# Putting Dawn Raids under Control

by

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## *Abstract*

Dawn raids have become an effective tool to enforce EU and national competition laws. Judicial review is an essential mechanism of control over the executive branch against possible misuse of this power. However, this judicial review has shown to have limits; it cannot always guarantee an adequate redress for the affected parties. How to address the limited judicial review to ensure control over dawn raids? This article argues that the limits of judicial review could be addressed by extending the types of controls over this action, i.e. ex ante legislative guidance and internal managerial accountability. The more conceptual argument that this paper puts forward is thus that it is essential to seek connections between different concepts and types of controls to ensure a comprehensive/water-tight system of controls over the actions of the executive branch.

## *Resumé*

*« Dawn raids »* sont devenus un moyen efficace de faire respecter le droit européen et national de la concurrence. Le contrôle judiciaire est un mécanisme essentiel de contrôle du pouvoir exécutif contre d'éventuels abus de ce pouvoir. Toutefois, ce contrôle judiciaire a montré ses limites ; il ne garantit pas toujours une réparation adéquate pour les parties concernées. Comment résoudre le problème du contrôle judiciaire limité pour assurer le contrôle des *« dawn raids »*? Cet article avance que les limites du contrôle juridictionnel pourraient être résolues en étendant les types de contrôle sur cette action, c'est-à-dire les orientations législatives ex ante et la responsabilité interne des administrateurs. Ainsi, la thèse plus conceptuelle de l'article est qu'il est essentiel de chercher des liens entre les différents concepts et types de contrôles pour garantir un système complet et efficace de contrôle des actions du pouvoir exécutif.

**Key words:** dawn raids; competition law; control; judicial review.

**JEL:** K21, K41, K49, L41, L49

## I. Introduction

During the period 2015 through 2019, 27 cartel cases were decided by the European Commission ("Commission"), and fines of more than eight billion euros were imposed (European Commission, 2019a). Andersson came to a similar conclusion in the timeframe 2010–2014 (Andersson, 2017). Even more cases have been decided at the Member States ("MSs") level by their national competition authorities ("NCAs"). Dawn raids play an important role in enforcing EU and national competition laws and policies (European Commission, 2019b; European Commission, 2018). They namely allow Commission/NCA officials to search through company premises and/or private homes with or without prior notice (Andersson, 2017). The element of surprise allows the Commission/NCA to gather evidence that would otherwise be destroyed or withheld (Andersson, 2017), which enhances the effectiveness of enforcement.

At the same time, dawn raids imply interfering with the rights, obligations and freedoms of private actors. For example, back in 2014 Deutsche Bahn's rights of defence were affected when the Commission carried out multiple dawn raids on their premises on the basis a suspicion on infringement 'A', but then seized documents, opened an investigation and sanctioned this company for infringement 'B'[1]. This led to the following research question: *How to balance the effectiveness of dawn raids as an enforcement instrument with the respect of the rule of law values?*

The recent case-law[2] and literature (Di Federico, 2014; Deselaers & Venot, 2015; Steene, 2016; Pinotti, 2018) seems to have been focusing on the question of to what extent ex ante and/or ex post judicial control of dawn raids has been effective. We took this question as a starting point and drew a comparison between the legal orders of certain MSs and the Commission and, as our analysis in this paper will show, there are different solutions in this respect. Some countries establish an obligation upon a competition authority to obtain a judicial authorisation prior to the search while others do not and rely upon ex post judicial control only. But even if both types of control could be used,

[1] Judgment of 18 June 2015, Case C-583/13 P, *Deutsche Bahn AG v. Commission*, ECLI:EU:C:2015:404.

[2] Judgment of 14 November 2012, Case T-135/09, *Nexans France S.A.S. and Nexans S.A. v. Commission*, ECLI:EU:T:2012:596; Judgment of 16 July 2020, Case C-606/18 P, *Nexans France S.A.S. and Nexans S.A. v Commission*, ECLI:EU:C:2020:571; Judgment of 6 September 2013, Case T-289/11, *Deutsche Bahn AG v. Commission*, ECLI:EU:T:2013:404; *Deutsche Bahn AG v. Commission* (2015), *supra* note 1 above; Judgment of 20 June 2018, Case T-325/16, *České dráhy a.s. v Commission*, ECLI:EU:T:2018:368.

to what extent are dawn raids under control and how can we enhance the controls to ensure the rule of law?

Comparative analysis considered recent cases in some MSs and the dawn raid legislation therein, based on which we argue that the classical approach of controlling dawn raids by means of judicial review, either ex-ante and/or ex-post, has limitations. Such limitations concern a partial redress to private parties affected by an illegal dawn raid and an efficient instrument to prevent abuses in the execution of dawn raids and to guide – to some extent – officials in that regard. Enforcing competition law within the rule of law is an obligation of any competition authority and it particularly has been on the public agenda of the Commission in the last couple of years (Vestager, 2017; Vestager, 2019). Therefore, we believe that in order to achieve this goal, it is necessary to take multiple perspectives and seek connections between different concepts and types of controls to ensure a comprehensive/watertight system of controls over the actions of the executive branch like dawn raids.

More specifically, we propose a possibility of extending the types of controls over this action, through measures such as ex ante legislative guidance and internal managerial accountability, in order to overcome the limitations of judicial review.

We will address this issue through a practical and comparative approach by analysing how the dawn raids are controlled in practice throughout 9 jurisdictions and showing that it is necessary to align such controls through the aforementioned additional measures. These 9 jurisdictions are Austria, Belgium, Germany, Italy, Ireland, the Netherlands, Portugal, Spain and the United Kingdom. The choice for these countries was mainly based on language-proficiency of the researchers, the different legal traditions (i.e. civil and common law approaches) (Cooper, 1950) and level of convergence with the EU framework (ECN Working Group, 2008).

In section 2, dawn raids and their legislative frameworks will be defined and explained. In section 3, we will explain why dawn raids need to be under control from the rule of law perspective. The necessity to extend the view to include other types of controls is argued in section 4, whereafter a conclusion will be given. This article invites further (policy) debate and research on how the limits of judicial review of dawn raids could be addressed. This article aims at promoting research and debate on a more conceptual level concerning the issue of connecting various concepts and types of controls over the executive to ensure watertight systems of controls.

## II. Dawn raids: what, why and how

### 1. Definition of dawn raids

A dawn raid is considered to be one of the most powerful and effective investigatory tools available to competition authorities to gather evidence on suspected antitrust infringements (OECD, 2013). It is an investigation conducted by NCAs or the European competition authority (the Directorate-General for Competition "DG COMP") based on a reasonable suspicion, meaning that the authority already 'possesses certain information constituting reasonable grounds for suspecting an infringement of the competition rules' which would be later confirmed or dismissed with the information gathered after the raid[3]. This investigation is, most of the time, unannounced to the investigated firm. The most common ground for launching inspections is generally the existence of elements pointing towards reasonable grounds for suspecting an infringement (ECN Working Group, 2012).

The objective of a dawn raid is to find evidence of a competition law infringement. Refusal of access to a property when ordered may be construed as a breach of the duty of cooperation and may result in a fine. The success of having this type of tool is twofold.

Firstly, because dawn raids are almost always unannounced, they have a deterrent effect (Scordamaglia-Tousis, 2013). Market participants worry that if they do not comply with competition law, eventually they will get in trouble with the competition authority. This has been classified as the authority being a *'gorilla in the closet'* that comes out at any time (Verbruggen, 2013; Rees, 1997). Secondly, inherent to the participation in a cartel is the silence of market parties, otherwise the competition authority will discover that the cartelists are acting contrary to the law. Evidence of a cartel infringement is therefore hard to find and safe-locked in companies' premises. Thus, the only way for an authority to obtain crucial information for its investigation is through a dawn raid (Harding and Joshua, 2010). It is the intrusive character of the dawn raid that makes it so powerful, but this intrusiveness also entails an inherent risk that fundamental rights are not properly safeguarded (Andersson, 2017; Wils, 2006).

[3] *Nexans v Commission* (2012) *supra* note 2 above; Judgment of 25 November 2014, Case T-402/13, *Orange v European Commission*, ECLI:EU:T:2014:991; *České dráhy a.s. v Commission* (2018), *supra* note 2 above.

## 2. Legislative frameworks

### 2.1. EU framework (European Commission – DG COMP)

DG COMP and NCAs are the main enforcers of competition law. Council Regulation (EC) No. 1/2003 ("Regulation 1/2003") creates a system of parallel competences where NCAs and the Commission apply Articles 101 and 102 TFEU, forming a network of public authorities which cooperate closely to protect competition. However, this does not imply that the enforcement is harmonised and coordinated between all MSs.

Regulation 1/2003 provides DG COMP with direct enforcement powers and grants powers to conduct all necessary inspections in order to determine the existence of an infringement of competition law. Even though DG COMP is empowered to decide on whether to conduct a dawn raid or not, it may need a judicial warrant in certain situations. Article 20(6) of Regulation 1/2003 does not allow the DG COMP to obtain access to premises by force. Thus, if a company opposes an inspection, Commission officials cannot enter the premises without the assistance of relevant national authorities. The Commission may request assistance as a precautionary measure in order to overcome any opposition from the undertaking, but only insofar as there are grounds for apprehending opposition to the inspection and/or attempts at concealing or disposing of evidence (Andersson, 2017). It must, however, also comply with national legislation and requirements.

### 2.2. National frameworks (NCAs)

The Commission shares its enforcement task with the NCAs in a system of parallel competences. Each MS has its own legal framework surrounding the enforcement of EU competition law and associated dawn raids. Comparative research in 9 Member States led to the following table:

| Member State | Law | Specifications |
|---|---|---|
| Netherlands | Art. 5:15 GALA | No warrant needed, only a written description of the objective and subject of the investigation. |
| Italy | Art. 12 Law No. 287/90 and Decree No. 217/98 | No warrant needed, only if it wants to use the 'strong arm' |

| Member State | Law | Specifications |
|---|---|---|
| United Kingdom | Section 27 Competition Act | No warrant but two working days' written notice unless there is reasonable suspicion, or the competition authority is unable to give notice besides all reasonable steps.<br><br>The competition authority does not need two working days' notice if it has a warrant from the High Court. |
| Germany | Section 59(4) GWB | A search warrant issued by the local court at the authority's principal place of business is generally required. Only where a prior court application would cause a delay that could jeopardise the investigation, can a judicial search warrant be dispensed with. |
| Ireland | Section 45 Competition Act | Prior warrant of judge of the District Court |
| Spain | Art. 27 Law No. 3/2013 | Prior consent of the party or judicial warrant |
| Portugal | Art. 18 Law No. 19/2012 | Prior warrant competent of the judicial authority |
| Austria | Section 12 WettbG | Prior order of the Cartel Court |
| Belgium | Art. IV.41(3) Competition Act | Specific instructions issued by a competition prosecutor and prior authorization of the president of the Competition Council |

Discrepancies in the enforcement of the Regulation 1/2003 framework across MSs are highlighted by problems with regard to safeguards and judicial review in some countries more than others (Błachucki and Jóźwiak, 2012; Townley, 2018). There is a tension between the need for a well-functioning and effective competition law system and the necessity of safeguarding fundamental rights (Aslam and Ramsden, 2008). For example, investigations and dawn raids conducted by the Commission entail some intricacies regarding certain procedural rights of an undertaking such as the right against self-incrimination[4], the right to remain silent[5] and the duty to state reasons[6] which are much more limited under EU law.

[4] Judgment of 22 March 1990, Case C-347/87, *Triveneta Zuccheri SpA and others v Commission*, ECLI:EU:C:1990:129.

[5] Judgment of 20 February 2001, Case T-112/98, *Mannesmannröhren-Werke AG*, ECLI:EU:T:2001:61.

[6] *Deutsche Bahn AG v Commission*, 2015, *supra* note 1 above.

Most recently, Directive 2019/1 was issued with the objective of empowering NCAs by introducing guarantees of independence, resources, and enforcement and fining powers in order to be more effective enforcers of competition law and to ensure the proper functioning of the internal market. Thus, Directive 2019/1 ensures that NCAs are provided with broader investigatory powers than those foreseen by Regulation 1/2003. For example, MSs are required to grant NCAs powers to inspect private homes and, overall, to enable NCAs to access the premises of undertakings where there are reasonable grounds for suspecting an infringement. Nevertheless, this instrument recognizes that MSs are not prevented from requiring prior authorisation by a national judicial authority for conducting inspections.

In this regard, we have grouped the frameworks in terms of the courts' intervention when it comes to executing a dawn raid. No judicial or administrative warrant prior to a dawn raid is needed in the Netherlands, Italy, and in the UK (although the Competition and Markets Authority needs to give a two days notice). When the law in MSs does not prescribe a warrant, DG COMP will also not need a warrant.

In the Netherlands, Article 5:15 of the General Administrative Law Act states that a supervisor (NCA) shall be authorised to enter any place, including the necessary equipment, with the exception of a domicile. The safeguard here is Article 5:13 of the same Act which establishes that a supervisor may make use of these powers to the extent that this is *reasonably necessary* for the fulfilment of the defendant's supervisory task.

The Italian Competition Authority is an independent administrative agency established by Law no. 287/90. The procedural rules and the investigative powers of the Authority are set out in the Law and in Decree No. 217/98. A dawn raid is carried out when the Italian Competition Authority has sufficient evidence of the existence of an infringement.

In the United Kingdom, the Competition and Markets Authority ("CMA") has the power to enter premises either with or without warrants. When conducting an inspection without a warrant, Section 27 of the Competition Act 1998 stipulates that CMA officials entering a business premise must give the occupiers of the premise at least two working days' written notice of the intended entry. Under Section 28, the CMA can be authorised by the court to enter the premises in question, gather any documents and use any force that is reasonably necessary. Then, the CMA does not need a two working days' written notice. It is interesting to note in this regard, that the CMA usually seeks a warrant in cases where there is a suspicion 'that the information relevant to the investigation may be destroyed or interfered with' if the CMA gives such prior notice or sends a written request (e.g. in cartel cases) (CMA, 2019).

In these jurisdictions, no warrant is needed to enter business' premises. The rationale for not needing a warrant to conduct a dawn raid differs. At the EU level, the European Court of Justice ("ECJ") held in the Deutsche Bahn case that prior judicial authorisation for a raid is only necessary if there are no meaningful safeguards to restrict the powers of the Commission[7]. Regulation 1/2003 provides for five types of safeguards which make prior authorization unnecessary[8] (Steene, 2016):

1. The decision must include a statement of reasons;
2. Limits on the Commission's conduct in the course of inspections;
3. The absence of coercive measures by the Commission itself to prevent the possibility of opposing an inspection;
4. The requirement that the Commission receives the assistance of national authorities if the search is opposed and the requirement that a national body consider the appropriateness of any contemplated coercive measures; and
5. The availability of ex post facto review by the ECJ, which may include the granting of interim relief, and the availability of non-contractual damages.

On the other hand, in the UK the CMA relies on warrants given the nature of the case at hand. If the CMA wants to assure the 'gorilla in the closet' effect, it will require the warrant; if not, giving prior notice will suffice the authority's needs.

In Austria, Belgium, Germany, Ireland, Portugal and Spain (6 out of 10 investigated legal orders), designated agencies require a court warrant preceding a dawn raid (it should be noted that in Spain the warrant can be obviated if the investigated party grants consent for the execution of the dawn raid). This means the competition authorities in these countries need to submit a dawn raid decision to the court. Thereafter, the court will, hopefully, give them a court warrant stating that they may conduct this dawn raid. Thus, in these jurisdictions the legislative option has been to provide an additional safeguard to the undertakings under inspection.

These differences in jurisdictions have implications for the parallel and, as shown, not aligned systems of controls.

[7] *Deutsche Bahn AG v Commission*, 2013 and 2015, *supra* notes 1 and 2 above.
[8] *Deutsche Bahn AG v Commission*, 2015, *supra* note 1 above.

## III. Controlling dawn raids: ex ante warrants vs ex post judicial review

There are two types of controls on dawn raids: ex ante judicial warrants and ex post judicial review. In this section, these two will be elaborated on. Afterwards, it will be shown how these controls work out in practice and which are the implications therein.

### 1. Ex ante controls

First, ex ante controls consist of a judicial warrant prior to the dawn raid. The contents of the court warrant can vary considerably. Nevertheless, the main elements that are present, to a certain extent, are (i) a identification of the investigating authority; (ii) the legal basis; (iii) the addressee and (iv) the object of the investigation and the suspected infringement (ECN Working Group, 2012). Differences arise in the level of detail provided in such documents and in the aspects of the infringement included. In some cases, the suspected infringement or facts of the case are described. Reference may also be made to the subject matter and purpose of the inspection. In some jurisdictions, the market affected or the economic sector or products concerned is mentioned (ECN Working Group, 2012).

Judicial warrants thus provide an extra safeguard to the process. The objective of the dawn raid is assessed before this is carried out: the judge will assess the non-arbitrariness and non-excessiveness of the coercive measures envisaged in the decision ordering the inspection (Messina, 2007). The judge cannot question the necessity of a dawn raid or other substantive parameters. It merely checks whether there indeed is a reasonable suspicion and thus whether the (European) competition authority may conduct a dawn raid. The requirement of a judicial authorization cannot, however, compensate for the lack of ex post review[9].

The European Court of Human Rights ("ECHR") has been one of the advocates in favour of an ex-ante judicial review of the dawn raid. Through its case-law the ECHR has held that, in order to have a dawn raid conducted in accordance of the ECHR, '(i) legal persons are entitled to the protection of their premises; (ii) searches must be well founded and the parties must be assisted by adequate guarantees; (iii) prior judicial authorisation can avoid arbitrary measures, but in any event decisions must be reviewable, in fact and in law, by a court' (Di Federico, 2013).

[9] *Deutsche Bahn AG v. Commission*, 2015, *supra* note 1 above.

Furthermore, scholars have analyzed and argued that the inspection powers as outlined in Regulation No. 1/2003 (with no judicial warrant) and the protection provided by the ECJ falls short of the protection provided by the ECHR (Aslam & Ramsdem, 2008; Steene, 2016).

## 2. Ex post controls

Ex post controls are the second category of controls on dawn raids. Competition authorities, whether European or national, that conduct a dawn raid often (if not always) use the evidence gathered in such an investigation for their final decision on a competition law infringement.

Regardless of whether there is a requirement of an ex ante judicial warrant or not, unlawful conduct from competition authority officials during a dawn raid is namely not always challengeable on a standalone basis (Andersson, 2017).

For example, at EU level, the affected company may appeal only after DG COMP has made an official decision with evidence they found during the dawn raid. Otherwise, the raided firm must take the step to go to court and argue that the authority has not acted proportionally or violated procedural provisions. This must be done without knowing if the documents copied/seized are actually used in the conviction decision. This is a step which the firm must undertake and the presence of high litigation costs may act as a deterrent for such firms to fully utilize all tools available to protect their legal rights.

Companies can challenge a dawn raid decision of the Commission under Article 263 TFEU. Dawn raids can therefore be challenged when they have produced binding legal effects capable of affecting the applicant's interests by bringing about a distinct change in his legal position[10]. As for measures taken during the course of an inspection (which are not considered to produce binding legal effects) the raided company will instead have to await the final decision in the underlying competition case before being able to take action (Andersson, 2017).

Now, this situation slightly differs in certain jurisdictions. For example, in the UK and Spain, where the competition procedure has a certain administrative gist, the inspection decision may not be challenged before the competition authority directly, but before the specialized administrative courts. Although challenging on a standalone basis is possible, one could say the solution is not completely effective.

[10] *Nexans v Commission*, 2012, *supra* note 2 above.

During the time between a dawn raid and a competition law infringement decision, harm could have already been done (Andersson, 2017). When an NCA or the Commission conducts a dawn raid and goes beyond its powers, there is no immediate way for a firm to appeal. It could go to court, but the court will not know, for instance, whether the NCA has actually utilised evidence illegally obtained. In some cases, the firm in question will have to wait until the formal infringement decision is taken before it can go to court for judicial review. A firm will have to wait around two to four years (the time cartel investigations normally take (Hüschelrach, Laitenberger and Smuda, 2013)), depending on the jurisdiction, before it can lodge an appeal (e.g. in the UK the CMA takes an average of two and a half years; in Portugal, an average of four to five years; in Spain, an average of two years; at the EU level, the Commission takes four years). This problem is worsened by the fact that, in some jurisdictions, the firm will have to wait without even knowing if a challenge will ever be possible (Andersson, 2017).

Furthermore, even if the judiciary determines that (parts of) the dawn raids were conducted illegally, there is no effective remedy for the affected party because there is no power to order the Commission to return or destroy collected material (Steene, 2016). The same principle applies to national dawn raid proceedings as the remedies will depend on whether the applicant asks for such measure and whether the courts uphold such claim.

These different circumstances across the multiple jurisdictions may collide with the right to an effective remedy. In this regard, it is worth mentioning the criteria of the ECHR[11] regarding the conditions to satisfy the right to an effective remedy (Citron, 2020):

- The existence of an effective judicial review of the facts and of points of law (requirement of effectiveness);
- The possibility for an individual to obtain an appropriate remedy when an unlawful act has taken place (requirement of efficiency);
- The certainty of access to proceedings (requirement of certainty);
- Judicial review within a reasonable time (requirement of a reasonable time).

[11] Judgment of 21 February 2008, *Ravon and others v. France*, Application No. 18497/03, ECLI:CE:ECHR:2008:0221JUD001849703; Judgment of 21 December 2010, S*ociété Canal Plus and others v. France*, Application no. 29408/08, ECLI:CE:ECHR:2010:1221JUD002940808; Judgment of 21 December 2010, *Compagnie des gaz de Pétrol Primagaz v. France*, ECLI:CE:ECH R:2010:1221JUD002961308; and Judgment of 2 October 2014, *Delta Pekárny asc Czech Republic*, ECLI:CE:ECHR:2014:1002JUD000009711; referred by the General Court in the Judgment of 5 October 2010, Case T-249/17, *Casino, Guichard-Perrachon and Achats Marchandises Casino SAS (AMC), formerly EMC Distribution v. Commission*, ECLI:EU:T:2020:458.

While judicial review of a competition authority's dawn raid decision, whether its DG COMP or an NCA, is possible, the key of the matter is to assess the requirements of the right to an effective remedy, as this mechanism of control may be limited due to, for instance, tight standing requirements at a court and negative implications from the differences between laws governing legal protection in different jurisdictions.

## IV. Shortcomings in controls and how to overcome them

### 1. 'Theory' on connecting concepts

The rule of law presupposes the necessity to control actions of the executive branch. In the case of dawn raids, it means that companies should have the right to question this action and decision by a competition authority, which normally goes through courts. At the same time, judicial control shows limits, which prompts the question of how to address those limits. Scholten proposes to focus on connections of various concepts, of types of control and of different legal orders to seek for possibilities to close gaps in individual types of control (Scholten, 2019). In this light, we here focus on how different types of controls could indeed be connected to mitigate the challenges that judicial control may have in relation to dawn raids.

### 2. The judicial control of dawn raids

How does the judicial control in relation to dawn raids work at this moment? In this section, we show a few examples of how it works and what limits it may have. Also, we note that the requirement for a prior judicial warrant does not necessarily guarantee an extra safeguard for the undertaking(s) involved. This conclusion can be drawn as a consequence of some recent cases in the European Union.

#### (a) Belgium

The Belgian competition authority conducted several dawn raids in 2006. They concerned companies in the travel sector. As stated earlier, the Belgian competition authority needs a judicial warrant before conducting dawn raids as is stated in their Competition Act. In this case, however, the competition authority did not have this judicial warrant authorising the dawn raids.

Therefore, the Court of Appeal decided that the competition authority was prohibited from using any information that was gathered during those dawn raids[12]. The Belgian Supreme Court affirmed that the dawn raids had been conducted illegally. Accordingly, the Court of Appeal was right to conclude that the evidence had to be dismissed from the case file[13].

In this case, note that the time elapsed from the execution of the dawn raid to the remedy given by the Court is approximately nine years. In terms of the criteria of the ECHR, this case lacks the requirement of reasonable time, affecting the right to an effective remedy.

**(b) The Netherlands**

The Dutch competition authority conducted dawn raids in the period of 2012–2016. As aforementioned, it does not need a judicial warrant prior to entering business premises. The court ruled that the competition authority collected data from persons that were not listed on the dawn raid decision by that same authority. It therefore went beyond the powers it intended to use during the dawn raid. The court prohibited the use of the data collected from the not mentioned persons[14].

**(c) Spain**

The Spaniard competition authority conducted dawn raids in the year 2012 to several waste management companies for a suspicion of an alleged infringement of Article 101 TFEU. As detailed in section 2.2.2, the authority needs a warrant if the undertaking does not grant its consent for the execution of the dawn raid; however, in the cases described herein the undertakings abided by the order of inspection issued by the NCA, so no judicial warrant was needed.

The Spaniard Supreme Court determined in 2019 and 2020[15] that the dawn raids were illegal since the competition authority issued an order of inspection with a vague scope: the subject matter of the inspection was 'possible collusive agreements in the markets of transport, collection and management of sanitary

[12] Judgment of 18 February 2015, Court of Appeal of Brussels in joined Cases 2013/MR/19, 20, 21, 22, 24, 25.

[13] Judgment of 26 April 2018, ECLI:BE:CASS:2018:ARR.20180426.9.

[14] Judgment of 10 October 2018, ECLI:NL:RBDHA:2018:12722.

[15] Judgment of 26 February 2019, *Hijos de Demetrio Fernandez S.A. v. Comisión Nacional de los Mercados y la Competencia*, ECLI:ES:TS:2019:670; Judgment of 26 February 2019, *Irmasol S.A. v. Comisión Nacional de los Mercados y la Competencia*, ECLI:ES:TS:2019:585; Judgment of 29 May 2020, *Isma 2000 S.L. v. Comisión Nacional de los Mercados y la Competencia*, ECLI:ES:TS:2020:1257.

or other type of waste', conducted the raid and later opened an investigation and sanctioned several undertakings for colluding in the market of 'recycling and commercialization of recycled paper and cardboard'. Thus, the Court considered that the inclusion of 'other types of waste' in the decision ordering the inspection was too broad and not specific enough, invalidating the procedure which was based on the collection of documents which were not referred to sanitary waste (i.e. paper and cardboard).

It is important to note that these actions were brought by the affected parties after a fining decision was issued in the proceedings before the NCA (although the regulatory framework allows the parties to question the decisions of the authority by means of judicial review).

Again, it is worth noting that the time elapsed between the execution of the inspection and the remedy given by the court was approximately seven years. This certainly conflicts with the requirement of reasonable time considered by the ECHR.

**(d) EU**

In 2016, the DG COMP conducted a dawn raid into a Czech rail company premise based on the suspicion of an infringement of Article 102 TFEU for allegedly incurring in 'predatory pricing and other forms of infringement of Article 102 TFEU'. The General Court later determined in 2018[16] that the Commission had only reasonable grounds for the specific conduct referred to in the decision ordering the inspection, which is predatory pricing in the Prague-Ostrava route. Consequently, the General Court declared invalid the inspection for any evidence collected which was not referred to predatory pricing in the Prague-Ostrava route.

In similar fashion, in another case in 2017, DG COMP conducted a dawn raid into certain companies of the food and non-food distribution sector in France. The information uncovered in the raids led to a formal EC investigation into alleged collusion between retailers through purchasing alliances (Citron, 2020). In 2020, the General Court held[17] that the Commission did not have sufficiently strong evidence to launch dawn raids in respect of some of the suspected behaviour (Citron, 2020), annulling partially the order of inspection in that regard.

In these cases the time lapse between the inspection and the decision of the General Court is between two and three years, which could be considered as reasonable. Notwithstanding, both decisions only circumscribed to the order

[16] *České dráhy a.s. v. Commission* (2018), *supra* note 2 above.

[17] *Casino, Guichard-Perrachon and Achats Marchandises Casino SAS (AMC), formerly EMC Distribution v. Commission*, 2020, *supra* note 2 above.

of inspection, not addressing the evidence itself, or the procedure on which the evidence is based. This could be considered as an inefficient remedy in terms of the criteria of the ECHR.

**(e) Corollary**

As it can be noted, both the MSs and the Commission had exceeded their powers when executing dawn raids. These cases might not be wholly representative of the actual practice of the Commission or NCAs. It does, however, give insights in some shortcomings in the relation between judicial control and dawn raids. A common issue in these cases is the fact that the authority went beyond what was reasonably expected from the decision which ordered a dawn raid (except for the Belgium case in which the raid was illegal for not being supported by a warrant). Furthermore, the judicial review of such cases was not necessarily respectful of the right to an effective remedy, as in some cases the judiciary took too long to issue a final decision, or the remedy did not completely address the effects of the illegal inspection.

An interesting fact, and surprising to some extent, is the DG COMP case against *České dráhy*, in which the infringement was similar to the Deutsche Bahn case from three years before. In both cases the Commission conducted a dawn raid for a certain infringement but then opened a proceeding for a different or additional conduct.

This brief snapshot on the recent cases involving the dawn raids shows that judicial control over this action of the executive works and allows the affected parties to seek judicial redress against unlawful behavior. At the same time, these cases illustrate that ex ante and/or ex post controls face limits. Ex ante judicial warrants provide not enough control on the afterwards conducted dawn raid because the judicial warrant is not constituted under 'full review' but only comments on the non-arbitrariness.

As can be illustrated from these cases, it does not matter whether a judicial warrant is required or it is not. In Belgium, a warrant is prescribed and the competition authority neglected this requirement. In the Netherlands, no warrant is required and the competition authority overstepped its boundaries.

In turn, ex post judicial review cannot restore the original situation. In all the aforementioned cases, evidence was excluded from the investigation. This in turn meant that the relevant competition authority could not base itself on these documents anymore. That, however, does not mean that the situation is restored to before the disproportionate behaviour happened. This depends also on whether the affected parties were able to ask for a particular remedy, as the judiciary usually only assesses the legality of the act.

There are no immediate controls on dawn raids that can be enforced during the investigations of the competition authority. It thus seems that existing controls are not sufficient to ensure the rule of law. Finally, the judicial procedure may be time – and resource consuming for both public authorities and private parties.

## 3. Enhancing the public control over dawn raids

The problems arising from the execution of the dawn raids claim for a solution taking a different approach. We suggest seeking connections with different concepts and types of controls. The proposed improvements are threefold: (i) full ex ante reviews of dawn raids decisions; (ii) accountability measures for officials; and (iii) legislative guidance. The benefits and drawbacks of these options follow below.

### 3.1. Full ex ante reviews

In theory, ex ante judicial review of dawn raid decisions has the potential to solve a lot of problems, a trend of thought that is not new (Messina, 2007). This would entail an EU-wide requirement of a judicial review of an NCA dawn raid decision, after which the competent court can or cannot distribute a warrant. It does thus not only encompass the awarding of a warrant, but also an extensive ex ante review by the court. The competition authority would then have to prove the necessity and the proportionality of the inspections before the court.

The underlying dawn raid decision should then be based on reasonable suspicion (as is already the case in the 6 warrant-needing MSs presented above). Moreover, as an additional safeguard, the decision should encompass the intentions of the NCA as to what evidence they want to confiscate and how they want to do that. This basis is then more extensive than is the practice today. The review could be left to a judge to establish which evidence of which persons or cases can be gathered. With a review of the dawn raid decision and a subsequent judicial warrant, a judge can ex ante comment on the lawfulness and necessity of such a dawn raid. This has as a result that these components of the dawn raid are legitimate. It would therefore also be clearer afterwards, whether the competition authority has exceeded its powers in evidence-gathering. This ex ante review will hold the NCA with dawn raid competences judicially accountable for its conduct.

In the EU context, however, additional means are required to align the different procedures in MSs. MSs will need guidance on how to design and

implement full ex ante reviews. To achieve the right amount of harmonisation, legislative guidance is needed from the EU institutions. It will be difficult to establish to what extent MSs will need guidance and how intrusive this guidance should be. 'Just' implementing these measures will thus not work: there is always extra work involved to obtain a sophisticated and aligned system of controls. Moreover, guidance still leaves a significant scope for divergence.

This more extensive, full prior judicial review, however, completely undermines the efficacy of dawn raids, limiting their utility as an investigative tool (Verbruggen, 2013; Andersson, 2017; Australian Securities and Investments Commission, 2017) (the '*gorilla in the closet*' approach). Moreover, this would be extremely burdensome for the judiciary (although it is the system established for the competition law enforcement in the US (OECD, 2013)) and does not assure that the dawn raid will be duly executed by the NCAs (Messina, 2007). Furthermore, it can be argued that standardizing the warrant requirements for all MSs would also undermine the national procedural autonomy of the NCAs (Arnull, 2011). Most importantly, this full ex ante judicial review does not guarantee that there will be no competition authorities still overstepping their boundaries. Therefore, imposing this profound ex ante judicial review does not appear to be an efficient and desirable alternative.

### 3.2. Accountability measures for officials

Another alternative that might be effective in terms of shaping the officials' behaviour with regards to dawn raids is implementing judicial and political accountability measures. These could hold the authority's officials responsible for an illegal exercise of their inspection powers, declared as such by the judiciary. For instance, measures such as bad performance reports or economic fines could be imposed to the officials responsible. In order to ensure the objectivity and transparency throughout the procedure, an independent entity should implement such accountability measures. This can be achieved by enhancing the powers of the hearing officer.

Currently, during investigations conducted by the European Commission, hearing officers have the role as independent arbiters 'who seek to resolve issues affecting the effective exercise of the procedural rights of the parties concerned' (European Commission, 2011). Likewise, in the UK the figure of the hearing officer is carried by the 'Procedural Officer' (Article 8 of the Competition and Markets Authority's Competition Act 1998 Rules).

Subsequently, the hearing officer has a vital role in the investigation phase. He or she can issue reasoned opinions when alleged violations of the principle of self-incrimination, legal-professional privilege and confidentiality took place (European Commission, 2011), or any procedural complaint brought

by the parties of the investigation (Article 8 of the Competition and Markets Authority's Competition Act 1998 Rules). Since the proposed measures fall perfectly within the existing powers of the hearing officer, these accountability measures such as issuing bad performance reports could easily be added to the competences of the hearing officer. Because the concept of hearing officers is currently only applicable to procedures conducted by DG COMP and the CMA, this concept should be utilized by the other NCAs as well.

While this alternative may provide more safeguards for the undertakings, it will be highly unlikely that competition authorities would create their own national variant of hearing officers. This is because this will undermine the officials' willingness to act and would also affect the efficacy of the authorities, since the threat of sanctions would avoid them from taking appropriate actions for the detection of illegal activities. Furthermore, if all actions conducted by the competition authorities must be examined by the hearing officers, the entire investigation will be more burdensome and prolonged.

Moreover, and perhaps most importantly, this option may hamper the independence of the authorities and officials, as it could be used as a tool to exert pressure to such officials (one could say that the hearing officer will gain power over the officials, affecting their independence). In this regard, Directive 2019/1 seeks to increase the independence of NCAs and free them from political influence, so the type of accountability measures discussed in this section may run contrary to EU law.

### 3.3. Guidance by means of legal instruments

Taking into consideration that the principle of procedural autonomy leads to a lack of uniformity in the administrative procedure throughout MSs, there could be an argument in favour of the uniform application of EU law. This will be beneficial in terms of equality of treatment, predictability and legal certainty and would be normatively justified in the achievement of a common market (Leczykiewicz, 2010). Guidance by means of legal instruments thus seems like the most desirable improvement.

This could be achieved through an EU Directive, a legislative measure that would not undermine the autonomy of the MSs. There are no real indicators that legal tradition plays a role in the regulation of dawn raids, but there may be policy choices that flow from these traditions. These traditions should be preserved and a directive is the best alternative in that regard.

In this way, uniformity could be used to implement some rules or principles oriented to the protection of the undertakings rights; for example, by integrating procedural rules and criteria for issuing a dawn raid order or for conducting the inspection. Furthermore, this alternative could be used for

'lowering' the criteria required for admitting judicial review actions (e.g. the legally binding effects required under Article 263 TFEU); or even include the possibility to return or destroy documents after a raid is declared illegal by the courts. Hence, this option is seen as the most effective and less intrusive for achieving a desirable outcome. This solution does need political will to be effectively implemented.

Coincidently, in 2013 the European Competition Network recommended that the NCAs should enhance and standardize their investigative powers (ECN Working Group, 2013). This recommendation gave later place to the Directive 2019/1 which has the purpose to '*ensure that NCAs have the guarantees of independence, resources, and enforcement and fining powers necessary to apply Articles 101 and 102 TFEU effectively*', considering also that '*the application of NCAs of national competition law* [...] *should not lead to a different outcome to the one reached by the NCAs under Union law*'.

In this regard, recital 7 of the Directive literally provides that '[g]*aps and limitations in the tools and guarantees of NCAs undermine the system of parallel powers for the enforcement of Articles 101 and 102 TFEU, which is designed to work as a cohesive whole*'.

Now, Directive 2019/1 also addresses the fact that the exercise of the investigative powers conferred '*should be subject to appropriate safeguards which at least comply with the general principles of Union law and the Charter of Fundamental Rights of the European Union*'. Such safeguards include the right to good administration and the respect of rights of defence. The former comprising the assurance to conduct a proceeding within a reasonable timeframe and the latter including the right to be heard, access the file, and the right to an effective remedy.

Since Directive 2019/1 however ensures that NCAs are granted even more far reaching powers than Directive 1/2003, the need for adequate procedural safeguards will be even more urgent post-transposition. However, given its objectives, this legislation only focused on enhancing the enforcement of Article 101 and 102 TFEU, giving a minimum set of investigative, decision-making and sanctioning powers (i.e. how to impose fines); as well as structural measures that would ensure the independence of the NCAs.

As for the power to conduct inspections on business premises, no greater regard was given to the protection of rights besides declarations of compliance with the principles of EU law and the Charter. Notwithstanding, it is worth mentioning that the competent authority has the power to continue the dawn raid searches at the authority's premises, as long as it will respect the undertaking's right of defence. In this regard, the Court of Justice recently found that it can be inferred from Regulation 1/2003 that Commission officials may copy data encountered during the dawn raid and assess the relevance to

the investigation at its own premises in Brussels. This all while safeguarding the companies' rights of defence by having a companies' counsel present in Brussels during the assessment[18].

It therefore seems that the awareness of disproportionate needs to be raised, before the implementation of any of these possible improvements could be introduced. Ideally, a section on procedural safeguards or an effective judicial review could have been included in the directive. For this purpose, the criteria of the ECHR on assessing the right to an effective remedy could be considered.

Thus, for instance, provisions on which decisions may be subject to appeal before the NCA may be included. Ideally, the decisions ordering inspections could be considered (enhancing the effectiveness requirement of the ECHR). Moreover, the section could lay the grounds on the procedure which an affected party may have to walk in order to apply for the review of the decision – either by competition authorities or by courts – enhancing the certainty requirement.

Furthermore, provisions regarding the remedies that the authority may issue if an infringement is found could be included as well (enhancing the efficiency requirement of the ECHR). Finally, as with interim measures, provisions could be considered requiring that the revision of inspection decisions may be executed in an expedited manner (enhancing the reasonable time requirement).

## V. Conclusion

Dawn raids have been an effective tool in (competition) law enforcement. At the same time, dawn raids imply interfering with the rights and freedoms of private actors, which leads to the necessity of establishing controls over this action of the executive. The traditional controlling mechanism has been judicial control. The debate in the recent case-law and literature have been focusing on which type of it should be established: ex ante and/or ex post judicial check. In this article, we have proposed to look beyond one type of control (judicial) and seek for connections between types of controls to address the limits that judicial control faces (e.g. limited scope of review). We have outlined three possibilities to address the existing challenges: full review of ex ante decisions on dawn raids, internal accountability checks for the relevant officials and legislative guidance. We invite further debate with academics and practitioners concerning the benefits of these possibilities for

[18] *Nexans v Commission*, 2020, *supra* note 2 above; Judgment of 24 September 2020, C-601/18 P, *Prysmian SpA and Prysmian Cavi e Sistemi Srl v. Commission*, ECLI:EU:C:2020:751.

dawn raids as well as more broadly on what (other) connections can be sought to address the limits of individual types of controls and how to make such connections to ensure the rule of law.

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