain on control measures of other entities whose rights were violated during the control; (3) prior judicial control with respect to searches and; (4) judicial review of final decisions of the UOKiK President in case of procedural objections in relation to the conduct of the administrative proceedings.

Firstly, under the Act on the Freedom of Economic Activity undertaking may lodge an objection against the manner in which public administrative authorities exercise their rights of inspection[181]. The objection lead to suspension of control until the decision of the UOKiK President[182] that may be subsequently appealed to the SOKiK[183]. Nevertheless this right is limited in relation to competition proceedings[184]. Undertakings are entitled only to contest irregularities regarding the control authorisation, e.g. the *de facto* broader extent of the control than the one set out in the authorisation[185]. Due to this limitation as well as to the lack of prior judicial control regarding the control, we may have serious doubts whether this stance is in line with the ECtHR standards regarding the requirement of scrutiny covering the question of legality and justification of the challenged inspection[186]. With reference to the question of fishing expeditions, it has to be noted that the SOKiK is not entitled to verify whether the scope of the control specified in the authorisation and the actions undertaken in its framework related to the subject matter of investigation. So far any objections of this kind raised by undertakings have not been successful in practice. In case Polkomtel the undertaking failed to complain on impartiality of the UOKiK inspectors, disproportionality of

[180] The *Robathin* judgment, paras. 42 – 43.
[181] Article 84c(1) of the Act on the Freedom of Economic Activity.
[182] Which is to be taken within 3 days. See Articles 84c (5) and (9).
[183] See Article 479^{28} (1) of the Polish Code of Civil Procedure, the SOKiK decision of 22 December 2009, XVII Amz 54/09/A, not published., the UOKiK President decision of 24 february 2011, DOK-1/2011, pp 13–14; See also *K. Róziewicz-Ładoń*, Postępowanie przed Prezesem Urzędu..., pp. 261–262
[184] Undertakings are entitled to lodge objections in relation to violations of only Article 79a(1) and 79a (3)-(9) of the Act on the Freedom of Economic Activity, while under the general rule, objections may concern the violations also of Articles 79(1) and 79 (3)-(7), Article 80(1), Article 82(1) and Article 83(1). Nevertheless, due to the existence of a *expressis verbis* statutory exemption, the latter provisions do not apply within competition law proceedings. See M. Bernatt, *Powers of Inspection...*, p. 60 and B. Turno, *Komentarz...*, p. 1156.
[185] Objections under the Act on the Freedom of Economic Activity are raised before the UOKiK President whose orders may be subsequently subject to review by the special Court of Competition and Consumer Protection, which is not an Administrative Court. See judgment of the Regional Administrative Court in Warsaw of 5 March 2010, III SA/Wa 1496/09. See also K. Róziewicz-Ładoń, *Postępowanie przed Prezesem Urzędu...*, pp. 261–262.
[186] M. Bernatt, G. Materna, *Article 105a..*, Chapter V, No. I. 7.

me asures undertaken in the framework of the control, the *de facto* broader extent of the control than the one set out in the authorisation and, finally, on defectiveness of the inspection authorisation. All objections were dismissed by the UOKiK President what was subsequently uphold by the SOKiK[187]. Therefore the current regulation and application of the institution of objection in competition law proceedings seems not to fully protect the undertakings rights[188].

Secondly, it has to be stressed that the new Article 105m introduces a brand new remedy regarding control, i.e. a complaint, that can be lodged to the SOKiK by entities[189] (individuals) whose rights were violated during the control[190]. This complaint may relate to any control measure or other control activities undertaken beyond the scope of control or in violation of the legal provisions[191]. It is thus important to emphasise that its scope is much broader than the scope of the possible undertaking objection.

Furthermore, in case of successful complaint, evidence obtained as a result of the contested control activities cannot be used in any proceedings, i.e. in the proceedings concerned, other proceedings conducted by the UOKiK President or in any other proceedings conducted pursuant to separate legal provisions. This new development is definitely of a immense importance also in the context of the prevention of fishing expeditions and may be regarded as slowly paving the way for admission of direct actions against measures undertaken during inspections.

Thirdly, the prior judicial control is limited only to searches[192] and its current regulation should be criticised for three further reasons. Firstly, its scope has not been set out in the ACCP[193,] This is inconsistent with Article 2 of the Polish Constitution since legal provisions resulting in a limitation of rights and freedoms are to non-ambiguous and precise[194]. It is nevertheless crucial that the question of proportionality is taken under

[187] See the order of theSOKiK of 22 December 2009, XVII Amz 54/09/A, the decision of the UOKiK President of 24 February 2011, DOK-1/2011, p. 12.

[188] *G. Materna, Sądowy nadzór nad wykonywaniem kontroli (przeszukania) u przedsiębiorcy w toku postępowania przed Prezesem UOKiK*, PUG 7/2012, p. 23; M. Bernatt, G. Materna, *Article 105a...*, Chapter V, No. I. 7.

[189] Other than undertaking concerned.

[190] M. Bernatt, G. Materna, *Article 105a...*, Chapter V, No. I. 7.

[191] The SOKiK decision maybe be further subject to an appealed.

[192] Controls are based on a UOKiK President's authorisation and maybe only subject to objections raised under the Act on the Freedom of Economic Activity, to court review of the UOKiK President decision of imposition of a fine for non-cooperation or of a final infringement decision issued by the UOKiK President. Moreover, this limitation is criticised due to above-mentioned problems in distinguishing between a search and a control.

[193] New Article 105 n(4) (previously 105c (3)) of the ACCP provides only that the SOKiK should decided within 48 hours on authorising a search upon the request of the UOKiK President.

[194] See the following judgments of the Constitutional Court: of 22 May 2002, K 6/02, (2002) 3/A *OTK ZU* sec. 33 and of 11 January 2000, K 7/99, (2000) 1 *OTK ZU* sec. 2. See also the ECtHR judgment of 16 February 2000

consideration by the SOKiK while deciding whether a justifiable suspicion exists that the ACCP had actually been violated. Secondly, this prior judicial control of the UOKiK President's inspection powers is minimal[195] since the SOKiK seems to authorise in practice all searches upon the UOKiK President request[196]. This is not in line with the ECtHR case-law, according to which the particular importance of the court's supervisory function requires considering whether a measure requested is "necessary in a democratic society", i.e. whether the relationship between the aim sought and the means employed can be considered proportionate or whether this aim may be achieved in a less onerous way[197]. Thirdly, decisions of the SOKiK authorising a search cannot be appealed[198] which is an exception from the constitutional principle of a two-instance judicial process[199]. This provision meets with vivid criticism due to significant interference of searches with the rights and freedoms of undertakings (in particular the right to privacy), on the one hand, and lack of sufficient procedural safeguards, on the other hand[200]. Therefore the is an urgent need for an adequate amendment to the ACCP introducing, similarly to solution adopted in the Polish criminal procedure[201], the right of undertakings to appeal the court order which authorises a search[202].

Finally, the UOKiK President decisions are subject to judicial review of the SOKiK that cannot limit itself to a mere review of the challenged decision but should assess the case to the merits to the same extent as if it would be the first instance authority[203], i.e. the SOKiK is obliged to investigate the case from the beginning instead of limiting its jurisdiction and relying on facts established by the UOKiK President[204]. In the context of this paper, it is indispensable to note that the court should be entitled to set aside the impugned decision[205], if

---

in case *Amann vs Switzerland*, application No. 27798/95, para. 56.

[195] Not to say illusory.

[196] It was at least the case between 2008 and 2011, when the SOKiK authorised 3 seraches in 2008, 5 in 2009, another 5 in 2010 and 6 only during the first six months of 2011. M. Bernatt, *Powers of Inspection of the Polish Competition Authority. Question of Proportionality*, YARS (Yearbook of Antitrust and Regulatory Studies), Vol. 4(5) 2011, p. 62.

[197] Paras. 42 - 43

[198] Article 105n(4) (previously 105c(3)) of the ACCP.

[199] Article 78 and Article 176(1) of the Polish Constitution.

[200] See also M. Bernatt, *Powers of Inspection …,* p. 62 and M. Swora, *Article 105c*..., No 16.

[201] Article 236 of the Code of Criminal Procedure.

[202] M. Bernatt, *Powers of Inspection...,* p. 62

[203] The judgment of the Court of Appeal of 21 June 2006, VI ACa 142/06, Journal of UOKiK of 2007, No. 1, item. 13. and the judgment of the Court of Appeal of 19 January 2011, VI ACa 1031/10, nyr VI ACa 1031/10. See also M. Błachucki, *Polish competition law…,* p. 75

[204] Judgment of the Court of Appeals of 31 May 2012, VI ACa 1299/10, nyr; See also Judgment of the Court of Appeal of 21 September 2006, VI ACa 142/06 , Journal of Laws of UOKiK of 2007, No. 1, item 13, in which the Court of Appeal held that the SOKiK 2obliged to independently assess all the evidence and draw its own conclusions".

[205] Either entirely or partially. Moreover, after setting aside the challenged UOKiK President decision the SOKiK enjoys full discretion on how to further proceed with the case. Judgment of the Antimonopoly Court of

"procedural requirements of fairness were not met in the proceedings which had led to its adoption[206]". Under Article 77(6) of the Act on the Freedom of Economic Activity, any evidence which was obtained in violation of legal norms regarding inspections cannot constitute proof in administrative proceedings conducted in relation to undertaking concerned, if it had influence on the results of the inspection in question. With reference to the principle of proportionality, the SOKiK review thus should, firstly, include effective control over how evidence resulting from inspections was collected, i.e. whether *inter alia* the principle of proportionality was observed by the UOKiK President, and if it finds an infringement of procedural rules in this context[207], the SOKiK is obliged to disregard such evidence[208]. Furthermore, according to the case-law of the Polish Supreme Court[209], if the remaining evidence does not suffice to prove the competition law infringement in question, the SOKiK is to change the challenged decision by establishing the lack of competition law infringement at stake. The Polish Supreme Court confirmed moreover that, a violation of requirements necessary for the validity of proceedings may constitute the ground sufficient for the revocation of a UOKiK President decision[210]. Therefore, in case of the violation of the values of procedural fairness[211], e.g. the right to be heard, right to defence or right to privacy during administrative proceedings[212], the SOKiK should annul a UOKiK President decision in its entirety[213].

Nevertheless, according to another approach of the Polish courts[214], procedural irregularities concerning evidence, including the violation of the privilege against self incrimination or a disproportional character of inspection in relation to the right to privacy, should not result in the revocation of the decision contested if the latter is in line with the provisions of substantial law. Moreover, SOKiK is not obliged to focus on the possible infringements of procedural rules[215], thus if the undertaking fails to prove that the procedural

---

18 October 2000, XVII Ama 6/00, Wokanda 2001, No. 12, item 51.

[206] See the *Potocka* judgment, para. 55.

[207] E.g. that a violation of the principle of proportionality being violated during the inspection concerned.

[208] M. Bernatt, *Powers of Inspection...*, p. 63.

[209] The judgment of the Supreme Court of 19 August 2009, in case III SK 5/09, *Marquard Media Polska*,, LEX, No. 548862. Nevertheless, the Supreme Court held only essential procedural requirements, contrary to some secondary procedural errors, can be 'healed' by the judicial power. Such he values of procedural fairness.

[210] See the judgment of the Polish Supreme Court of 29 April 2009, III SK 8/09.

[211] What constitutes a violation of a requirement indispensable for the validity of the proceedings.

[212] For instance if namely in a consequence of an inspection an undertaking was deprived of the right to defence during the proceedings.

[213] M. Bernatt, *The control of Polish courts...*, p. 304; See also: C. Banasiński, E. Piontek (eds), *Ustawa...*, pp. 919–920.

[214] See the *Marquard Media Polska a*nd the judgment ofd the Court of Appeal in Warsaw of 17 June 2008, VI Aca 1162/07, nyr.

[215] SOKiK judgments of 24 July 2007, XVII Ama 84/06, not reported and of 22 June 2005, XVII Ama 55/04,

irregularities influenced the UOKiK decision on its merits, they should not be taken into account by the judicial control at all[216]. One should strongly disagree with this opinion since, firstly, breaches of procedural fairness should *per se* be covered by the courts' examination irrespective of their eventual impact on the merits of the decision and, secondly, violations of such procedural rules of substantial character should lead to the annulment of the decision concerned[217].

Therefore, while expecting the Supreme Court to take a further opportunity to clarify its opinion and adopt a coherent approach in this issue, some doubts may arise whether the actual judicial control exercised by the SOKiK is fully in line with the EConHR standards regarding the requirements of full jurisdiction, especially in relation to procedural infringements[218].

IV. Switzerland

In Switzerland, like in Poland, the EConHR is directly applicable and all authorities are obliged to act in line with its provisions as well as the case-law of the ECtHR. Furthermore, the Federal Constitution[219] constitutes another important source of fundamental rights of undertaking.

The rule of proportionality is derived from Article 5 (the rule of law), stating that State activities must be conducted in the public interest and be proportionate to the ends sought, and Article 36, according to which any restrictions on fundamental rights, besides having a legal basis and being justified in the public interest or for the protection of the fundamental rights of others, must be also proportionate[220]. Furthermore, the right to privacy is protected under Article 13 of the Federal Constitution[221] and the relevant procedural guarantees of

---

UOKiK Official Journal 2005 No. 3, item 42. See also the SOKiK judgment of 27 October 2009, XVII Ama 126/08, Journal of Laws of UOKiK of 2010, No. 1, item 5, in which it held *expressis verbis* that, since it hear the case independently and from the beginning, any procedural irregularities that took place during proceedings before the UOKiK President are irrelevant for the result of the court proceedings. Threfore the appeal against the UOKiK president decision cannot be based on alleged procedural shortcomings which occurred within the antimonopoly proceedings.

[216] See the judgement of the Court of Appeal in Warsaw of 24 July 2008, VI ACa 12/08. See also the Supreme Court decision of 29 April 2009, III SK 8/09, not reported and SOKiK judgment of 20 February 2007, XVII Ama 95/05, not reported. In this context it has to noted that proceedings before the SOKiK are of civil charcter which means that the burden of proof lies on the claiming party. The SOKiK does not conduct evidence proceedings, thus all evidence is produced only upon the motion of the parties. See the judgment of the SOKiK of 19 December 2006, XVII Ama 15/06, Journal of Laws of UOKiK of 2007, No. 2, item 21. See moreover M. Błachucki, *Polish competition law – Commentary, case law and texts*, UOKiK, Warsaw, 2013, p. 74

[217] M. Bernatt, *The control of Polish courts...*, p. 304 – 305; See also R. Summers, E*valuating and Improving Legal Process – A Plea for "Process Values",* Cornell Law Review 1974, 60(1), pp. 11–14.

[218] M. Bernatt, *The control of Polish courts...*, p. 303 - 305

[219] Federal Constitution of the Swiss Confederation of 18 April 1999 as amended.

[220] Moreover, Article 9 ensures protection against arbitrary conduct of state authorities.

[221] "Every person has the right to privacy in their private and family life and in their home, and in relation to

undertakings are ensured by Articles 29[222], 29a[223], 30[224] and 32[225].

In the Swiss doctrine it is stressed that, in order to ensure that undertakings concerned can effectively exercise their right to defence, the procedural safeguards should be applied from the very beginning of the proceedings[226]. In particular, it is paramount that the undertakings are granted sufficient legal protection during the dawn raids, i.e. unexpected inspections, constituting the interference with the private and secret sphere of undertakings.

The legal basis for the the Swiss Competition Commission's[227] powers of inspections were introduced within the substantial Cartel Act reform[228] in 2004[229]. Article 42 (2) Cartel Act provides the Comco with power to order searches[230] as well as seize any evidence and thus gave the Comco effective instrument to detect and fight against competition law infringements, in particular hard-core cartels. In practice searches are carried out by the Comco Secretariat that has to obtain a prior written authorisation from the presiding body, i.e. Presidium of the Comco[231]. The recent Comco statement shows that the authority has made a frequent use of its powers, since during the last 10 years the dawn raids were carried out 91 times in the framework of 18 investigations and mostly led to decisions finding infringement and imposing fines[232].

The overall aim of inspections is to ensure that the Competition Commission disposes of effective measures to detect competition law infringements. Nevertheless due to high interference with undertakings rights and activities, inspections cannot be ordered freely but they have to be subject to specific requirements, regarding inter alia the existence of

---

their mail and their telecommunications."

[222] Right to a fair trial and right to be heard.

[223] Guarantee of access to the courts.

[224] Right to be heard by a independent and impartial court.

[225] Presumption of innocence.

[226] Astrid Waser, *Verfahrensrechte der Parteien – neueste Entwicklungen* [in:] I. Hochreutener, W. Stoffel, M. Amstutz (eds), *Droit de la concurrence: Développements, droit de la procédure, décloisonnement du marché suisse / Wettbewerbsrecht: Entwicklung, Verfahrensrecht, Öffnung des schweizerischen Marktes*, Schulthess, Growth Publisher Law, 2014, p. 72

[227] Hereinafter: the "Comco".

[228] Amongst other significant amendments one should point at introduction of direct sanctions and leniency program.

[229] Since it was disputed whether the former Cartel Act provided a sufficient legal basis for dawn raids in Switzerland, no such inspection had taken place under the previous regulation.

[230] Likewise int he EU and contrary to Polish regulation, in Switzerland there is no distinction between a control and a search. Each inspection includes competences of the Secretariat's inspectors to run a search. Moreover searches may be conducted not only at the undertaking premises but also at premises of its officers.

[231] S. Bangerter, *Kommentar zu Art. 42 KG* [in:] M. Amstutz, M. Reinert (eds), *Basler Kommentar KG*, Basle 2010, No. 62,

[232] See e.g. R. Corazza, *10 ans de sanctions directes/programme de clémence – bilan du point de vue du Secrétariat*, presented at the Annual Press Conference on 14 April 2014, available at http://www.weko.admin.ch/dokumentation/00226/index.html?lang=fr and the press release of 14 April 2014 "La Comco dress son bilan" available at https://www.news.admin.ch/message/index.html?lang=fr&msg-id=52647

sufficient suspicion and to precised limitation of the inspection scope. This inspection order has thus a limiting and controlling function, since it should allow the undertaking concerned to verify whether the measure undertaken in its application are in line with its content[233]. Therefore the characteristics of the infringement suspected as well as reasons[234] of this suspicions have, in particular, to be indicated therein[235]. In addition, such an order must specify the parties, object as well as the purpose of the investigation. Moreover, undertakings premises may only be inspected (1) if there is sufficient suspicion of the commitment of a competition law infringement and (2) if it is probable that the sought items for can be found therein[236].

According to some scholars , it important to stressed that the probability that relevant evidence will be found in the to be searched premises, constitute an aspect separate from the suspicion of infringement: While the latter refers to the question whether the undertaking has committed a competition law infringement, the former relates to the question whether sufficient indication exists that the sought evidence can be found by carrying out a search in the specified undertaking premises[237].

The requirement of sufficient suspicion is comprised of two prerequisites. Firstly, from the facts of the case, described in details, a suspicion may result that one or more competition law infringements were committed. Secondly, the suspicion in order to be sufficient must be supported by adequate evidence or indications provided in order to confirm the indicated facts[238]. Such indications should refer to incriminated conduct and allow to sufficiently establish adequate suspicion[239].

According to case law of the Federal Criminal Court, however, the evidence or indications being in authorities hand at the early stages of a process have neither to indicate a significant or high probability of conviction[240] nor to be able to justify precise suspicion of possible sanctions[241]. In competition law proceedings the Federal Criminal Court accepted, for instance, a search which was conducted only on the basis of the vague presumption of a

[233] Otherwise and if not, to raise relevant objections.
[234] Relevant facts.
[235] D. R. Gfeller, *Kommentar zu Art. 241 StPO* [in:] M. Niggli, M. Heer , H. Wiprächtiger (eds), *Basler Kommentar Schweizerische Strafprozessordnung / Jugendstrafprozessordnung*, Basle 2010, N 7 f.
[236] Art.48 paragraph 1 of Swiss Administrative Criminal Law.
[237] D. R. Gfeller , S. Oswald, *Kommentar zu Art.249 StPO* [in:] M. Niggli, M. Heer , H. Wiprächtiger (eds), *Basler Kommentar Schweizerische Strafprozessordnung / Jugendstrafprozessordnung*, Basle 2010, No. 12.
[238] The decision of the Federal Criminal Court of 4 October 2012, BE. 2012.9, E. 3.1.
[239] The judgment of the Federal Court of 25 April 2013, 1B 98/2013.
[240] The decision of the Federal Criminal Court of 4 October 2012, E. 3.1.
[241] The decision of the Federal Criminal Court of 20 Fenruary 2007, BE. 2006.7, E. 3.1.

price agreement[242].

This court's interpretation of sufficient suspicion has been strongly criticised for hindering the fundamental rights protection. Swiss scholars emphasise that the sole appearance of an illegal restriction of competition, based either on the possible initial authority's research or consumers complaints of allegedly too high or the same prices in the market[243] remarks from competitors, may not be regarded as sufficient suspicion[244]. On the contrary, sufficient suspicion requires the existence of concrete indications, going beyond the general suppositions, the rumours or the pure guesses, that argue for the presence of an illegal restriction of competition[245]. Hence, e.g., specific information provided from leniency applicants providing concrete indications in relation to a competition law infringement in a determined market will meet the above requirement[246].

Unfortunately, such opinion cannot be identified in the practice of the Comco or the Federal Criminal Court. In the so called Bathrooms case the opening of the proceedings and conducting of dawn raids (including coping of hard discs) were based only on consumers emails, by which they complained about too high prices[247]. The Federal Criminal Court upheld this stance and recalled that the criminal proceedings can be initiated on the basis of a substantiated complaint that justifies a probable cause[248].

This case show, that bigger accent should be put on prevention of fishing expeditions. An inspection should be regarded as a disproportionate and arbitrary measure unless it is based on a reasonable suspicion supported by specific indications of competition law infringement. Moreover when indication relates to particular sector, inspection must be limited only to this part of undertaking business activity that is *expresis verbis* indicated in

---

[242] The decision of the Federal Criminal Court of 11 July 2012, BE. 2012.4, E. 3.3.

[243] Compare Decision of the Swiiss Federal Criminal Court of 11 July 2012, in Bathrooms case, BE. 2012.4, E. 3.2: The openinig of the proceedings and conductiing of searches (including coping of hard discs) based only on consumenrs E-Mails, by which they complainted about too high prices.

[244] Astrid Waser, *Verfahrensrechte der Parteien...*, p. 75; S. Bangerter, *Kommentar zu Art. 42 KG...*, No. 50.

[245] J. Weber, *Kommentar zu Art. 197 StPO*, [in:] M. Niggli, M. Heer , H. Wiprächtiger (eds), *Basler Kommentar Schweizerische Strafprozessordnung / Jugendstrafprozessordnung*, Basle 2010, No. 7 f.

[246] Astrid Waser, *Verfahrensrechte der Parteien...*, p. 75.

[247] E.g., the consumer email of 22 October 2011: "prices were very similar" ("les prix étaient très proches"), the consumer email of 1 November 2011: "I've become aware of massive increase of prices in the construction industry, for example, of bath » ("ich bin auf massiv überhöhte Preise im Baugewerbe aufmerksam geworden, z.B. Badewannnen")

[248] E. 3.2 "An dieser Stelle ist daran zu erinnern, dass zu Beginn eines Strafverfahrens eine substantiierte Strafanzeige zur Begründung eines hinreichenden Tatverdachts genügen kann (...) Die hier vorliegende Mehrzahl - meist konkret formulierter - Anzeigen sowie die eigene Marktbeobachtung der Gesuchstellerin liefern demnach - entgegen den Ausführungen der Gesuchsgegnerin (siehe act. 4, Rz. 40 - 42) genügend konkrete Hinweise, welche im jetzigen Zeitpunkt zu Beginn der Untersuchung den hinreichenden Verdacht begründen, wonach im Markt der Sanitäranlagen unzulässige Preisabreden bestehen könnten. See also the decision of the Federal Criminal Court of 22 April 2005, BE.2004.10, E. 3.3.2.

the search order. This should also limits the abusive use of single economic unit concept[249] disproportionately extending the scope of inspection. Similarly, the geographical scope should be precisely determined and respected by the officials while applying the inspection decision.

Furthermore, even though the privilege against self-incrimination applies in competition law and consequently, undertakings may refuse to cooperate actively if it would lead to self-incrimination, they are nevertheless under a passive obligation to obey the inspection[250] and are *de facto* not allowed to interfere notably with the search actions undertaken by the officials[251]. This obligation should nevertheless only relate to what is indicated in the inspection order[252] and not to actions going beyond its scope.

With further regard to the direct application of the EConHR in Switzerland, the privilege against self-incrimination and presumption of innocence should be respected in the competition law proceedings[253], especially in the context of authority power to request for information and to carry out an inspection[254] as well as to impose a fine on an undertaking[255]. An undertaking should not be fined if it refuse to provide incriminating information (orally or in writing)[256].

Therefore it is postulated that the level of protection of procedural and fundamental rights of the inspected undertakings should be improved[257]. It is, first of all, indisputable that the powers of inspections should be used in conformity with the right to privacy enshrined in Article 8 EConHR and the ECtHR case-law extending its scope to undertaking as well[258]. Pursuant to this provision "everyone has the right to respect for his private and family life, his home and his correspondence' with exception to a public interference which is (1)'in accordance with the law", (2) 'necessary in a democratic society" and (3) "in the interests of the economic well-being of the country [or] for the prevention of disorder or crime". It the judgment in case *Société Colas Est and Others v France* related to the field of competition

[249] With regard to the notion of undertaking see A. Waser, M. Meinhardt, *Konzerne und Wettbewerbsrecht* [in:] P. V. Kunz, O. Arter, F. Jörg (eds), *Entwicklungen im Gesellschaftsrecht VIII*, Berne 2013, p. 135 et seq.
[250] A. Kölz, I. Häner, M. Bertschi, *Verwaltungsverfahren und Verwaltungsrechtspflege des Bundes*, 3rd Edtition, Zürich/Basle/Geneva 2013.
[251] M. Rauber, *Verteidigungsrechte von Unternehmen im kartellrechtlichen Verwaltungsverfahren, insbesondere unter Berücksichtigung des "legal privilege"*, Zuurich/St. Gallen 2010, p. 228
[252] Which emphasises important informing and limiting function of such an order.
[253] In accordance with the ECtHR judgment of 29 November 1996 in case *Saunders*.
[254] See the *Funke* judgment.
[255] See the J.B. vs Switzerland judgment, paras 64 and 66-71 as well as the judgment of the Federal Administrative Court of 7 July 1995, 121 II 257, paras 268 and 269.
[256] P. Kobel, *Sanctions du droit des cartels et problèmes de droit administratif pénal*, AJP/PJA 9/2004, p. 1156.
[257] Astrid Waser, *Verfahrensrechte der Parteien...*, p. 73
[258] The ECtHR judgment of 16 April 2002 in case *Société Colas Est and other vs France*, application no. 37971/97, para. 51.

law procedure the ECtHR confirmed the direct application of Article 8 ECHR for the purposes of the protection of undertakings against arbitrary inspections carried out by competition authorities[259]. The ECtHR further emphasised that even though the aim to "prevent the disappearance or concealment of evidence of anti-competitive practices" justifies the impugned interference with undertakings' right to respect for their premises, the relevant legislation and practice must however afford "adequate and effective safeguards against abuse"[260]. Although the ECtHR held in case Niemietz that entitlement to "interfere" to the extent permitted by paragraph 2 of Article 8 may be "more far-reaching" where professional or business activities or premises are involved[261], the inspections have to nevertheless be "strictly proportionate to the legitimate aims pursued[262]".

Therefore, contrary to the practice of the Comco, it is argued that the inspections should not be undertaken within preliminary investigation[263], but only at the stage of a full investigation which can be initiated only if there are indications of an unlawful restraint of competition, and after consultation with a member of the presiding body[264].

An inspection undoubtedly constitutes a significant intervention in business activities of the undertaking concerned. During a dawn raid undertakings activities are usually paralysed. And subsequently their resumption may be impeded as well[265]. Therefore, the principle of proportionality requires that the interference with the undertakings business activities has to be the least onerously possible. It is not only about the type of documents seized but also about the way in which they are seized. In this regard the Comco highlights its

[259] The *Société Colas Est* judgment, paras 48-49; Even though in its literally wording, Article 8 seems to be applicable only natural persons and to private dwellings, its scope has been extended by the ECtHR to legal persons and business premises as well. See also the ECtHR judgment *of 16 December 1992*, in case *Niemietz vs Germany, application no. 13710/88*.

[260] Para. 48 See also para. 49. "The Court observes, however, that that was not so in the instant case. At the material time – and the Court does not have to express an opinion on the legislative reforms of 1986, whereby inspectors' investigative powers became subject to prior authorisation by a judge – the relevant authorities had very wide powers which, pursuant to the 1945 ordinance, gave them exclusive competence to determine the expediency, number, length and scale of inspections. Moreover, the inspections in issue took place without any prior warrant being issued by a judge and without a senior police officer being present (ibid., *mutatis mutandis*, p. 25, § 57, p. 63, § 40, and p. 90, § 38, respectively). That being so, even supposing that the entitlement to interfere may be more far-reaching where the business premises of a juristic person are concerned (see, *mutatis mutandis*, *Niemietz*, cited above, p. 34, § 31), the Court considers, having regard to the manner of proceeding outlined above, that the impugned operations in the competition field cannot be regarded as strictly proportionate to the legitimate aims pursued (see *Funke*, *Crémieux* and *Miailhe (no. 1)*, cited above, p. 25, § 57, p. 63, § 40, and p. 90, § 38, respectively)."

[261] *See the Niemietz* judgment, para. 31.

[262] M. Bernatt, *Powers of Inspection...*, p. 50

[263] Article 26 of the Cartels Act.

[264] Article 27 of the Cartels Act.

[265] Astrid Waser, *Verfahrensrechte der Parteien...*, p. 80

development since 2004[266]. At the very beginning the inspectors were seizing the original documents[267], nowadays the Secretariat practice is to make copies of the relevant documents on the spot and leave the originals in the inspected premises and it is planned that, in the future, the documents will be scanned on site, i.e. the Secretariat will take the copies of relevant documents only in electronic form[268].

With reference to seizure of copies of electronic documents or hard drives, the material and geographic limitation of the inspection should be considered not respected if the competition authority make forensic copies of entire hard drives or servers and seize them in order to conduct a subsequent search in its premises[269]. During this subsequent search of electronic data, the Comco Secretariat will surely come across documents either cover by privileges or being outside the order scope, i.e. not regarding the areas for which there is sufficient suspicion of competition law infringement. Documents which search cannot be justified in the light of inspection authorisation, cannot be seized, reviewed or used in any further purpose[270]. And although undertakings have right to assist during theses subsequent searches, one cannot exclude that ones data are in the Comco possession, an abuse in relation to information stocked on the hard drives may easily take place.

With regard to remedies, it is noteworthy that provisions of the Swiss Administrative Criminal Law[271] concerning searches and seizures apply *per analogiam* to these "coercive measures" undertaken in the field of competition law[272]. Article 50 regulating search of documents is of a particular importance in the context of the principle of proportionality and prevention from fishing expeditions, since it obliges inspectors to respect the private secrets and well as legal professional privilege and emphasises that only documents apparently relevant for the investigation matter may be examined by the inspectors. Moreover this provision grants the undertaking inspected the right to indicate a content of a document before it examination and consequently kind of a right to oppose its examination. Namely, in such a case the document in question should be sealed, deposited in a safe place and deliver

[266] See S. Bangerter, *Hausdurchsuchungen. Aktuelle Etwicklungen in der Praxis*, Presentation from Studienvereinigung Kartellrecht of 21 June 2013 at the University of Berne, p. 8; available at https://www.studienvereinigung-kartellrecht.de/downloads/201300621_martenet.pdf

[267] Exceptionally copies were made of documents indispensable for the undertaking to continue its activities.

[268] See S. Bangerter, *Hausdurchsuchungen...,* and J. Prangenberger, *Aktuelle Fragen des Schweizer Kartellrechts*, Jusletter of 12 August 2013, p. 4.

[269] Astrid Waser, *Verfahrensrechte der Parteien...*, p. 79

[270] A. Eicker, F. Friedrich, J. Achermann, *Verwaltungsstrafrecht und Verwaltungsstrafverfahrensrecht*, Bern 2012, p. 172

[271] Articles 45 – 50 of the Federal Act of 22 March 1974 on Administrative Criminal Law.

[272] Message on the modification of Cartel Act of 7 November 2001, BBl 2002, p. 2047.

to the Federal Criminal Court that is to decide on the admissibility of its search[273].

Nevertheless, it has to be stressed that besides this envelope procedure, there is no possibility to appeal against the inspection authorisation or challenge separately other measures undertaken by inspectors during the inspections, which seems to be incoherent with the ECtHR case-law requiring that the investigation measures must be subject to judicial control[274]. Some Swiss authors argue that, to full be in line with the EConHR requirements, a judicial control should take place before the conduct of an inspection, i.e. the Comco should obtain a prior authorisation from a cantonal judge[275].

Finally, in relation to the question of judicial review of the infringement decisions, we should have a closer look at the landmark judgement of the Swiss Federal Supreme Court in case *Publigroupe*[276], by which the Swiss Federal Supreme Court acknowledged the compliance of the Swiss competition procedure with the EConHR standards. Since the the penalties provisions provided in the Cartel Act[277] are of criminal nature, the relevant procedural guarantees of the EConHR[278] and of the Swiss Federal Constitution[279] are applicable to the competition proceedings. Pursuant to the Federal Supreme Court, the requirements following from those safeguards are sufficiently fulfilled since the Federal Administrative Court has in principle full jurisdiction and reviews the Comco's decision in relation to questions of fact and law. However, the Swiss Federal Supreme Court held that the Federal Administrative Court is allowed to restraint its review of technical factual questions.

This ruling brought about a vivid debate on the institutional framework of the competition regulation. It noteworthy that this judgement has influenced the current Cartel Act reform since in its aftermath the Council of State rejected the Swiss Federal Council project of institutional change[280] proposed within the framework of prepared amendments[281].

---

[273] Article 25 (1). Judgment of the Federal Tribunal of 27 September 2005, 1S.28/2005, E. 2.4.2 and judgment of the Federal Criminal Court of 20 June 2005, BV.2005.20, E. 2.1.1. The sole existence of such opportunity does not mean that this remedy is successful for undertakings as showed the Bathrooms case. See e.g. Decision of the Swiss Federal Criminal Court of 11 July 2012, BE. 2012.4, E. 3.2.

[274] The *Société Colas Est* judgment, paras 107, 125.

[275] P. Kobel, *Sanctions du droit des cartels...*, p. 1157

[276] See the judg*ement of the Swiss Federal Supreme Court of 29 June 2012 in case P*oubligroupe S.A. vs Competition Commission, related to the question of abuse of a dominant position in relation to the commissioning of professional intermediaries for newspapers. The investigation was initiated in 2002, the Comco deliver its decision imposing a fine on 5 March 2007. The *Poubligroupe* appeal was rejected by the Federal Administrative Court in 2010.

[277] Article 49a of the Cartels Act.

[278] I.e. Articles 6 and 7 EConHR.

[279] I.e. Articles 30 and 32 of the Swiss Federal Constitution.

[280] The introduce an institutional separation between an investigatory body and a Competition Court.

[281] The National Council refused to discuss and to decide on the proposed reform.

Last but not least it should be mentioned that since Switzerland is not a member state of the EU, it has no obligation to be inspired by the legal solutions adopted within the EU or the CJEU case-law. Nevertheless, we may note that Switzerland remain somehow influenced by the EU competition law. This has been seen during the current reform of the Cartel Act which introduces some provisions taken after the EU law[282]. Moreover we may come across numerous references to the EU competition law, made mostly by scholars[283] and practitioners[284] but sometimes also by the Comco[285]. More specifically, there has been a vivid discussion after the *Nexans* judgment with reference to the need of strengthening the prevention of fishing expeditions in Switzerland.

V. Conclusions

From the above presentation of selected problems and developments of competition authorities powers of inspections analysed in particular in the light of the principle of proportionality as well as in the context of the questions of fishing expeditions and subsequent electronic searches we may come to the following conclusions.

Despite some improvements[286] in all presented legal orders, the legal position of undertakings inspected by the competition authorities is still very weak. Fearing of imposition of fines for obstruction, undertakings do not know how they can *de facto* exercise their right to defence[287], including the right to oppose, during dawn raids. The lack of immediate remedies lead to serious negative consequences since before the time that an undertaking will be entitled to challenge the illegal or abusive measures undertaken by the inspectors, the harm or irretrievable damage will have already been done, for instance new proceedings against it will be initiated based on the evidence illegally obtained during an inspection constituting a fishing expedition. This stance is even more questionable in the light of the recent highly controversial General Court approach presented in the *Deutsche Bahn* judgment which actually gave a green light for such a scenario. Nevertheless, the competition authorities should never be permitted to make any use of documents that they are not allowed to search for.

---

[282] New wording of Article 5 prohibiting anticompetitive agreements, new test for merger control etc.
[283] V. Martenet, Ch. Bovet, P. Tercier, *Commentaire Romand. Droit de la concurrence*, Helbing Lichtenhahn Verlag, Basle, 2013
[284] A. Waser, *Verfahrensrechte der Parteien...*, pp. 71 - 95
[285] Decision of the Competition Commission of 6th July, 2009, RPW 2009/3, p. 217, where the Comco made reference to the Commission notice on immunity from fines and reduction of fines in cartel cases (Official Journal C 298, 8.12.2006, p. 17).
[286] E.g. relevant amendements to the ACCP, prohibition of fishing expeditions expressly stated by the General Court.
[287] What exactly they can legally do and to what extent in order not to be punished.

Therefore, it is expected to reinforce procedural safeguards and requirements regarding the power to carry out a dawn raid. Besides the obligation to specify in details the extent[288] and goal[289] of an inspection it is in particular paramount that there are incontestable grounds for the use of this investigative power interfering with undertakings rights. Namely, the perquisites in relation to the existence of sufficient suspicion of the competition law infringement, including prior significant knowledge in this regard based on sufficient evidence being already in the authority possession, must be interpreted strictly. Otherwise it will lead to the abuse of the power to carry out inspections, e.g., fishing expeditions.

Furthermore, the current practice common to all competition authorities regarding coping of the entirety of digital storage mediums (such as hard drives) for subsequent review in the competition authority's offices should be prohibited since it is intrusive, not in line with the principle of proportionality and does not ensure the sufficient protection of undertakings fundamental rights (*inter alia* right to defence, right to privacy and privilege against self-incrimination). If there are no chances for such a prohibition, the use of this coercive measure must be specified[290], i.e. it requires introduction of relevant provisions which will provide for limits of authorities powers and procedural safeguards for undertakings concerned, in order to prevent search for digital evidence from being tantamount to a fishing expedition. In Poland it is indispensable to allow the undertakings concerned to assist during the subsequent search of the copied data in the UOKiK offices. Finally, the courts, in particular the CJEU, are expected to eventually take clear position with regard to this issue.

In all presented systems it is necessary that both law and practice afford adequate and effective safeguards against abuse and arbitrariness, including an immediate effective judicial review. It is thus strongly recommended to introduce a separate immediate remedy in relation to the measures undertaken by the competition authorities during the inspection[291]. In Poland and in Switzerland it is necessary to establish a possibility for undertakings to appeal against an inspection authorisation. Moreover, where a prior judicial control exists, it should not be illusory. Such a supervisory function is of particular importance[292]. Therefore the court is to

[288] In relation to the subject matter, period involved and geographic scope.
[289] Description of the facts that authority wishes to establish through an inspection.
[290] In conformity with the *Robathin* requirements, i.e. search of all electronic data should be justified by particular prevailing reasons and be proportionate to the circumstances at stake (the *Robathin* judgment, paras 50-52).
[291] EspecialLy, since the judicial review through challenging of the final infringement decision may be extremely belated, i.e. may take place coupe of years after the dawn raid.
[292] The *Robathin* judgment, para. 51.

consider all relevant requirements, including those resulting from the principle of proportionality[293], and cannot take for granted the arguments raised by the competition authority and consequently automatically authorise a requested search.

Finally, it is indispensable that the subsequent judicial control is in line with the ECtHR approach according to which any decision taken by administrative bodies which is not "tribunal" under Article 6(1) ECHR must "be subject to subsequent control by a judicial body that has full jurisdiction" over both questions, i.e. of fact and of law[294]. Consequently, the judicial review cannot be limited to the verification whether the appealed decision is compatible with substantive law[295], but should comprise the examination of all relevant facts of the case as well[296]. Therefore any factual or legal limitation in relation to the court review should be assessed negatively. Especially the question of procedural fairness and principle of proportionality must be fully taken under consideration by the court review. Furthermore, the courts must be entitled to quash the appealed decision in relation to all factual and legal aspects[297]. The *Nexans* judgement showed that the courts should be moreover entitled to give precise orders to competition authorities regarding, e.g., the obligation to return to undertakings inspected all documents seized that the authority was not entitled to search for, i.e. those covered by privileges or falling outside the time, matter or geographical scope of the investigation and inspection authorisation.

[293] I.e. whether a search does not go beyond what is necessary to achieve the legitimate aim. See the *Robathin* judgment, para. 43.
[294] See, e.g., the *Albert and Le Compte* judgment, para. 29; the *Gautrin* judgment, para. 57; the *Frankowicz* judgment, para. 60. ; the *Bendenoun* judgment, para. 46; the *Umlauft* judgment, para. 37–39; the *Schmautzer* judgment, para. 34; the *Janosevic* judgment, para. 81.
[295] See the *Potocka* judgment, para. 55, 58; the *Sigma Radio Television* judgment, para. 153–154.
[296] *See the Schmautzer* judgment, para. 35.
[297] *Ibidem, para. 35 ; the Janosevic* judgment, para. 81.