

Fishing Expeditions and Subsequent Electronic Searches in the Light of the Principle of Proportionality of Inspections in Competition Law Cases in Europe

by

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*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*

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¹ Opinion of Advocate General (hereafter: AG) Kokott of 3 April 2014 in Case C-37/13 P *Nexans SA and Nexans France SAS vs European Commission*, para 1.

Abstract

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

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

This paper focuses on the questions of fishing expeditions and subsequent electronic searches. They are analysed mostly in the light of the principle of proportionality. The paper presents selected controversies and developments in relation to the powers of inspection granted to competition authorities as well as procedural safeguards available to undertakings.

Résumé

Les inspections menées dans les affaires du droit de la concurrence sont sans aucun doute un instrument efficace de l'application du droit de la concurrence, car ils constituent un moyen fructueux d'obtenir des preuves pertinents. Néanmoins, cette institution mène souvent à une grave ingérence dans la sphère des droits des entreprises, en particulier le droit de la défense.

Plusieurs problèmes peuvent être observés par rapport à la conduite des inspections dans le cadre du droit de la concurrence en Europe. Ceux-ci concernent, inter alia, le droit de la défense, y compris la protection contre l'auto-incrimination et le secret professionnel, le droit à la vie privée, le droit à un recours effectif et le principe de proportionnalité. La plupart de ces questions sont communes à plusieurs pays européens, car ils émergent au niveau de l'Union européenne, dans les anciens et les nouveaux États membres de l'UE (comme la Pologne) ainsi que dans les pays extérieurs à l'UE (Suisse).

Cet article se concentre sur les questions des «expéditions de pêche» et des recherches électroniques ultérieures qui sont analysées à la lumière du principe de proportionnalité. Ce texte présente certains controverses et développements concernant les pouvoirs d'inspection conférés aux autorités de la concurrence ainsi que des garanties procédurales offertes aux entreprises.

Classifications and key words: Fishing expeditions, subsequent electronic searches, principle of proportionality, procedural safeguards of undertakings, competition law's inspections, powers of inspections, judicial review

I. Introduction

“Dawn raids” are unannounced inspections conducted by competition authorities. They are undoubtedly an effective instrument that leads to the detection of competition law infringements² committed by inspected undertakings. Inspections are said to be much more effective if carried out without a forewarning³ seeing as this usually makes it possible to gather key evidence of the given investigation. For that reason, dawn raids often constitute a significant investigative step leading to the subsequent finding of a competition law infringement and imposition of substantial fines⁴.

Nevertheless, the implementation of those far reaching investigative powers granted to competition authorities constitutes a major intervention into the private sphere of the undertakings concerned regarding their private activities and premises. It has to be stressed that inspections are liable to interfere with several rights granted to undertakings namely: the right to defence⁵, including the privilege against self-incrimination and legal professional privilege, right to privacy⁶, right to effective judicial protection⁷ as well as with the principle of proportionality.

The principle of proportionality requires that any interference with an undertaking’s business activities has to take the least onerous form possible. This principle has been introduced in all of the legal orders under review – the EU, the Polish and the Swiss. Still, one might sometimes question whether the powers of inspection granted to competition authorities, on the one hand, and the safeguards granted to undertakings, on the other hand, entirely guarantee the observance of the principle of proportionality in competition law proceedings. Such controversies relate mostly to the issue of fishing expeditions and the coping of entire hard drives for subsequent electronic searches.

It is indispensable in this context that those subject to an inspection are “given the opportunity to seek a comprehensive and effective judicial review of

² For instance cartels.

³ M. Bernatt, “Powers of Inspection of the Polish Competition Authority. Question of Proportionality” (2011) 4(5) *YARS* 58.

⁴ The level of imposed fines has been constantly increasing, mostly in the EU, due to the Commission’s prevailing aim to strengthen deterrence of EU competition law violations. On the increase of fines, see, e.g. I.S. Forrester, “Due Process in EC competition cases: A distinguished institution with flawed procedures”, (2009) 34 *ELRev* 824-826.

⁵ Art. 6(1) of the European Convention of Human Rights (hereafter: ECHR); since inspections are part of proceedings of a criminal or quasi-criminal nature.

⁶ Art. 8(1) ECHR.

⁷ Art. 6 and 13 ECHR (right to an effective remedy).

the legality of both the decision ordering that investigation and the individual steps taken during the investigation”⁸. In the light of the above, the following assessment covers remedies available to undertakings as well as the scope of judicial review.

Since most of the relevant questions are common to various European states, that is, they emerge at the level of the European Union, in old and in new EU Member States as well as in countries outside the EU, all above issues are analysed in the light of the EU, Polish and Swiss competition law regimes⁹. In conclusion, some improvements to the current system are proposed.

II. 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”¹⁰. Actions of public authorities should be deemed disproportional if the aim they pursue can also be achieved by less intrusive means.

The *Société Colas Est and Others v France*¹¹ judgment related to competition law procedure. The European Court of Human Rights (hereafter: ECtHR) confirmed therein the direct application of Article 8 of the European Convention of Human Rights (hereafter: ECHR) for the purposes of the protection of undertakings against arbitrary inspections carried out by competition authorities¹². Pursuant to this provision “everyone has the right to respect for his private and family life, his home and his correspondence”

⁸ Opinion of AG Kokott of 29 April 2010 in Case C-550/07, *Akzo Nobel Chemicals and Akcros Chemicals Ltd vs Commission*, para 43.

⁹ The perception of this problem is nevertheless different depending on whether it is discussed in the EU, in Poland or in Switzerland since its focus is placed on diverse aspects and perspectives. The author decided to slightly differentiate the analyses of these three legal orders (scope and emphasized content) so as to reflect the particularities of the relevant legal debates present in each competition law regime.

¹⁰ M. Bernatt, “Powers of Inspection...”, op. cit., p. 48.

¹¹ Judgment of the European Court of Human Rights (hereafter: ECtHR) of 16 April 2002 in case *Société Colas Est and other vs France*, application no. 37971/97, para 51.

¹² ECtHR judgment in *Société Colas Est*, paras 48-49 and 51; even though in its literal wording Art. 8 ECHR seems to be applicable only to natural persons and private dwellings, its scope has been extended by the ECtHR to legal persons and business premises. See ECtHR judgment of 16 December 1992 in case *Niemietz vs Germany*, application no. 13710/88.

apart from 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”. 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”¹³. Although the ECtHR held in *Niemietz* that entitlement to “interfere” to the extent permitted by paragraph 2 of Article 8 ECHR may be “more far-reaching” where professional or business activities or premises are involved¹⁴, inspections must nevertheless be “strictly proportionate to the legitimate aims pursued”¹⁵.

The principle of proportionality is part of the legal order of the EU, Poland and Switzerland. Pursuant to Article 5(4) TEU, the content and forms of EU actions shall not exceed what is necessary to achieve the objectives of the Treaties. Moreover, the jurisprudence of the Court of Justice of the EU (hereafter: CJ) confirms 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”¹⁶.

The European judiciary clarified also that 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 guaranteed under the law in all the legal systems of the Member States.¹⁷

¹³ ECtHR judgment in *Société Colas Es*, para 48;

¹⁴ See ECtHR judgment in *Niemietz*, para 31.

¹⁵ M. Bernatt, “Powers of Inspection...”, op. cit., p. 50.

¹⁶ ECJ judgment in case C-133/93 *Crispoltoni v Fattoria Autonoma Tabacchi*, [1994] ECR I-4863, para 41; See also judgment in 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 I-4023, para 13.

¹⁷ ECJ judgment of 21 September 1989 in Joined Cases 46/87 and 227/88 *Hoechst AG v Commission*, para 19; an unannounced inspection should be regarded as proportionate only if it is justified in the given circumstances. See to this effect ECJ judgment in case 136/79, *National Panasonic vs Commission*, para 30.

With regard to the Polish legal order, the principle of proportionality is enshrined in Article 31(3) of the Polish Constitution. Article 31(3)¹⁸ 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”. Pursuant to Article 22(1) “limitations upon the freedom of economic activity may be imposed only by means of statute and only for important public reasons”.

In the Swiss legal order, the principle of proportionality is derived from Article 5 of the Federal Constitution (the rule of law), stating that State activities must be conducted in the public interest and be proportionate to the goals pursued. According to Article 36 thereof, any restrictions on fundamental rights, aside from having a legal basis and being justified by a public interest or by the need to protect the fundamental rights of others, must also be proportionate¹⁹. Furthermore, the right to privacy is protected by Article 13 of the Federal Constitution²⁰; the relevant procedural guarantees granted to undertakings are set out in Articles 29 (right to a fair trial and right to be heard), Article 29a (guarantee of access to the courts), Article 30 (right to be heard by a independent and impartial court) and Article 32 (presumption of innocence) thereof.

An inspection undoubtedly constitutes a significant intervention in the business activities of the undertaking concerned. An undertaking’s activities are usually paralysed during a dawn raid; their subsequent resumption may be impeded as well.²¹ Inspections run by competition authorities, which are liable to interfere with the rights of undertakings, are thus only allowed if they meet the above-mentioned requirements. The principle of proportionality should be fully respected, regardless of the gravity of the suspected infringement of competition law²².

¹⁸ Art. 31(3) is part of Chapter III entitled “*Freedoms, Rights And Obligations Of Persons And Citizens*”.

¹⁹ Moreover, Art. 9 of the Federal Constitution grants protection against arbitrary conduct of state authorities.

²⁰ “Every person has the right to privacy in their private and family life and in their home, and in relation to their mail and their telecommunications.”

²¹ A. 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. 80.

²² Since dawn raids occur in principle only in cases regarding hard-core infringements of competition law, all suspected anticompetitive behaviours of the undertakings inspected are

III. Fishing expeditions

The overall aim of inspections is to ensure that the competition authority disposes of an effective measure to detect competition law infringements. Nevertheless, due to the scale of the interference with the rights and activities of undertakings, inspections cannot be ordered freely. An unconditional competence to carry out inspections might lead to an arbitrary or disproportionate intervention by public authorities into the private sphere of undertakings. It might, for instance, result in so called *fishing expeditions*. This term refers to inspections conducted without factual or legal basis – they are driven merely by an unsubstantiated suspicion of a potential infringement. Fishing expeditions are prohibited since they constitute an abuse of public powers by a competition authority, a realisation which was, *inter alia*, recently confirmed by the CJ²³.

Certain procedural guarantees have been put in place in order to avoid such an abuse and, more generally, to balance the far-reaching powers of competition authorities. Inspections have to be subject to specific requirements regarding, *inter alia*, the existence of a sufficient suspicion of an infringement as well as a precise delineation of their scope in the prior authorisation of a given investigation (obligation to specify the purpose and the subject matter). These prerequisites should be regarded as a fundamental guarantee against an arbitrary or disproportionate intervention by public authorities. The scope of the inspection, specified in its authorisation, determines the areas of the activities of the investigated undertaking which the inspection relates to. It thus sets the limits of the allowed interference of the officials²⁴. The Polish Supreme Court confirmed in this context that during an inspection of business premises, the obligation to cooperate with the inspectors includes providing access to documents, or providing a copy of them, that are related to the subject of the inspection²⁵.

actually regarded as serious and very detrimental. The standard of the undertakings' protection does not vary depending on the gravity of alleged infringement but applies equally to all undertakings inspected.

²³ See judgment of the General Court (hereafter: GC) of 14 November 2012 in Case T-135/09 *Nexans v Commission*.

²⁴ No measure can go beyond it; see e.g. Art. 79a (8) of the Polish Act on the Freedom of Economic Activity.

²⁵ Polish Supreme Court judgment of 7 May 2004, III SK 35/04, OSNP 2005, No. 7, item 103.

This requirement may be identified in all relevant legal orders, albeit the form of such authorisation²⁶, as well as precise requirements and emphases as to its content, vary depending on the legal system concerned.

In the EU, it is emphasised first of all that an inspection decision must be *properly reasoned*. The obligation to state the reasons for an act of the European Union derives from Article 296 TFEU. It 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 Union²⁷ (hereafter: Charter). In accordance with settled jurisprudence, every EU institution which adopts a measure has to explain it. It must disclose its reasoning (in a statement of reasons) in a clear and unequivocal manner in order to provide the entity concerned with the justification of the undertaken measures, as well as to enable EU courts to exercise their power of review²⁸. More specifically, Article 20(4) Regulation 1/2003²⁹ further clarifies the required content and scope of the obligation to state the reasons for the issuance of an inspection decision. Pursuant to its second sentence, such decisions must specify, *inter alia*, the subject-matter and purpose of the inspection in question. This provision is meant to ensure that no inspection constitutes a “fishing expedition”, in other words, that is it not carried out by the Commission on a speculative basis and without any concrete suspicions³⁰. EU courts have repeatedly held that this special duty to state reasons is a fundamental requirement in this context – 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”³¹.

²⁶ Namely, an authorization of the UOKiK President, an order of the Presidium of the Swiss Competition Commission (hereafter: Comco), a decision of the European Commission or an order of the Polish Court of Competition and Consumers Protection (hereafter: SOKiK).

²⁷ See Opinion of AG Kokott in *Nexans*, para 41.

²⁸ ECJ judgment in Case C-367/95 P *Commission vs Sytraval and Brink's France*, para 63; ECJ judgment in case C-413/06 P *Bertelsmann and Sony Corporation of America vs Impala*, para 166; and CJ judgment in case C-439/11 P *Ziegler vs Commission*, para 115; See also Opinion of AG Kokott in *Nexans*, para 42

²⁹ 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, pp. 1–25

³⁰ See in this regard Opinion of AG Mischo in cases 46/87 and 227/88 *Hoechst vs Commission*, para 206 and the Opinion of the AG in case C-109/10 P *Solvay v Commission*, para 138.

³¹ *Hoechst* judgment, para 29; ECJ judgment in Case 85/87 *Dow Benelux vs Commission*, para 8 and 40; ECJ judgment in Joint Cases 97/87 to 99/87 *Dow Chemical Ibérica and Others vs Commission*, paras 26 and 45; and ECJ judgment in Case C-94/00 *Roquette Frères*, para 47. Similarly, ECJ 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*

With reference to the content of inspection decisions, the General Court held that they must at least state “essential characteristics of the suspected infringement” and “identify the sectors covered by the alleged infringement”³², albeit they are not required to specify the relevant geographical market³³. The Commission is further obliged to indicate as precisely as possible the presumed facts which it intends to investigate³⁴ including the evidence sought and the matters to which the investigation must relate³⁵.

Polish legislation focuses mostly on the (1) indication, in the inspection authorisation, of the subject and scope of the inspection, including the period covered³⁶, as well as (2) prior possession of relevant evidence supporting the need to carry out an inspection³⁷. Therefore, an authorisation or a court order should firstly indicate the markets and the products or services covered by the investigation as well as the suspicious conduct being subject to the inspection (such as is pricing policy). Secondly, it should specify the alleged competition law infringement concerned³⁸. With reference to the indication of the aim of the inspection, the President of the Polish Office of Competition and Consumer Protection – *Prezes Urzedu Ochrony Konkurencji i Konsumentow* (hereafter UOKiK President) – is required to determine, on the basis of knowledge already in his/her possession, the facts, which he/she intends

Commission, para 299. This jurisprudence relates to the predecessor provision of Regulation 17, however it is readily transposable to Art. 20(4) Regulation 1/2003. See also Opinion of AG Kokott in *Nexans*, para 44.

³² GC judgment in *Nexans*.

³³ CJ judgment of 25 June 2014 in case C-37/13 P *Nexan vs Commission*, where the CJ accepted the description of the relevant geographical market as “probably global”; See Opinion of AG Kokott in *Nexans*, paras 22 and 45.

³⁴ *Hoechst* judgment, para 41; *Dow Benelux* judgment, para 10; *Dow Chemical Ibérica* judgment, para 45; Opinion of AG in *Solvay*, para 138.

³⁵ *Roquette Frères* judgment, para 83.

³⁶ Other necessary elements of an inspection authorization issued by the UOKiK President, in case of a control, or with a court order, in case of a search include: (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; (6) determination of beginning and anticipated completion date of the inspection; (7) signature of the authorizing person, (8) instruction of the rights and obligations of the undertakings concerned.

³⁷ M. Bernatt, “Powers of Inspection...”, op. cit., p. 52.

³⁸ M. Bernatt, G. Materna, “Article 105a” [in:] T. Skoczny, A. Jurkowska, D. Miąsik (eds) *Ustawa o ochronie konkurencji i konsumentów, Komentarz*, C.H.Beck Warsaw 2014, Chapter V, No. V. 8; direct relation should occur between the control and the allegations regarding the undertaking controlled. See also M. Bernatt, *Sprawiedliwość proceduralna w postępowaniu przed organem ochrony konkurencji*, Warsaw 2011, p. 197 and CFI judgment in Case T-39/90, *SEP vs Commission*, para 29.

to establish through the control indicating the suspected infringement of competition rules³⁹.

In Switzerland, the focus rests mostly on the existence of (1) sufficient suspicion of the commitment of a competition law infringement⁴⁰ and (2) probability that relevant evidence will be found in the given undertaking's premises⁴¹. The inspection order has a limiting and controlling function⁴². For that reason, it must, in particular, indicate the characteristics of the infringement suspected as well as reasons (relevant facts) of this suspicion⁴³.

Nevertheless, some problems may arise when it comes to the judicial interpretation of the above requirements. The approach adopted by the judiciary while assessing the legal requirements applicable to the statement of reasons for an inspection decision seems too lenient. Since unannounced inspections normally take place at a very early stage (as part of preliminary investigations⁴⁴), competition authorities understandably lack, at that time, the information necessary to make a specific legal assessment⁴⁵. Taking into account the above argument, doctrine postulates, however, that the scope of the inspection should not be indicated too vaguely in order to avoid potential abuses of inspectors' powers⁴⁶.

Unfortunately, the European judiciary held that it is not indispensable for an inspection decision to contain exact legal assessments, despite the legitimate interest of undertakings in safeguarding their rights of defence.

³⁹ M. Bernatt, G. Materna, "Article 105a...", op. cit., Chapter V, No. I. D.

⁴⁰ The requirement of sufficient suspicion is comprised of two prerequisites: 1) from the facts of the case, described in details, a suspicion may result that one or more competition law infringements were committed; 2) the suspicion in order to be sufficient must be supported by adequate evidence or indications provided in order to confirm the indicated facts. Such indications should refer to incriminated conduct and make it possible to sufficiently establish adequate suspicion. See judgment of the Federal Court of 25 April 2013, 1B 98/2013.

⁴¹ Art. 48 para 1 of Swiss Administrative Criminal Law.

⁴² I.e. it should allow the undertaking concerned to verify whether the measure undertaken in its application is in line with its content and if not, to raise relevant objections.

⁴³ D.R. Gfeller, "Kommentar zu Art. 241 stop" [in:] M. Niggli, M. Heer, H. Wiprächtiger (eds), *Basler Kommentar Schweizerische Strafprozessordnung / Jugendstrafprozessordnung*, Basle 2010, N 7 f.

⁴⁴ 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. Whish, D. Bailey, *Competition Law*, 7th ed., Oxford OUP, p. 285.

⁴⁵ See to this effect *National Panasonic*, para 21 as well as Opinion of AG Mischo in *Hoechst*, para 174; Opinion of AG Kokott in *Solvay*, para 143. Regarding the determination of whether an infringement of Art. 101 or 102 TFEU occurred, see Opinion of AG Mischo in *Hoechst*, para 176; Opinion of AG Kokott in *Solvay*, para 144 and Opinion of AG Kokott in *Nexans*, para 48.

⁴⁶ C. Kosikowski, *Ustawa o swobodzie działalności gospodarczej. Komentarz*, 7th Edition, LexisNexis Warsaw 2013, p. 519.

An inspection decision does not need to precisely define the relevant market, set out the exact legal nature of the presumed infringement⁴⁷ or indicate the period during which the infringement at stake are said to have been committed⁴⁸. According to the CJ, the focus should be shifted to the definition of the suspected infringements of competition law rather than on a precise description of the markets concerned⁴⁹. The Commission must only show “that it is in possession of information and evidence providing reasonable grounds for suspecting the infringement”, it “is not required to state the evidence and indicia on which the decision is based”⁵⁰.

In a recent ruling, the Polish Court of Competition and Consumer Protection (*Sad Ochrony Konkurencji i Konsumentów*, hereafter SOKiK)⁵¹ did not agree with the allegations raised by an undertaking in relation to the inspection carried out at its premises. The undertaking complained that the authorisation did not specify whether the inspection related to a suspected infringement in the form of an anticompetitive agreement or an abuse of a dominant position⁵². Such lack of specifics is, however, liable to allow UOKiK officials to conduct fishing expeditions.

According to the jurisprudence of the Swiss Federal Criminal Court⁵³, the evidence or indications held by the authorities at early stages of the investigation neither have to present a high degree of probability of subsequent conviction⁵⁴ nor to precisely predict possible future sanctions⁵⁵. In competition law proceedings, the Swiss Federal Criminal Court accepted, for instance, a search which was conducted solely on the basis of the vague presumption of a price agreement⁵⁶. In the so called *Bathrooms* case, the opening of the proceedings and the conduct of dawn raids (including making copies of hard drives) was based on consumer emails only that complained about excessive

⁴⁷ It is sufficient to indicate the “essential features” of the suspected infringements. See CFI judgment of 8 March 2007 in Case T-339/04, *France Télécom SA v Commission*, paras 58 and 59.

⁴⁸ *Hoechst* judgment, para 41; *Dow Benelux* judgment, para 10; *Dow Chemical Ibérica* judgment, para 45; *Roquette Frères* judgment, para 82; Opinion of AG Kokott in *Nexans*, para 49. It is worth remembering that this period must be specified in Poland in the inspection authorization.

⁴⁹ CJ judgment in case *Nexans 2014*, Opinion of AG Kokott in *Nexans*, para 59.

⁵⁰ *FranceTélécom* judgment, paras 60 and 123.

⁵¹ 1st instance court for competition matters in Poland.

⁵² Only a general notion of “practices restricting competition” was used to indicate the object of the control. See SOKiK ruling of 14 February 2012, XVII Amz 6/12, XVII Amz 7/12, unpublished.

⁵³ The highest instance court for criminal matters in Switzerland.

⁵⁴ Decision of the Swiss Federal Criminal Court of 4 October 2012, E. 3.1.

⁵⁵ Decision of the Swiss Federal Criminal Court of 20 February 2007, BE. 2006.7, E. 3.1.

⁵⁶ Decision of the Swiss Federal Criminal Court of 11 July 2012, BE. 2012.4, E. 3.3.

prices⁵⁷. The Swiss Federal Criminal Court upheld this stance and recalled that criminal proceedings can be initiated on the basis of a substantiated complaint that justifies a probable cause⁵⁸.

The Swiss Federal Criminal Court's interpretation of sufficient suspicion has been strongly criticised for hindering the protection of fundamental rights. Swiss scholars emphasise that one cannot come to the conclusion that a *sufficient suspicion* exists only basing on an ungrounded perception, resulting from the authority's initial research, consumer complaints of allegedly excessive or fixed prices in the market⁵⁹ or remarks from competitors that an illegal restriction of competition might have occurred⁶⁰. To the contrary, sufficient suspicion requires the existence of concrete indications, going beyond general suppositions, rumours or pure guesses that suggest the presence of an illegal restriction of competition⁶¹.

The approach towards documents falling outside the scope of the inspection decision constitutes another important issue connected with the problem of fishing expeditions.

As confirmed by the courts, such as the Polish SOKiK, it is the very essence of an inspection that inspectors may uncover information and documents that are not covered by the scope of the given inspection⁶². Nevertheless, it is obvious that the authority's powers are limited to the subject-matter of the investigation. While carrying out an unannounced inspection, inspectors are thus entitled to search for, and examine, only those business records that can be relevant to the proceedings at stake⁶³. Items not related to the subject matter

⁵⁷ E.g., a consumer email of 22 October 2011: "prices were very similar" ("*les prix étaient très proches*"), consumer email of 1 November 2011: "I've become aware of excessive prices in the construction industry, for example, of bathtubs" ("*ich bin auf massiv überhöhte Preise im Baugewerbe aufmerksam geworden, z.B. Badewannen*").

⁵⁸ Decision of the Swiss Federal Criminal Court of 11 July 2012, BE. 2012.4, E. 3.2; See also decision of the Federal Criminal Court of 22 April 2005, BE.2004.10, E. 3.3(2)

⁵⁹ Compare Decision of the Swiss Federal Criminal Court of 11 July 2012, in the *Bathrooms* case, BE. 2012.4.

⁶⁰ A. Waser, *Verfahrensrechte der Parteien...*, op. cit., p. 75; S. Bangerter, *Kommentar zu Art. 42 KG...*, op. cit. No. 50.

⁶¹ 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.; Hence, e.g., specific information provided from leniency applicants giving concrete indications in relation to an infringement in a determined market will meet the above requirement. See A. Waser, *Verfahrensrechte der Parteien...*, op. cit., p. 75.

⁶² SOKiK judgment of 8 November 2003, XVII Ama 123/02.

⁶³ See in this regard *National Panasonic* judgment, para 20; *Hoechst* judgment, para 25; *Dow Benelux* judgment, para 36; *Dow Chemical Ibérica* judgment, para 22; *Roquette Frères* judgment, para 48. This limitation is however not required to be expressly specified in the statement of reasons. See Opinion of AG Kokott in *Nexans*.

of the given proceedings can therefore be neither subsequently taken into consideration nor seized⁶⁴. Furthermore, every case of a dispute regarding the nature of the document at hand should be noted in the inspection protocol⁶⁵.

However, if documents falling outside the scope of the inspection happen to be seized by the competition authority, it is paramount that such illegally obtained documents are returned to the undertaking. They cannot remain in the authority's possession. Unfortunately, undertakings may not always have sufficient legal instruments to successfully execute the return of such documents.

At the EU level, the General Court (hereafter: GC) expressly held that it is not entitled to issue precise instructions in order to determine the consequences of the decision's annulment. Namely, it cannot order the Commission to return all documents collected by the Commission in relation to annulled parts of inspection decision⁶⁶. Indeed, EU law does not provide the courts with such power⁶⁷. Nevertheless, since documents which had been obtained illegally are to be excluded from the case file and returned to the undertaking concerned, it may be justified to recommend the introduction of such a power.

The need for granting the GC with such additional power is strengthened by the fact that, pursuant to the Commission Notice on the rules for access to the Commission file⁶⁸, documents found to fall outside the scope of the subject matter of the case "*may*⁶⁹ be returned to the undertaking from which they have been obtained" and "will no longer constitute part of the file". In EU competition law proceedings the irrelevant documents are in practice subsequently returned to the undertaking concerned. Nevertheless, a legal approach that lacks a clear obligation to return the documents that "the Commission had no power in the first place to take"⁷⁰, is definitely untenable.

⁶⁴ Judgment of the Polish Supreme Court of 7 May 2004, III SK 35/04; See also M. Swora, *Article 105 b...*, No. 12.

⁶⁵ M. Bernatt, G. Materna, "Article 105a...", op. cit., Chapter V, No. II. D.

⁶⁶ In GC judgment in *Nexans*.

⁶⁷ Under Art. 266 TFEU, it is for the Commission to draw the consequences of the decision's annulment. If undertaking is willing to receive the contested documents from the Commission, and the Commission does not do so spontaneously or following the undertaking's request, the undertaking concerned has to bring, for this purpose, an action for failure to act under Article 264 TFEU.

⁶⁸ 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.

⁶⁹ Instead of "must".

⁷⁰ D. Théophile, I. Simic, *Legal Challenges...*, op. cit., p. 518.

The recent *Deutsche Bahn*⁷¹ ruling of the GC may raise some further doubts in this context. Deutsche Bahn challenged the legality of all inspection decisions regarding this undertaking and claimed that its fundamental rights had been violated. It contested the fact that the 2nd and 3rd inspections were based on information obtained illegally during the 1st inspection. In its judgement, the GC confirmed its position⁷² that it is not illegal for the Commission to use as intelligence (as opposed to as evidence) information which it has obtained accidentally. Pursuant to the GC, the Commission was allowed to “kill two birds with one stone” – it should not turn a blind eye to documents potentially pointing to another infringement even if they are discovered by accident during an investigation regarding another potential violation. Nevertheless, such approach might be subject to criticism and regarded as giving a green light for conducting fishing expeditions or making an illegal use of “chance discoveries”.

Although due to the limits of this paper it is not possible to consider fishing expeditions any further, it is important to briefly identify other most questionable points. It is worth noting that inspections are commonly carried out already during explanatory proceedings⁷³. Even though this solution seems to be common practice, it has both supporters as well as opponents in the doctrine. In the Polish context, since explanatory proceedings may be conducted with various aims, an inspection may only be justified if the given explanatory proceedings aim at “initially determining whether an infringement took place of the provisions of the [Competition Act] which would justify the institution of antimonopoly proceedings”. Inspections should be excluded in other circumstances. It is argued in Switzerland in this context that, contrary to the practice of the Competition Commission (hereafter: Comco), inspections should not be undertaken within preliminary investigation but only at the stage of a full investigation. The latter can be initiated only if there are indications of an unlawful restraint of competition, and after consultation with a member of the presiding body⁷⁴.

⁷¹ In March 2011, the Commission carried out dawn raids at various premises of Deutsche Bahn suspecting abuse in relation to the supply of electric traction by giving preferential rebates to its own subsidiaries. During the inspection, Commission officials uncovered documents indicated other possible abuses (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 a 2nd inspection decision followed by a 3rd in July 2011, entitling the officials to return to DB's premises to search for further evidence in relation to a possible abuse in all railway transport markets.

⁷² Established since the *Dow Benelux* judgment.

⁷³ See A. Waser, *Verfahrensrechte der Parteien...*, op. cit., p. 80

⁷⁴ Art. 26 and 27 of the Cartels Act.

Problems surround also the distinction between a control and a search in Polish competition law. A control, specified in Article 105(a), takes place when 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”⁷⁵. By contrast, a *search*⁷⁶ has been defined as an inspection where UOKiK inspectors look for evidence of an alleged infringement independently, that is, without any cooperation or help from the representatives of the undertaking concerned.

The division between a control and a search results in a problematic differentiation of the safeguards granted to undertakings depending on the type of inspection carried out since safeguards are more limited with respect to controls than with respect to searches. First, unlike with a search, no judicial consent is needed for a control. Second, the control authorization issued by the UOKiK President is not regarded as an order under Art.123 of the Code of Administrative Procedure. Therefore, contrary to the solution adopted in EU competition law, the undertaking concerned is deprived of the right to challenge the legality and proportionality of the control authorization before a court. The undertaking is, however, obliged to cooperate with the inspectors during the control and has no possibility to deny access to its premises without being fined⁷⁷. It has to be stressed also that the presence of the undertaking’s representatives in the inspected premises is not obligatory during a control. There is also no procedural safeguard to prevent such a control from practically becoming a search. This stance may easily lead to abuse (fishing expeditions) and a violation of the undertaking rights. Unfortunately, the subsequent seeking of relief before the SOKiK may not be successful⁷⁸.

⁷⁵ SOKiK judgment of 11 August 2003, XVII Ama 123/02, Journal of Laws of UOKiK of 2004, No. 1, item 281.

⁷⁶ See, e.g. judgment of the Supreme Court of 7 May 2004, III SK 34/04, UOKiK OJ 2004 No. 4, item 330; the judgment of the SOKiK of 11 August 2003, XVII Ama 123/02, Journal of Laws of UOKiK of 2004, No. 1, item 281.

⁷⁷ See Art. 105e and 106(2)(3) of the Competition Act; the UOKiK President’s decision of 4 November 2010, DOK-9/2010 and of 24 February 2011, DOK-1/2011. See also M. Kozak, *Simple procedural 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 Telefonii Cyfrowa Sp. z o.o. (DOK-9/2010) and of 24 February 2011 Polkomtel SA (DOK-1/2011)*, YARS 2011 4(5).

⁷⁸ In the *Centertel* case, which focused on this issue, the SOKiK rejected the allegations that the UOKiK inspectors were *de facto* carrying a search, rather than a control, and upheld the UOKiK President’s decision to impose a fine on the undertaking inspected for its refusal to cooperate. See judgment of the Supreme Court of 7 May 2004, III SK 34/04 *Polskiej Telefonii*

So far, pursuant to the old version of Article 105c(1), a search could be conducted within a control and ordered during a control. According to the new provisions, searches become a totally distinct type of an inspection, regulated separately in the Competition Act. The newly added Article 105n clarifies that during explanatory or antimonopoly proceedings of cases regarding practices restricting competition, the UOKiK President is entitled to conduct a search in the undertaking's premises. The purpose of a search is to find and obtain information from various types of items (including digital information) that could possibly constitute evidence in the case. A search can be conducted if justified reasons exist to support the view that relevant information or objects are kept in those premises.

Another problematic issue concerning dawn raids that must be mentioned here is the lack of an effective right to oppose an inspection which is analysed in the following section.

IV. Subsequent electronic searches of copied hard drives

Taking away forensic copies of computer hard drives for later review at an authority's premises constitutes an extremely controversial, albeit common, practice related to inspections carried out by competition authorities. Looking at the ECtHR's approach confirmed in *Robathin*⁷⁹, some doubt may however arise whether this practice is fully in line with Strasbourg jurisprudence.

According to the ECtHR, any seizure amounts to an interference with the right to privacy which has three consequences. First, 1) a sufficient basis for such an action must be established in the relevant legal provisions. Second, 2) the use of this measure must be necessary to achieve the legitimate aim in the circumstances at stake (question of proportionality). Third, 3) the inspected entity must be granted safeguards against arbitrary actions by the authorities.

In the *Robathin* case, the ECtHR found a violation of Article 8 ECHR since the seizure and examination of electronic data had gone beyond what was necessary to achieve the legitimate aim. The ECtHR noted first that the scope and purpose of the inspection warrant had been very broad and thus procedural guarantees and remedies were required in order to counterbalance

Komórkowej "Centertel Spółki z o.o vs the UOKiK President. See also the previous judgment in this case of the SOKiK of 11 August 2003, XVII Ama 123/02.

⁷⁹ During the search, officials copied all files from the applicant's computer. Since Mr. Robatin objected to the data being examined, the copied discs were sealed and provided to the court which approved the screening of all data.

its scope. The applicant was provided with a remedy – a court scrutinized whether the examination of the seized electronic data was permissible. However, according to the ECtHR, the review body exercised its supervisory function incorrectly since it only gave very brief and rather general reasons for authorising the search. It also did not consider the issue of proportionality – it neither addressed the question whether it would be sufficient to search only that data which was limited to the scope of the investigation, nor gave any specific reasons for its finding that a search of all of the applicant's data was necessary for the investigation⁸⁰. Nevertheless, a seizure of electronic data raises questions of proportionality. Even if the seizure took place in pursuit of a legitimate goal (public protection of competition⁸¹), it is indispensable to ascertain whether the measure subject to the complaint was “necessary in a democratic society”. In other words, the court should have assessed whether the relationship between the aim sought to be achieved by way of the inspection and the means employed can be considered proportionate⁸².

Before considering whether the solutions adopted in the EU, Poland and Switzerland are in fact compatible with the three Robathin requirements, it is worth noting the unfortunate avoidance of the European judiciary to rule on the merits of this issue. As an example, one may point to the judgement in *Nexans*. The GC was called to rule on the question of the legality of a measure consisting of the removal from company premises of forensic copies of computer hard drives for later review at the authority's premises. However, instead of pronouncing on the issue, the GC simply declared the challenges inadmissible⁸³.

According to the ECtHR, the first issue to consider with respect to the seizure of copies of entire computer hard drives is whether there is a sufficient legal basis for such far-reaching public intervention. In the EU, one can indicate here Article 20(2)b and c Regulation 1/2003⁸⁴ as well as, as a complementary document, *Commission's 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*⁸⁵.

⁸⁰ *Robathin* judgment, paras 47-52.

⁸¹ Judgment of the Polish Supreme Court of 28 October 2003, I CK 179/02, not yet reported.

⁸² *Robathin* judgment, paras 42-43.

⁸³ It was noted, however, 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 GC did not specify what the term *damage* means in this context.

⁸⁴ Commission officials authorized to conduct an inspection are empowered to examine the books and other records related to the business, irrespective of their storage medium, and to take or obtain in any form copies of or extracts from such books or records.

⁸⁵ Paras 9, 10 and 14 entitle the Commission to take a full image of a server or storage media for safekeeping purposes, block individual email accounts and examine storage media.

In Poland, UOKiK officials were entitled to search and copy “all kinds of documents and data carriers” already under the previous version of the Competition Act. The newly amended Competition Act⁸⁶ provides for an even stronger basis thereof⁸⁷. According to the new Article 105b(1)2 and 4, UOKiK inspectors are empowered *expressis verbis* to search and take copies of computer storage media or other IT equipment containing electronic data or IT systems⁸⁸.

The Swiss Federal Act on Cartels and other Restraints of Competition (hereafter: LCart)⁸⁹ lacks a sufficiently clear and explicit basis for the discussed practice. Article 42(2) LCart, constituting the sole legal basis for investigative powers, has an extremely general nature – it only states that “the competition authorities may order searches and seize any evidence”. Moreover, the relevant provisions of the Swiss Criminal Administrative Law⁹⁰, to which the LCart makes reference, use the term *papiers*⁹¹. IT storage media or electronic data cannot, therefore, be seen as covered by the scope of the inspectors’ competences.

When it comes to the criteria of necessity (proportionality), it has to be stressed that the matter and geographic limitation of the inspection is simply not respected by the inspectors in every case of subsequent electronic searches of hard drives that had been copied in their entirety. Taking away the forensic copies of entire hard drives equals the seizure of documents falling outside the investigation, being covered by the scope of neither the investigation nor the inspection decision. For instance, they might relate to other activities of the inspected undertaking. Furthermore, hard drives may contain documents that can never be searched or sized by competition authorities, including documents protected by the right to privacy, confidentiality of correspondence as well as legal professional privilege.

And yet this measure might also be considered a means to shorten the time frame in which the undertaking’s activities are being interrupted by an inspection. Since the functioning of the undertaking is paralysed during an inspection, some undertakings may prefer letting the inspectors continue the search at the authority’s premises rather than having their own premises

⁸⁶ The amended Act on competition and consumer protection was adopted by the Polish Parliament on 10 June 2014 and subsequently signed by the President on 30 June 2014. It will come into force on 18 January 2015. See Journal of Laws 2014, 945.

⁸⁷ See the amended Art. 105b(1)2 of the Polish Competition Act.

⁸⁸ Including providing access to IT systems owned by another entity but contained data related to the subject of the inspection, insofar as the undertaking inspected has access to them.

⁸⁹ Federal Act of 6 October 1995 on Cartels and other Restraints of Competition.

⁹⁰ Federal Act of 22 March 1974 on criminal administrative law.

⁹¹ Fr. *Perquisition visant des papiers* / Ger. *Durchsuchung von Papieren* / It. *Perquisizione di carte*.

occupied for a longer period of time. Nevertheless, it is crucial for this solution not to be imposed arbitrarily by the officials but for the inspected undertakings to have an actual choice in this matter.

As to the third requirement of the safeguards – the right to oppose an inspection – it is worth noting that an attempt by the scrutinised undertaking to exercise its right to stop such measure usually leads to the imposition of a procedural fine⁹². Even though undertakings are said to be granted the right to oppose⁹³, none of the courts has specified the conditions under which they may successfully (that is, without being fined) do so⁹⁴. Due to the lack of any practical judicial guidance, undertakings inspected are left in a very difficult situation.

An undoubtedly important, albeit not sufficient, safeguard lies in the inspected undertaking's right to assist (be present) during the subsequent searches of its copied data. Nevertheless, unlike the solutions adopted in the EU or Switzerland, in Poland inspected undertakings do not have the right to be present during the subsequent searches of their data undertaken by the inspectors in the UOKiK office. This stance should be regarded as truly unacceptable – undertakings cannot know whether inspectors examine only documents falling into the scope of the investigation or whether they abuse their powers and review documents covered by privileges, private information or data not related to the investigation at stake, but containing information that may lead to the opening of new proceedings⁹⁵. The risk of making an illegal use of data discovered by chance has increased especially in the aftermath of the recent *Deutsche Bahn* judgment. Inspectors may now try to raise the argument that they have used the discovered information only as *intelligence* rather than as evidence.

Finally, none of the relevant legal orders provides for separate judicial control over seizure of electronic data. According to the courts, contested actions of a competition authority do not constitute actionable decisions but are merely measures implementing the inspection decision. Such implementing measures can thus only be challenged in the appeal of the final decision on

⁹² Either immediately or in the framework of the final decision; see EU case *Energeticky a prumyslový*, T-272/12 and the Polish case *Polkomtel S.A.*

⁹³ See e.g. GC judgment of 6 September 2013 in *Deutsche Bahn* T-289/11.

⁹⁴ Even if according to the GC, fines provided for in Art. 23 & 24 Regulation 1/2003 may only be imposed if an undertaking either obviously obstructs or abuses its right to oppose. Unfortunately, the GC has not clarified what should be understood under the term *an obvious obstruction or an abusive opposition*.

⁹⁵ In the light of *Deutsche Bahn*, a competition authority is allowed to make use (initiate separate proceedings) of unrelated documents that the officials came across incidentally while exercising their inspections powers.

the infringement, or the decision imposing fines for a failure to cooperate⁹⁶. Such stance brings about legal uncertainty for undertakings since it leads to unreasonable delays between the carrying out of inspections and the moment its implementation stands to be reviewed⁹⁷. Moreover, it is conditional upon the adoption of a decision finding an infringement or imposing a fine, which may not necessarily happen⁹⁸.

It is noteworthy that, at the EU level, undertakings have nevertheless the possibility to lodge an action for damages under Article 268 TFEU – a solution that may be regarded as an immediate remedy. Such action can further be accompanied by requests for interim measures⁹⁹ that may include injunctive relief¹⁰⁰ as well as provisional damages, if it is necessary and appropriate to avoid irreparable harm.

However, due to its particular character and especially its serious consequences for the undertaking, seizure of entire discs of electronic data should be considered as an example of acts adopted during inspections “which produce binding legal effects such as to affect the interests of an applicant by bringing about a distinct change in his legal position” and therefore should be able to be the subject of an action for annulment. Like in the case of legal professional privilege, a decision by the competition authority to reject the right to oppose granted to an undertaking, and to consequently take a copy of the entire hard drive for subsequent search at the authority premises, brings about a significant change to that undertaking’s legal position and irreversibly affects its fundamental rights (right to privacy and right to defence). Documents enter into the possession of the competition authority which the latter does not have the right to seize (such as documents covered by legal professional privilege or privilege against self-incrimination). The above denies the undertaking sufficient protection of its right to defence¹⁰¹.

⁹⁶ See for instance GC judgment in *Nexans*.

⁹⁷ Often couple of years after the inspection had been carried out.

⁹⁸ See GC judgment of 17 September 2007 in Joined Cases T-125/03 and T-253/03, *Akzo Nobel Chemicals Ltd and Akros Chemicals Ltd vs Commission*, para 47; D. Théophile, I. Simic, “Legal Challenges to Dawn Raid Inspections under the Principles of EU, French and ECHR Law”, (2012) 3(6) *Journal of European Competition Law & Practice*, 519.

⁹⁹ Available under Art. 279 TFEU.

¹⁰⁰ In order to prevent further damage occurring. Furthermore, in interim measure cases, unlike cases regarding an annulment of final decisions, the EU judiciary can give precise instructions to the Commission.

¹⁰¹ See *Akzo Nobel* judgment, paras 46 and 47.

V. Remedies and judicial review

Given the far-reaching inspection powers granted to competition authorities¹⁰², and the weak position of the inspected undertakings, it is essential that both inspection decisions as well as all measures undertaken during inspections are subject to full judicial review exercised by independent courts. The principle of effective judicial protection is enshrined by the ECHR¹⁰³ as well as the legal orders concerned¹⁰⁴.

The ECtHR has set standards to be followed by judicial review in a number of its cases¹⁰⁵. For instance, in the *Ravon*¹⁰⁶ judgment, the ECtHR emphasised that both inspection decisions and measures taken in their application should be subject to effective judicial control *de facto* and *de iure*¹⁰⁷. In the view of the ECtHR, full jurisdiction occurs if a court is entitled to examine all relevant facts of the case and actually does so¹⁰⁸ as well as to quash the appealed decision in relation to all its factual and legal aspects¹⁰⁹. Furthermore, the court has to be entitled to set aside the impugned decision either entirely

¹⁰² With controversies arising around some of them.

¹⁰³ Art. 6(1) and 13 ECHR.

¹⁰⁴ See Article 47 (1) of the Charter of Fundamental Rights of the EU, Article 45 of the Polish Constitution and Article 30 of the Swiss Federal Constitution.

¹⁰⁵ ECtHR judgment of 7 June 2007 in Case *Smirnov v. Russia*, no. 71362/01, para 45 as well as ECtHR judgment of 15 February 2011 in Case *Harju vs Finland*, no. 56716/09, paras 40 and 44, and ECtHR judgment of 15 February 2011 in Case *Heino vs Finland*, no. 56720/09, para 45; ECtHR judgment of 10 February 1983 in Case *Albert and Le Compte v Belgium*, application no. 7299/75, 7496/76, para 29; ECtHR judgment of 20 May 1998 in Case *Gautrin and others v France*, application no. 21257/93, para 57; ECtHR judgment of 16 December 2008 in Case *Frankowicz v Poland*, application no. 53025/99, para 60. In relation to judicial control over administrative bodies see: ECtHR judgment of 24 February 2004 in Case *Bendenoun v. France*, application no. 12547/86, para 46; ECtHR judgment of 23 October 1995 in Case *Umlauft v Austria*, application no. 15527/89, para 37–39; ECtHR judgment of 23 October 1995 in Case *Schmautzer v Austria*, application no. 15523/89, para 34; ECtHR judgment of 21 May 2003 in Case *Janosevic v Sweden*, application no. 34619/97, para 81. See also Opinion of AG Kokott in *Nexans*, para 85.

¹⁰⁶ ECtHR judgment of 21 February 2008 *Ravon e.a. vs France*, application No. 18497/03, in relation to the French tax authorities' inspection regime.

¹⁰⁷ Para 28. According to the established ECtHR jurisprudence, any decision taken by administrative bodies, which is not a *tribunal* under Art. 6(1) ECHR, must "be subject to subsequent control by a judicial body that has full jurisdiction" over both fact and law. See L. Drabek, "A Fair Hearing Before EC Institutions", (2001) 4 European Review of Private Law 561; K. Lenaerts, J. Vanhamme, "Procedural Rights of Private Parties in the Community Administrative Process" (1997) 34 CMLR 561-562.

¹⁰⁸ *Schmautzer* judgment, para 35.

¹⁰⁹ *Ibidem*; See *Janosevic* judgment, para 81.

or partially, if “procedural requirements of fairness were not met in the proceedings which had led to its adoption”¹¹⁰.

Moreover, while ruling on the *Primagaz*¹¹¹ case, regarding competition law, the ECtHR clearly stated that it is necessary to allow the inspected undertakings to rely on “the certainty (...) to obtain effective judicial review of the contentious measure and within a reasonable time period”.

It is appropriate to consider next remedies available to undertakings as well as the scope of judicial review in the relevant legal orders.

In principle, there is no prior judicial control within the EU¹¹². This stance is, however, unproblematic since a prior court authorisation is not mandatory for an inspection to be considered legal as long as the inspection can be subject to comprehensive judicial review. The undertakings have the possibility to challenge an inspection decision but their appeal cannot include the contestation of an inspection measure since “a provisional measure intended to pave the way for the final decision is not (...) a challengeable act”¹¹³. In the search for an immediate remedy, undertakings inspected may lodge an action for damages under Articles 268 TFEU. Nevertheless, as already mentioned, no special and separate remedy is provided for measures undertaken during the inspection, besides the exception provided for legal professional privilege¹¹⁴.

The *ex post* judicial review exercised by the EU Courts is regarded as complete¹¹⁵ since the GC has the power to review all legal and factual questions; nevertheless, it cannot act *ex officio*, but only at the request of the applicant

¹¹⁰ *Potocka* judgment, para 55. In consequence, the court should also consider whether the principle of proportionality was observed by the competition authority. M. Bernatt, “Powers of Inspection...”, op. cit., p. 63

¹¹¹ ECtHR judgment of 21 December 2010 in Case *Primagaz* application No. 29613/08.

¹¹² An exception is provided in Art. 20(7) Regulation 1/2003. If an inspection is carried out with the assistance of national officials, due to its very coercive nature, this type of inspection may be subject to prior judicial control by national courts, if national relevant law provides so. Nevertheless, this control is said to be illusory since its scope is limited only to whether the “coercive measures envisaged are neither arbitrary nor excessive having regard to the subject matter of the inspection”, (do not appear “manifestly disproportionate and intolerable in the light of the objectives pursued by the investigation”). This test was established in ECJ judgment of 2 October 2002 in Case C-94/00 *Roquette Frères SA v Directeur général de la concurrence, de la consommation et de la répression des frauds* (paras 74, 80) and subsequently introduced in Art. 20(8) Regulation 1/2003.

¹¹³ See *Akzo Nobel* judgment, para 45.

¹¹⁴ More precisely, 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 (current Article 263 TFEU)”.

¹¹⁵ W.J.P. Wils, “The Compatibility with Fundamental Rights of the EU Antitrust Enforcement System in Which the European Commission Acts Both as Investigator and as First-Instance Decision Maker” (2014) 37(1) *World Competition* 5-26.

when it comes to reviewing evidence¹¹⁶. Despite some critical comments¹¹⁷, the present judicial review regime applying to Commission inspections seems to be in line with the standards set by the ECtHR, although it could be improved.

Considering remedies and judicial control provided in Poland in response to the powers of inspection of the UOKiK President, the following should be listed: (1) prior judicial control with respect to searches, (2) the right to lodge an objection in relation to the conduct of an inspection, (3) right to complain on control measures granted to other entities whose rights were violated during a control and (4) judicial review of final decisions of the UOKiK President in case of procedural objections in relation to the conduct of administrative proceedings.

Prior judicial control is limited to searches only¹¹⁸ and its current legal basis should be criticised for three further reasons. First, the Competition Act fails to set out its scope¹¹⁹ – this is a solution inconsistent with Article 2 of the Polish Constitution which states that legal provisions resulting in a limitation of rights and freedoms are to be non-ambiguous and precise¹²⁰. It is nevertheless crucial that the question of proportionality is taken under consideration by the SOKiK while deciding whether a justifiable suspicion exists that the Competition Act had actually been violated. Second, prior judicial control of the UOKiK President's inspection powers is minimal (not to say illusory) since, in practice, the SOKiK seems to authorise all searches requested by the UOKiK President¹²¹. This is not in line with the jurisprudence of the ECtHR which states that the particular importance of a court's supervisory function requires considering whether a measure requested is "necessary in a democratic society". In other words, the court should check if the relationship between

¹¹⁶ See e.g. GC judgment of 14 March 2014 in Case T-296/11 *Cementos Portland Valderrivas*, paras 24-26 and 41.

¹¹⁷ D. Théophile, I. Simic, *Legal Challenges...*, op. cit., p. 518.

¹¹⁸ Controls are based on a UOKiK President's authorization and may only be subject to objections raised under the Act on the Freedom of Economic Activity, to court review of the UOKiK President decision of the imposition of a fine for non-cooperation or of a final infringement decision. Moreover, this limitation is criticized due to the above-mentioned problems in distinguishing between a search and a control.

¹¹⁹ The new Art. 105n(4) (ex 105c (3)) of the Competition Act provides only that the SOKiK should decide within 48 hours on authorizing a search upon the request of the UOKiK President.

¹²⁰ See judgments of the Polish 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 in Case *Amann vs Switzerland*, application No. 27798/95, para 56.

¹²¹ This was at least the case between 2008 and 2011, when the SOKiK authorized 3 searches in 2008, 5 in 2009, another 5 in 2010 and 6 in the first six months of 2011. M. Bernatt, "Powers of Inspection...", p. 62.

the aim sought and the means employed can be considered proportionate or if this aim may be achieved in a less onerous way¹²².

Third, decisions of the SOKiK authorising a search cannot be appealed¹²³, which is an exception from the Polish constitutional principle of a two-instance judicial process¹²⁴. This provision meets with vivid criticism due to the significant interference of searches with the rights and freedoms of undertakings, on the one hand, and the lack of sufficient procedural safeguards, on the other hand (in particular the right to privacy). Therefore, there is an urgent need for an adequate amendment to the Competition Act introducing, similarly to the solution adopted in Polish criminal procedure¹²⁵, the right of undertakings to appeal the court order which authorises a search¹²⁶.

With reference to the second point, undertakings are entitled to lodge an objection against the manner in which public administrative authorities exercise their rights of inspection under the Act on the Freedom of Economic Activity¹²⁷. The objection leads to the suspension of the control until the decision of the UOKiK President¹²⁸ is rendered, which may be subsequently appealed to the SOKiK¹²⁹. However, this right is unfortunately limited in relation to competition proceedings¹³⁰. Undertakings are only entitled to contest irregularities regarding the control authorisation, such as a *de facto* broader extent of the control than the one specified in the authorisation¹³¹. With regard 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

¹²² See *Amann* judgment, paras. 42-43.

¹²³ Art. 105n(4) (ex 105c(3)) of the Polish Competition Act.

¹²⁴ Art. 78 and 176(1) of the Polish Constitution.

¹²⁵ Art. 236 of the Code of Criminal Procedure.

¹²⁶ M. Bernatt, "Powers of Inspection...", op. cit., p. 62.

¹²⁷ Art. 84c(1) of the Act on the Freedom of Economic Activity.

¹²⁸ Which is to be taken within 3 days. See Art. 84c(5) and (9).

¹²⁹ See Art. 479 (1) of the Polish Code of Civil Procedure, SOKiK decision of 22 December 2009, XVII Amz 54/09/A, not published, UOKiK President decision of 24 February 2011, DOK-1/2011, pp. 13-14; See also K. Różiewicz-Ładoń, *Postępowanie przed Prezesem Urzędu...*, pp. 261-262.

¹³⁰ Undertakings are entitled to lodge objections in relation to violations of Art. 79a(1) and 79a(3)-(9) of the Act on the Freedom of Economic Activity only, while under the general rule, objections may concern violations of Art. 79(1) and 79(3)-(7), Art. 80(1), Art. 82(1) and Art. 83(1) also. Nevertheless, due to the existence of an *expressis verbis* statutory exemption, the latter provisions do not apply in competition law proceedings. See M. Bernatt, "Powers of Inspection...", op. cit., p. 60 and B. Turno, *Komentarz...*, op. cit., p. 1156.

¹³¹ 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 SOKiK, 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. Różiewicz-Ładoń, *Postępowanie przed Prezesem Urzędu...*, op. cit., pp. 261-262.

in the authorisation, and the actions undertaken in its framework, related to the subject matter of the investigation. In practice, objections of this kind raised by undertakings have so far never been successful¹³². Therefore, the current legal basis and the application of the legal institution of an objection in competition law proceedings does not seem to fully protect the rights of undertakings¹³³.

It has to be stressed next that the new Article 105m of the Polish Competition Act will introduce a brand new remedy regarding controls – a complaint that can be lodged to the SOKiK by entities other than the undertaking concerned whose rights were violated during the control proceedings¹³⁴. This complaint may relate to any control measure, or other control activities, undertaken beyond the scope of the control or in violation of legal provisions¹³⁵. It is thus important to emphasise that its scope is much broader than the scope of an objection by the inspected undertaking. Furthermore, in case of a successful complaint, evidence obtained as a result of the contested control activities cannot be used in any proceedings. This means not just the proceedings concerned but also other proceedings conducted by the UOKiK President or in any other proceedings conducted pursuant to separate legal provisions. This new development is definitely of immense importance also for the prevention of fishing expeditions and may be regarded as slowly paving the way for the admission of direct actions against measures undertaken during inspections.

Finally, decisions of the UOKiK President are subject to judicial review of the SOKiK which cannot limit itself to a mere review of the challenged decision but should assess the case on the merits to the same extent as if it would be the competition authority¹³⁶. The Polish Supreme Court confirmed

¹³² In *Polkomtel*, the undertaking unsuccessfully complained on the impartiality of the UOKiK inspectors, on the disproportional nature of the measures undertaken in the framework of the control, the *de facto* broader extent of the control than the one set out in the authorization and, finally, on the defects in the inspection authorization. All objections were dismissed by the UOKiK President and subsequently upheld by the SOKiK. See the order of the SOKiK of 22 December 2009, XVII Amz 54/09/A, the decision of the UOKiK President of 24 February 2011, DOK-1/2011, p. 12.

¹³³ G. Materna, “Sądowy nadzór nad wykonywaniem kontroli (przeszukania) u przedsiębiorcy w toku postępowania przed Prezesem UOKiK” (2012) 7 *PUG* 23; M. Bernatt, G. Materna, “Article 105a...”, op. cit., Chapter V, No. I. 7.

¹³⁴ M. Bernatt, G. Materna, “Article 105a...”, op. cit., Chapter V, No. I. 7.

¹³⁵ A SOKiK decision maybe be subject to a further appeal.

¹³⁶ The SOKiK is obliged to investigate the case from the beginning instead of merely relying on facts established by the UOKiK President. See judgment of the Court of Appeal of 21 June 2006, VI ACa 142/06, Journal of UOKiK of 2007, No. 1, item. 13, judgment of the Court of Appeal of 19 January 2011, VI ACa 1031/10, nyr VI ACa 1031/10, judgment of the Court of Appeals of 31 May 2012, VI ACa 1299/10, no yet reported, and judgment of the Court of Appeal of 21 September 2006, VI ACa 142/06, Journal of Laws of UOKiK of 2007, No. 1,

that the SOKiK is entitled to set aside the impugned decision¹³⁷ if “procedural requirements of fairness were not met in the proceedings which had led to its adoption”¹³⁸. Nevertheless, Polish courts have followed a different approach also¹³⁹ whereby procedural irregularities concerning evidence, including the violation of the privilege against self incrimination or a disproportional character of inspections in relation to the right to privacy, should not result in the revocation of the contested decision provided the latter is in line with the provisions of substantive law. Pursuant to the latter approach, the SOKiK was said not to be obliged to focus on possible infringements of procedural rules¹⁴⁰, thus if the undertaking fails to prove that the alleged procedural irregularities influenced the UOKiK decision on its merits, they should not be taken into account by judicial control at all¹⁴¹.

item 13, where it was held that the SOKiK is obliged to independently assess all evidence and draw its own conclusions. See also M. Błachucki, *Polish competition law – Commentary, case law and texts*, UOKiK, Warsaw, 2013, p. 75.

¹³⁷ Either entirely or partially; also, after setting aside the challenged decision, the SOKiK enjoys full discretion on how to further proceed. Judgment of the Antimonopoly Court of 18 October 2000, XVII Ama 6/00, Wokanda 2001, No. 12, item 51.

¹³⁸ See the *Potocka* judgment, para 55. The Polish Supreme Court held that a violation of requirements necessary for the validity of proceedings may constitute sufficient grounds for the revocation of a UOKiK President decision. See judgment of the Polish Supreme Court of 29 April 2009, III SK 8/09. Therefore, in case of a violation of procedural fairness, constituting a violation of a requirement indispensable for the validity of the proceedings (e.g. the right to be heard) during administrative proceedings, the SOKiK should annul a UOKiK President decision in its entirety. See M. Bernatt, “The control...”, op. cit., p. 304; See also: C. Banasiński, E. Piontek (eds), *Ustawa...*, op. cit., pp. 919–920.

¹³⁹ *Marquard Media Polska* judgment of the Court of Appeal in Warsaw of 17 June 2008, VI Aca 1162/07, not yet reported.

¹⁴⁰ SOKiK judgments of 24 July 2007, XVII Ama 84/06, not reported and of 22 June 2005, XVII Ama 55/04, UOKiK OJ 2005 No. 3, item 42. See also SOKiK judgment of 27 October 2009, XVII Ama 126/08, Journal of Laws of UOKiK of 2010, No. 1, item 5, where it was held *expressis verbis* that, since it hears 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. Therefore, the appeal against the UOKiK President decision cannot be based on alleged procedural shortcomings which occurred within the antimonopoly proceedings.

¹⁴¹ See judgment 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 be noted that proceedings before the SOKiK are of a civil nature which means that the burden of proof lies on the claimant. The SOKiK does not conduct evidence proceedings, thus all evidence is produced only upon the motion of the parties. See judgment of the SOKiK of 19 December 2006, XVII Ama 15/06, Journal of Laws of UOKiK of 2007, No. 2, item 21. See also M. Błachucki, *Polish competition law...*, op. cit., p. 74.

Fortunately, the Supreme Court took the opportunity to fully clarify its opinions and adopt a coherent approach in relation to this issue in its recent judgment in the *PKP Cargo*¹⁴² case. It was clearly stated therein that the first approach, constituting a well established practice of the SOKiK and of the Court of Appeal in Warsaw, should prevail. In other words, judiciary review is to also cover procedural aspects regarding administrative proceedings, albeit not every justified procedural allegation may lead to the acknowledgment of an appeal. Therefore, in the light of this recent interpretation provided by the Polish Supreme Court, the current state of judicial control over final decisions of the UOKiK President seems to be in line with the ECHR standards regarding the requirements of full jurisdiction¹⁴³.

The Swiss regime provides neither prior judicial control of the inspection order¹⁴⁴ nor a right to challenge it. Furthermore, apart from the “envelope procedure”¹⁴⁵, there is no possibility to challenge separately measures undertaken by inspectors during the inspection, which might seem to be incoherent with ECtHR jurisprudence requiring that measures taken during an investigation must be subject to judicial control¹⁴⁶. Nevertheless, the judicial review system of the decisions taken by the Comco was recognised as being coherent with ECtHR requirements. In its landmark *Poubligroupe*¹⁴⁷ judgement, the Swiss Federal Supreme Court acknowledged the compliance of the Swiss competition procedure with ECHR standards. The Court stressed that since the provisions on penalties set out in the LCart¹⁴⁸ are of a criminal

¹⁴² See judgment of the Polish Supreme Court of 10 October 2013, III SK 67/12 *PKP Cargo*.

¹⁴³ M. Bernatt, “The control...”, op. cit., pp. 303–305.

¹⁴⁴ Some Swiss authors argue that, to be fully in line with the ECHR requirements, judicial control should take place before the conduct of an inspection, i.e. the Comco should obtain prior authorization from a cantonal judge. See P. Kobel, “Sanctions du droit des cartels...”, op. cit., p. 1157.

¹⁴⁵ Under Art.50 of Swiss Administrative Criminal Law, the undertaking inspected is granted the right to indicate the content of a document before its examination and thus, kind of, has a right to oppose its examination. In such cases, the document in question should be sealed, deposited in a safe place and delivered to the Federal Criminal Court that is to decide on the admissibility of its search (according to Art. 25(1) thereof). See 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 gives effective protection as shown by the *Bathrooms* case. See e.g. Decision of the Swiss Federal Criminal Court of 11 July 2012, BE. 2012.4, E. 3.2.

¹⁴⁶ *Société Colas Est* judgment, paras 107, 125.

¹⁴⁷ See judgment of the Swiss Federal Supreme Court of 29 June 2012 in Case *Poubligroupe S.A. vs Competition Commission*, which related to the question of abuse in relation to the commissioning of professional intermediaries for newspapers. The investigation was initiated in 2002, the Comco delivered its decision imposing a fine on 5 March 2007. The *Poubligroupe* appeal was rejected by the Federal Administrative Court in 2010.

¹⁴⁸ Art. 49a of the Cartels Act.

nature, the relevant procedural guarantees of the ECHR¹⁴⁹, and of the Swiss Federal Constitution¹⁵⁰, are applicable to competition proceedings. According 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 Comco's decisions in relation to questions of fact and law. The Federal Supreme Court held, however, that the Federal Administrative Court is allowed to limit its review of technical factual questions.

This ruling brought about a vivid debate on the institutional framework of competition law. It is worth noting that this judgement has influenced the current LCart reform. In its aftermath, the Council of State rejected the proposal presented by the Swiss Federal Council to introduce an institutional change (to set up an institutional separation between the investigatory body and the Competition Court) presented within the framework of prepared amendments¹⁵¹.

VI. Conclusions

The presented analysis covered selected problems and developments concerning the powers of inspections granted to competition authorities. They were assessed, in particular, in the light of the principle of proportionality as well as in the context of problems surrounding the issue of fishing expeditions and subsequent electronic searches.

Despite some improvements¹⁵² in all of the presented legal orders (the EU, Poland and Switzerland), the legal position of undertakings subject to an inspection remains weak and thus needs to be strengthened. It is necessary that both law and practice afford further effective safeguards against the abuse and arbitrary behaviours of competition authorities exercising their extensive inspection powers.

First, it is indispensable for courts to apply a strict interpretation of the requirement of *sufficient suspicion* including checking its components (such as prior possession of sufficient evidence)¹⁵³. There should be an obligation for

¹⁴⁹ I.e. Art. 6 and 7 ECHR.

¹⁵⁰ I.e. Art. 30 and 32 of the Swiss Federal Constitution.

¹⁵¹ The National Council refused to discuss and to decide on the proposed reform.

¹⁵² E.g. relevant amendments to the Competition Act, prohibition of fishing expeditions expressly stated by the GC.

¹⁵³ In order to avoid the occurrence of unjustified cases such as the Swiss *Bathrooms* case.

an inspection decision to specify in detail its extent (subject matter¹⁵⁴, period involved and geographic scope) and goal (facts which the authority wishes to establish through the inspection) in order to successfully avoid any possible abuses by inspectors (fishing expeditions).

Second, the current practice, common for all competition authorities, regarding copying of entire digital storage mediums (such as hard drives) for subsequent review in the competition authority's offices, should be prohibited since it is too intrusive, not in line with the principle of proportionality and does not ensure a sufficient protection of the fundamental rights of undertakings¹⁵⁵. If an amendment of that type is impossible, additional legal provisions have to be established specifying the details¹⁵⁶ of how to use this coercive measure – providing limits to the power of the authorities and for procedural safeguards for the undertakings concerned. Such provisions are necessary in order to prevent subsequent searches of digital evidence from being tantamount to fishing expeditions. In Poland, it is furthermore indispensable to allow undertakings concerned to be present during subsequent searches of the copied data that takes place in the offices of the UOKiK. Moreover, the judiciary is expected to eventually take clear position on the lawfulness of this practice.

Finally, it is strongly recommended to introduce a separate immediate remedy in relation to the measures undertaken by competition authorities during inspections¹⁵⁷. Both in Poland and in Switzerland, it is necessary to establish a possibility for undertakings to lodge an appeal against an inspection authorisation. Moreover, where prior judicial control exists, it should not be illusory. Such a supervisory function is of particular importance¹⁵⁸. Therefore, reviewing courts are to consider all relevant requirements, including those resulting from the principle of proportionality¹⁵⁹. They cannot take arguments raised by competition authorities for granted and automatically authorise any inspection requested.

¹⁵⁴ It is important, in particular, to define the suspected infringements of competition law. The use of too vague indication, for instance “practices restricting competition”, should not be acceptable. See, *a contrario*, the SOKiK ruling of 14 February 2012, XVII Amz 6/12, XVII Amz 7/12, unpublished.

¹⁵⁵ *Inter alia* right to defense, right to privacy and privilege against self-incrimination.

¹⁵⁶ 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. See the *Robathin* judgment, paras 50-52.

¹⁵⁷ Especially, since a long period of time might pass since the final decision is reviewed by the judiciary.

¹⁵⁸ *Robathin* judgment, para 51.

¹⁵⁹ I.e. whether an inspection does not go beyond what is necessary to achieve its legitimate aim. See *Robathin* judgment, para 43.