

Recent judgements of the General Court and the Supreme Court of the Slovak Republic in inspection matters – Landmark Decisions or Wasted Opportunities to Solve Problem?

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I. Introduction

On-the-spot investigations (inspections, dawn raids) are now an indispensable tool in the portfolio of a competition authority's investigative powers. They constitute a very efficient method of seizing documents and accumulating information of an undertaking regarding its alleged anticompetitive behaviour – information that the undertaking would not normally be willing, or in fact obliged to provide because of the right of non self-incrimination. On the other hand, inspections are a rather “uncomfortable” intrusion into the private sphere of undertakings. As a result, the violation of the principle of the ‘inviolability of the home’ has become a common objection against inspections carried out by competition authorities. It is not the aim

of this article to analyse differences, if any, between rights of natural and legal persons (undertakings) under human rights conventions and charters. For the purposes of this paper, the right of the ‘inviolability of the home’ shall be deemed to have the same content for both natural and legal persons. Inspections can thus be considered an invasion of the home. In order to be legal, three conditions must be met for an interference with the right to the protection of the private sphere by public bodies: the intrusion must be based on the law, it must have a lawful purpose and there must be protection against abuse.

The right to carry out inspections is based on Article 20 of Regulation 1/2003¹. This Regulation contains rules on the authorisation of inspections, issuing a decision ordering an undertaking to submit to an inspection, and on rights of inspectors during the inspection. The basic and only aim of inspections is to find evidence of competition law infringements in order to enable the authorities to put end to and prosecute such activities. Competition protection, as one of the policies that ensures the proper functioning of the economy, is considered a lawful purpose for an interference with an individual’s rights, a fact clearly confirmed in the *COLAS* Case². While the fulfilment of the first two conditions for the legality of inspections carried out by the European Commission seem to be satisfied, the fulfilment of the third (protection against abuse) depends on the application of the principles of non-arbitrariness and proportionality³.

The situation is similar regarding the legislation of inspections carried out by the Antimonopoly Office of the Slovak Republic (hereafter, AMO). Their legal basis is given by § 22(3) and § 22(3) of Act No. 136/2001 Coll. on Protection of Competition and on Amendments and Supplements to Act of the Slovak National Council No. 347/1990 Coll. on Organization of Ministries and Other Central Bodies of State Administration of the Slovak Republic as amended (hereafter, Competition Act). Subsequent subparagraphs regulate inspections carried out in private premises. The powers of the AMO are very similar to those of the Commission in the sphere of inspections; the same can be said about the powers granted to inspectors. Similar conclusions can therefore be drawn with respect to inspections in Slovakia and the EU regarding the fulfilment of the first two legality conditions of inspections (interference with the right of privacy). Similarly also, protection against abuse deserves further scrutiny. The main procedural difference between the powers of the Commission and those of the AMO is that the latter must issue a decision ordering an undertaking to submit to an inspection only when it is necessary to carry it out in non-business premises. In Slovakia, undertakings are generally obliged to submit to inspections under § 40 Competition Act and AMO inspectors are empowered to carry them out in business premises upon an authorisation of the Chairmen of the AMO.

¹ Council Regulation (EC) No. 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 [EC] and 82 [EC], OJ [2003] L 1/1.

² *Société Colas Est and Others v. France*, no. 37971/97, ECHR 2002-III.

³ F. Arbault, E. Sackers, ‘Cartels’ [in:] J. Faull, A. Nikpay (eds), *The EC Law on Competition*, 2nd edition, New York 2007, p. 894.

This paper will deal with two sets of questions regarding safeguards against abuse and solutions applied in European and Slovak jurisprudence. The first set of questions is bound to the content of inspection decisions/authorisations; the second set relates to the power to make a copy of data stored on electronic devices. Both of these groups of questions were raised in cases T-135/09 *Nexans France SAS, Nexans SA v European Commission*⁴ and T-140/09 *Prysmian SpA, Prysmian Cavi e Sistemi Energia Srl v European Commission*⁵ ruled by the General Court⁶ as well as in the *ŠEVT* case⁷ tried by the Supreme Court of the Slovak Republic (hereafter, Supreme Court). Analysing these three judgements makes it possible to compare their respective contribution to the clarification of the rules on inspections, seeing as both courts dealt with similar issues. The Commission and the AMO became aware of these judgements because they disturbed their long-term every-day enforcement practice. They forced the two competition authorities to rethink or improve (update) their administrative practices. However, did these judgements raise any novel insights or merely reconfirm past and present rules that the competition authorities had so far overlooked? Did the courts succeed in solving the legal questions brought before them considering that their human rights aspect cannot be ignored?

Every decision that deals with these questions has a chance to become a landmark case because these issues tend to be in the centre of interest of the theory of competition law⁸. Authors are usually more interested in analysing the very text of the legal provisions or the questions of human rights protection during the inspections (e.g. question of previous court authorisation).

II. Factual Background

1. *Nexans* case and *Prysmian* case

By Decision C (2009) 92/1 of 9 January 2009, the Commission ordered *Nexans* and all companies directly or indirectly controlled by it (hereafter, *Nexans*) to submit to an inspection in accordance with Article 20(4) Regulation 1/2003 (hereafter, the inspection decision). The subject-matter of the inspection was defined in Article 1 of the inspection decision as follows: ‘... potential participation in anti-competitive

⁴ Judgment of the General Court (Eighth Chamber) of 14 November 2012 in Case T-135/09 *Nexans France SAS and Nexans SA v European Commission* (not yet reported).

⁵ Judgment of the General Court (Eighth Chamber) of 14 November 2012 in Case T-140/09 *Prysmian SpA and Prysmian Cavi e Sistemi Energia Srl v European Commission* (not yet reported).

⁶ The *Nexans* case and the *Prysmian* case are identical in their reasoning so in the legal positions and arguments analysed in this paper referring to the *Nexans* judgement will not be repeated regarding the *Prysmian* case.

⁷ *ŠEVT, a.s. v Antimonopoly Office of the Slovak Republic*, No. 3 Sžz 1/2011, judgement of 5 April 2011.

⁸ Compare e.g. J. Faull, A. Nikpay (eds), *The EC Law on Competition*, 2nd edition, New York 2007; L. Ritter, W. D. Braun, F. Rawlinson F., *EEC Competition Law. A Practitioner's Guide*, Deventer, Boston, 1991; R. Whish, *Competition Law*. 6th Edition, Oxford 2008.

agreements and/or concerted practices contrary to Article 81 EC ... in relation to the supply of electric cables and material associated with such supply, including, amongst others, high voltage underwater electric cables, and, in certain cases, high voltage underground electric cables. Those agreements and/or concerted practices consist of the offering of concerted bids in public tenders, client allocation, as well as the illegal exchange of commercially- sensitive information relating to the supply of those products.’ In the reasoning of the inspection decision, the Commission stated that it ‘received information that electric cable suppliers, including the companies targeted in this decision, were participating or had participated in agreements and/or concerted practices in relation to the supply of electric cables and material associated with such supply, including, amongst others, high voltage underwater electric cables, and, in certain cases, high voltage underground electric cables’.

During the inspection, Commission inspectors examined, *inter alia*, the content of a computer hard drive used by employees of Nexans. From there, they recovered a number of files, documents and emails, as well as copied two sets of emails onto four data-recording devices (the DRDs). These DRDs were placed in envelopes which were sealed and then signed by one of the Nexans’s representatives. Inspectors decided to take the envelopes back to the offices of the Commission in Brussels and informed the inspected company that it would be notified of the date on which the inspection would be continued. The inspected company Nexans stated that it would prefer for the examination of the above DRDs to take place at the premises of Nexans, rather than at the Commission. Although the inspectors analysed one of the DRDs at the premises of Nexans, at all, and printed and kept two documents extracted from that DRD and returned this DRD to the representatives of Nexnas, the inspectors ultimately made three copy-images of the examined hard drive onto three DRDs and gave one of these to the Nexans representatives at their request. They placed the other two DRDs in sealed envelopes which they took back to Brussels, after taking formal note of the fact that Nexans disputed the legitimacy of their removal. The inspectors stated that the sealed envelopes would only be opened in the Commission premises in the presence of Nexans representatives. Ultimately, the envelopes sealed at the premises of Nexans were opened in the Commission’s offices in the presence of Nexans’ lawyers. The documents stored on the DRDs were examined and the inspectors printed out data which they considered relevant for the purposes of the investigation. A second paper copy of those documents and their list was given to Nexans’ lawyers. The office of the Commission in which the documents and the DRDs were examined was sealed at the end of each working day, in the presence of the inspected companies’ lawyers, and opened again the following day, also in their presence.

The decision addressed to the Prysmian group (decision C(2009) 92/2 of 9 January 2009) was almost identical to the inspection decision issued in the *Nexans* case regarding the subject-matter of the inspection and its reasoning. During the inspection of Prysmian’s premises, inspectors decided to extract image-copies of computer hard drives of three employees in order to examine them in the premises of the Commission in Brussels. The legitimacy of this approach was challenged also in this case on the basis of the argument that Article 20 Regulation 1/2003 is applicable

in the undertaking's premises only. The extraction of the copy-image of an entire hard drive was seen by the investigated company as contrary to the 'principle of proportionality', seeing as materials acquired during an inspection should only be pertinent to its object. However, the inspectors responded that an opposition to such extraction will be considered as an act of "non-collaboration" and continued to make the copies. Finally, the DRDs contenting the copy-images were envelope-sealed and taken to Brussels. The inspectors invited company representatives to the premises of the Commission where the copy-images were later examined. The envelopes were re-opened only in their presence and sealed again at the end of each day. These activities lasted for three day. The DRDs containing the copy-images were ultimately deleted.

In their court actions, both Nexans and Prysmian asked, *inter alia*, for the annulment of their respective inspection decisions because of their vagueness and extensive product and geographical scope. They also requested the Court to declare that the Commission's decision to physically remove copies of some computer files and copies of certain hard drives from company premises to Brussels was unlawful.

2. ŠEVT case

The AMO Chairwoman authorised its officers under § 22 Competition Act to carry out an inspection of the premises of ŠEVT because the company allegedly concluded an agreement restricting competition under § 4 Competition Act. The infringement was said to have consisted of a collusive practice in the public procurement field regarding the supply of stationery.

Among other things, a copy was made during the inspection of the entire content of a hard drive belonging to one of the managers (senior manager, but not a member of the Board of Directors) of the inspected company. The image-copy was recorded on hard drive of the AMO. This hard drive with forensic copy-image was sealed in an envelope and taken to the premises of the AMO. The inspected company and its manager were informed that the envelope would be opened in the presence of company representatives and that the content would be examined in AMO premises. During the procedure in AMO premises, the aforementioned manager of the inspected company contested such approach arguing that sensitive personal information might be leaked and asked the authority to provide security certification of the tools used. Furthermore, AMO offices were informed by the attorney of the inspected company that the disk contains ,attorney's secret'. During the examination of the image-copy, an email communication between the aforementioned manager and his attorney was indeed found but no printed copy was made.

In its court action, ŠEVT claimed that the AMO used its inspection powers too extensively when it seized an individual employee's entire hard drive seeing as it also contained private information belonging to that employee (the company permitted private use of the company computer). The hard drive could thus also contain information on that employee's political activities. The inspected company challenged also the depth of the investigation. However, case documentation is unclear in this

matter since the judgement is inconsistent mentioning both 20 and 50 key words used by AMO inspector for the purpose of their analysis. ŠEVT saw in this approach an infringement of its rights and asked the Supreme Court to order the AMO to refrain from the examination of the contested image-copy and requested for the content of the disk with the image-copy to be deleted.

III. Basic questions in issue

Comparing the judgements of the General Court in the *Nexans* and the *Prysmian* cases and the ruling of the Slovak Supreme Court in the *ŠEVT* case shows that they are, despite procedural matters, similar with respect to the issues that they tried to solve, or they should have solved.

First, they dealt with the content of inspection decisions/authorisations. While the content of inspection decisions was a substantial part of the claims of the applicants in the two EU cases, the Slovak Supreme Court examined the content of the domestic authorisation *ex officio*.

Second, the extraction of forensic image-copies, and their subsequent out-of-premises examination, extends human-rights scrutiny over the interference by competition authorities with the ‘right to protect the home’ not only to the question of abuse protection, but also to the question of the legal basis of such interference.

1. Content of the inspection decisions/authorisations

1.1. LEGAL BACKGROUND AND PREVIOUS JURISPRUDENCE

Article 20(4) Regulation 1/2003 defines the essential elements which must be present in a Commission decision ordering an inspection. Under that provision: ‘Undertakings and associations of undertakings are required to submit to inspections ordered by decision of the Commission. The decision shall specify the subject matter and purpose of the inspection, appoint the date on which it is to begin and indicate the penalties provided for in Articles 23 and 24 and the right to have the decision reviewed by the Court of Justice’. Since the Commission orders an inspection by way of a decision, requirements of this act under the Treaty on the Functioning of the European Union must be followed. In particular, the decision has to be reasoned (Article 296 TFEU).

Slovak legislation specifies only one requirement for the authorisation of an inspection – the act must take a written form [§ 22(3) Competition Act]⁹. The Competition Act does not require the authorisation to be reasoned; it does not even define its content.

⁹ The legal provisions on the competences of the AMO and its officers regarding inspections are rather inconsistent and unsystematic. First, § 22(2) gives AMO officers powers to request company employees and representatives to provide any business documents or explanations. These powers are general and can be realised during both ‘on-site’ investigations (i.e. inspections) and ‘off-site’ investigation (i.e. written orders to provide information sent by post). In order to secure these documents or information, AMO officers are empowered by this subparagraph to seal the premises or their parts and to seize and take away documents and media storage in

It is clear that EU legislation is more precise in this context than Slovak provisions. This realisation is strengthened by the fact that legal requirements for inspection decisions have been well explained by established jurisprudence. The constitutional requirement to provide reasons for public decisions is meant to guarantee transparency of the decision-making process and enable courts to review their legality. The reasoning allows the addressee of a decision to assess whether the act is well founded, or whether there are insufficient grounds to make the addressee subject to duties conferred by the decision, or even whether the decision is a mere abuse of powers by the issuing authority. Although the scope of the duty to give reasons for a particular type of decision depends on the nature of the measure and on the context in which it is adopted¹⁰, lack of relevant reasons can enable the addressee to successfully contest its legality before a court

European judiciary explained that the need to specify the subject matter of an inspection is a safeguard for the addressees of an inspection decision to assess the scope of their duty to cooperate with the inspection while, at the same time, safeguarding their right of defence¹¹. It was confirmed also that the scope of the duty to give reasons in inspection decisions cannot be limited because of factors relating to the effectiveness of the investigation. On the other hand however, the Commission is not required to communicate all the information it possesses concerning the presumed infringements, or to precisely delimit the relevant market, or to set out the exact legal nature of the presumed violations, or to indicate the period during which they were allegedly committed¹². The Commission is thus obliged to balance between its aim to maintain the effectiveness of the investigation (provide the suspect with as little information as possible) and the addressees' right to defence as well as right for a well-grounded decision acting as a safeguard against the abuse of public power.

These requirements are also relevant for evaluating the legality of an interference with the addressee's privacy under the Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, hereafter also ECHR) or the Charter of the Basic Rights of the EU. Providing enough safeguards against abuse is one of the cumulative requirements for the legality of such interference. So the Court requires the Commission to state as precisely as possible the presumed facts which it intends to investigate (what it is looking for and the matters to which the investigation relates). To that end, the Commission must state in an inspection decision the essential characteristics of the suspected infringement by indicating the market thought to be affected, the nature of the suspected restrictions of competition and the supposed degree of involvement of the undertaking concerned. It is also

order to copy them. The Competition Act states that AMO officers have these powers during inspections. Secondly, § 22(3) empowers AMO officers with a written authorisation of the AMO Chairman to enter the premises of an undertaking in order to carry out an inspection.

¹⁰ Case 185/83 *Instituut Electronenmicroscopie* [1984] ECR 3623, para. 38, and Case T-349/03 *Corsica Ferries France v Commission* [2005] ECR II-2197, paras 62 and 63.

¹¹ In relation to Regulation No 17, Joined Cases 46/87 and 227/88 *Hoechst v Commission* [1989] ECR 2859, para. 29, and Case 94/00 *Roquette Frères* [2002] ECR I-09011, para. 47.

¹² In relation to Regulation No 17, Case 85/87 *Dow Benelux v Commission* [1989] ECR 3137, para. 10; *Hoechst v Commission*, para. 41; and *Roquette Frères*, para. 48.

required to state the evidence sought and the matters to which the investigation must relate as well as the powers conferred on its inspectors¹³. It is clear that every element of the operative part of the decision shall be reasoned and grounds for its specific wording or element shall be given. However, the judiciary has given very few instructions on how much information should be provided regarding the subject-matter of the investigation, how deep the reasoning must be and how to balance between the effectiveness of the investigation and the rights of the investigated.

Another group of reasons of a decision ordering an inspection needs to explain why there is a need to violate the home and privacy of the addressee. European courts are more instructive in this matter. In order to establish that the inspection is justified, the Commission is required to show, in a properly substantiated manner, that it is in possession of information and evidence providing reasonable grounds for suspecting the alleged infringement by the undertaking subject to the inspection¹⁴. The above standards for reasoning inspection decisions could also be useful in establishing standards for the reasoning of the subject matter of the inspection itself.

It shall be noted that inspections are mostly carried out in the premises of alleged infringers or their managers. For that reasons, jurisprudence is not as well established on the possibility to carry out inspections in the premises of an entity that is not a suspect, but is merely presumed to be in possession of relevant documents or information. Still, the approach would be very similar in both scenarios. The Commission shall first explain the necessity of an inspection by declaring that it expects the addressee of an inspection decision to be in possession of information on a possible infringement of competition rules. The Commission shall then explain why it is likely that the addressee holds information regarding the infringement. Finally, if the Commission alleges that the addressee is in possession of information or evidence providing reasonable grounds for suspecting the infringement or for another hypothesis, the Commission must actually be in possession of documents and evidence that made it come to such conclusion when adopting the inspection decision.

Before the adoption of the *ŠEVT* judgment, inspections were carried out by the AMO only in two cases; neither the formal nor substantial grounds of their authorisations were questioned. It is thus likely that the AMO was never forced to adjust the rather formal and summary authorisation standards used in the past.

1.2. DECISION IN *NEXANS* AND *PRYSMLAN* CASE

The two companies challenged their respective inspection decisions because of two issues: first, the decisions were imprecise in their delimitation of the products concerned; second, the high voltage underwater cable sector was the only field where the Commission had reasonable grounds for suspecting an infringement of competition rules on the part of the scrutinised companies.

¹³ In regard to Regulation No. 17, Case 136/79 *National Panasonic v Commission* [1980] ECR 2033, para. 26, and *Roquette Frères*, paras 81, 83 and 99.

¹⁴ In relation to Regulation No. 17, *Roquette Frères*, paras 55, 61 and 99.

The General Court rejected the first allegation and confirmed that by referring in the inspection decision to all electric cables and all materials associated with those cables, the Commission has met its obligation to define the subject-matter of its investigation¹⁵. The Court scrutinised the definition of the subject-matter of the inspection only as far as its extent is concerned – if it enabled the applicants to assess the scope of their duty to cooperate with the inspection and if the delimitation of the matters covered by the investigation was sufficiently precise (in relation to all of their activities). It is with relation to that delimitation that the Court must be able to check whether the Commission had, at the time of the adoption of the inspection decision, reasonable grounds justifying the interference into the private activity sphere of the applicants. Regarding these questions, the Court considered it irrelevant that the wording of Article 1 of the inspection decision and its grounds were rather ambiguous¹⁶.

Regarding the second challenge, the Court analysed whether the Commission had at its disposal at the time of the adoption of the inspection decision information on a cartel covering all electric cables and all materials associated with those cables. The Court recalled here the need to balance the investigative powers of the Commission, the element of surprise of an inspection and the powers to search documents in the undertaking's premises on the one hand, with safeguards against the abuse of public power and 'fishing expeditions' on the other. The Commission believes that its powers of investigation would serve no useful purpose if it could do no more than ask for documents which it was able to identify with precision in advance. So its right to investigate implies the power to search for various items of information which are not already known to it or fully identified¹⁷. The Court confirmed that the Commission has the power to search and examine certain business records of the addressee of the inspection decision even if it is not known whether they relate to activities covered by that decision, in order to ascertain whether that is indeed the case as well as to prevent the undertaking from hiding evidence which is relevant to the investigation, under the pretext that that evidence is not covered by the investigation¹⁸.

Notwithstanding the above, it is clear that once the Commission has found after its inspection that a document or other item of information does not relate to the subject matter of the inspection, it is obliged to refrain from using it for the purposes of its investigation¹⁹. Not following this approach and extending searches to all activities of the inspected undertaking, despite having indicia concerning only a specific area of its business activity, in order to find 'any' infringement ('fishing expedition'), is seen by the Court as an interference into the private activities of a legal person. Such approach is incompatible with the guarantees of fundamental rights of a democratic society²⁰.

¹⁵ *Nexans*, para. 53.

¹⁶ *Nexans*, para. 54.

¹⁷ *Nexans*, para. 62.

¹⁸ *Nexans*, para. 63.

¹⁹ *Nexans*, para. 64.

²⁰ *Nexans*, para. 65.

After examining the content of the file as well as the submissions of the Commission and the parties, the General Court found that the authority did have enough indicia regarding a cartel covering high voltage underground and underwater cables and materials associated with those cables. Its reasoning concerning the whole market of electric cables and the materials associated with those cables was, however, insufficient. It must be stressed that the Court refused to accept the decision's reasoning not merely because the authority had no indicia regarding the whole market of electric cables. It also analysed whether the Commission's thinking process, which made it extend its suspicions to the entire electric cables market, was consistent and reasonable.

Once the General Court found that the Commission had no indicia, no evidence and no reasonable grounds to suspect the addressees of the two inspection decisions had participated in a cartel covering all electric cables and associated materials, it annulled the inspection decisions both with respect to Nexans and Prysmian in so far as they concerned anything other than high voltage underwater and underground electric cables and materials associated with those cables. The rest of the inspection decisions was upheld.

A question remains, however: did the rulings of the General Court bring anything new to EU jurisprudence on the evaluation of inspection decisions issued under Regulation 1/2003? More precisely, has the Court delineated the powers of the Commission in this context somewhat more restrictively than in the past?

First, the General Court confirmed *expressis verbis* or *via facti* that:

1. The Commission is not obliged to explain and give all its indicia and evidence regarding the alleged activity.
2. The Commission is prohibited to extend its inspection activities to documents and items of evidence outside the scope of the subject matter of the inspection.
3. Inspectors are not limited to only examine documents and items of evidence that *prima facie* correspond to the subject matter of the inspection.
4. In order to define the subject matter of the inspection, the Commission shall provide relevant assertions that can reasonably lead to suspicions regarding all the business activities and all the undertakings that are covered by the inspection decision.
5. The Commission is obliged to show to the court that assertions made in the reasoning of the inspection decision are based on relevant information in its possession in the form of documents, evidence or a consistent analysis.
6. If the Commission fails to show that it holds information that enables it to reasonably suspect the existence of an infringement regarding the whole market or its specific part, the court shall annul the inspection decision in its entirety or in part respectively.

It seems therefore that the General Court followed established jurisprudence, upheld strong investigative powers of the Commission and added no further safeguards for undertakings other than those that existed already. The General Court made also no theoretical analysis concerning the extent or quality of information that forms sufficient grounds for suspicion. It merely assessed on a case-by-case basis the documents, information and evidence provided by the Commission as well as

the consistency of its reasoning. Even if the General Court thus refused to accept the Commission's reasoning regarding markets other than those mentioned in the leniency application, this does not seem to mean that the judiciary will not accept arguments in favour of a subject matter other than that supported by 'hard' evidence. Otherwise the Court would not have bothered at all to analyse the consistency and reasonableness of the Commission's assessment on issues outside the subject matter of the leniency application.

Hence the Nexans and Prysmian judgements do not seem to be landmark decisions and shall not change the course of the inspection practice of the Commission. Their only outcome regarding this issue is that the authority is without a doubt obliged to provide correct information in the reasoning of its inspection decision. If the Commission was in fact known to have provided reasoning based on information that it did not actually possess, the two judgments could have resulted in a change in its practice. It is believed that there was no such practice in the first place, however, seeing as it would have amounted to an abuse of powers.

The Nexans and Prysmian judgments do not solve the question of what standards are to be followed for inspections in the premises of those not suspected of competition law infringements. The answer could, in theory, be very simple, but it provides no firm guidance for future practice. In a democratic society, the Commission is obliged to explain why it is necessary to interfere into the private sphere of undertakings and why is this interference proportionate to the aim sought by the authority. In other words, the Commission is obliged to explain why it expects that documents and information could be found in the premises of a non-suspect that may be necessary for the enforcement of the powers of the Commission to protect competition within the internal market, and why can they not be obtained by any other means than an inspection. All of these elements of proportionality and necessity shall be assessed by the court on a case by case basis.

1.3. DECISION IN THE ŠEVT CASE

Although formal questions regarding authorisation were not part of the action submitted by the plaintiff, the Slovak Supreme Court tried to deliver a precedent ruling in this case by analysing the form of the authorisation.

First, it noted that an element of surprise is used during an inspection. It is thus necessary that the undertaking shall have a 'legal possibility', but only by an immediate look at the authorisation, to check if and on what basis it is being examined²¹. The Supreme Court found that this possibility was disabled in the scrutinised case because the authorisation referred merely to § 22 Competition Act, which contains a total of 10 subparagraphs. The undertaking was thus not able to discern which of the powers enlisted in § 20 Competition Act (sic!, it seems to be an error of the court and it meant § 22) was being enforced against it. This failure was seen as a grave error

²¹ 'Podnikateľ musí mať právnu možnosť z poverenia okamžitým nahliadnutím si odkontrolovať, či a na základe akého ustanovenia zákona sa voči nemu takto postupuje'.

in the AMO's proceedings and a reason for the illegality of the inspection. It must be stressed, however, that § 22 Competition Act contains only one power of AMO inspectors – to inspect the premises of an undertaking under authorisation by the Chairman of the AMO.

The Supreme Court saw another reason for the illegality of the inspection in the fact that the authorisation was missing AMO's official seal. On the one hand, the Court admitted that the Competition Act does not require a seal on the authorisation for an inspection. On the other hand, it labelled the seal to be the basic prerequisite of the execution of powers of a public body as required by the Slovak Administrative Code (a fact of common knowledge in the practice of public bodies). According to the Court, the seal acts as the official sign manifesting that a given document is an actual public instrument. In the opinion of the Supreme Court, the seal makes it possible for the undertaking to realise that an official act is executed against it.

However, what is more interesting than a rather medieval insisting on the importance of the powers of a seal, is the reference to the prerequisites of a decision listed in § 47(5) Administrative Code in connection to its § 3(1) and § 3(6). They include: the designation of the public body that issued the decision, date of the decision, forename and surname or name of the addressee, official seal and signature with forename and surname of responsible official. These were seen by the Court as essential prerequisites stemming from general principles of intelligibility and certainty of acts of public bodies. As such, they applied not only to decisions but also to authorisations.

Although the Supreme Court referred to the prerequisites of a decision under § 47(5) Administrative Code and arrived at the conclusion that an authorisation shall meet the same criteria, its further arguments are rather inconsistent and can hardly serve as guidance for future enforcement practice of the AMO. The Supreme Court saw another fault of the scrutinised authorisation in the fact that it was missing an registration number. However, having registration number is neither listed as a prerequisite of decisions nor authorisations. A judicial extension of the list of prerequisites of legal acts of public bodies endangers the future practice of issuing such acts, seeing as they might end up be annulled by a court because they lack a prerequisite requested by that court specifically even if it is not prescribed by the law. This approach can undermine the will of the Slovak parliament as the sole legislator; it is also contrary to the principles of Continental law.

The Supreme Court remained silent on reasoning being an essential prerequisite of a decision, seeing as decisions without a reasoning are somewhat of an exemption. However, while silent on reasoning in general terms, it mentioned the necessity of reasoning an authorisation of an inspection. Its arguments here create, however, somewhat of a legal turmoil: 'During the inspection, it is necessary to distinguish between invasive and non-invasive acts. Invasive acts interfere into basic rights and freedoms. There is a difference between situations when the defendant during the investigation is asked to submit documentation regarding which it is clear that it does not contain private data, and in cases of copying data storage devices of employees which cannot be avoided but could be reasonably expected to also contain private

correspondence (e.g. hard drive PC, notebook, USB stick). In these cases, the authorisation shall be reasoned²².

It is hardly possible to distinguish between 'invasive' and 'non-invasive' actions during an inspection in the premises of a scrutinised undertaking since the inspection itself is an 'invasive' act. The Supreme Court acknowledged an 'invasive' act's interference into basic rights, but it remained silent about acts other than those which are 'invasive'. It also failed to answer the question if such interference into basic rights and freedoms can be considered legal. Moreover, it did not explain what acts are 'invasive' and what acts are 'non-invasive'. Reading this paragraph of the judgment in its entirety and assuming that it deals with one question only, a demand to submit documentation regarding which it is clear that it does not contain any private data can be categorised as 'non-invasive'. By contrast, copying information from data storage devices of employees, which cannot be avoided, but could be reasonably expected to also contain private correspondence, can be seen as 'invasive'. However, this classification says nothing about rights and freedoms of the company itself, focusing instead on rights and freedoms of its employees.

Finally, although the Supreme Court ruled that authorisations shall be reasoned in the case of 'invasive' acts, it nevertheless, stopped here in its own reasoning leaving several questions unanswered. First, shall the reasons for the authorisation be contained in the very text of the authorisation or shall they be at the disposal of the AMO and be provided afterwards to the reviewing court? Second, shall the reasons of the inspection itself or the reasons for the interference into the privacy of employees be provided? Third, how can the AMO be able to give reasons in advance for its interference into the rights of employees without prior information on the internal structure of the inspected company and specific benefits enjoyed by each employee? Fourth, what could justify the inspection of the computer of an employee which is also used for private purposes? The Supreme Court gave no guidance on how to answer these questions and wasted an opportunity to formulate specific rules on inspections performed by the AMO.

However, Slovak officers and practitioners can seek some partial answers in Czech jurisprudence since the two neighbouring legal orders are in some aspects very similar. In a judgement of 2007²³, confirmed by the Supreme Administrative Court in 2009²⁴, the Regional Court in Brno admitted that inspectors of a competition authority are allowed to inspect a notebook found in the premises of the inspected company and

²² 'Pri výkone inšpekcie je nevyhnutné rozlišovať invazívne a neinvazívne úkony. Invazívne úkony zasahujú do základných práv a slobôd. Je rozdiel, ak žalovaný v rámci šetrenia žiada obchodnú a účtovnú evidenciu a doklady, o ktorých je jednoznačné, že neobsahujú žiadne súkromné údaje a je rozdiel, ak ide o kopírovanie dátových nosičov zamestnancov podnikateľa, u ktorých nemožno vylúčiť a dôvodne možno predpokladať, že obsahujú i súkromnú korešpondenciu (napr. hard disk PC, notebook, USB Kľúče a pod.). V týchto prípadoch poverenie musí byť i odôvodnené'.

²³ Judgement of 27 September 2007, No. 62 Ca 1/2007.

²⁴ Judgement of 29 May 2009, No. 5 Afs 18/2008.

used even only partially for business, even if the employee claims that the notebook is also used for private purposes. In such situation, inspectors are allowed to take a cursory look at its documents and assess their *prima facie* private or business nature.

It can be concluded that the Supreme Court failed to give a clear explanation of its position regarding the prerequisites of an authorisation for an inspection and wasted a chance to deliver guidance for future inspections performed by the AMO. It also failed to perform a comprehensive legislative analysis and comparison even though the Competition Act does not stand alone in the Slovak legal system – several of its administrative bodies are empowered to perform authorised inspections. Their prerequisites are enumerated in various legal acts including those on audit of state administration, tax audit and financial sector surveillance. Hence, taking into account the ŠEVT judgment as well as the philosophy of acts regulating similar types of inspections, an authorisation of an inspection for the purpose of competition law enforcement shall contain the following:

1. indication of the authority which issued the authorisation – the Chairman of the AMO,
2. legal basis under which the authorisation is issued,
3. identification of the case in which the inspection is carried out,
4. formulation of the authorising order,
5. identification of the entity whose premises shall be inspected,
6. time scale of inspection, which shall be sufficiently certain and proportionate,
5. aim and scope of the inspection,
6. names and surnames of authorised staff,
7. name and signature of the person who issued the mandate,
8. official seal of the AMO.

In order to achieve more clarity and transparency, the authorisation shall also contain an explanation of the powers of the inspectors, possible remedies as well as reasons for the inspection, that is, statements why searching the premises of the inspected entity is necessary.

2. Removing image copies of hard drives from the premises of inspected undertakings

2.1. LEGAL BACKGROUND

Legal provisions on making copies are very similar in the European environment [Art. 20(2) Regulation 1/2003] and in the Slovak legislative framework [§ 22(2) Competition Act]. Both Commission and AMO inspectors have, *inter alia*, the right to examine the books and other records related to the inspected business, irrespective of the medium on which they are stored, and to take or obtain in any form copies of or extracts from such books or records. Additionally, under § 22(2)b) Competition Act, AMO inspectors have an explicit right ‘to take away this information and these documents for the necessary time with the aim of making copies or gaining access to information if the Office is unable, primarily for technical reasons, to gain access to information or make copies of documents during the performance of an

inspection'. Although the law does not explicitly empower inspectors to take away copies of documents and information other than those falling within the scope of the inspection defined in the inspection decision or authorisation, the practice of both the Commission and the AMO show that inspectors are used to removing copies of entire hard drives from the inspected premises. It is clear that such image-copies contain electronic documents that are outside the scope of the inspection and might even contain data of a non-business nature (e.g. private documents or communication of the employees).

Despite changes in wording, the 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 revised on 18 March 2013 (hereafter, Explanatory Note) maintains the procedure of removing copies of electronic data from company premises. The Explanatory Note is neither a legally binding document nor is it published in the Official Journal, but it not only summarises the powers of inspectors under EU law, it also explains what the Commission believes itself to be empowered to do. The most controversial part of the act is a group of provisions dealing with IT forensics and the duty to cooperate during an inspection of electronic data. In paragraph 14 of the Explanatory Note, the Commission states its powers as follows: 'If the selection of the relevant documents for the investigation is not finished during the inspection on the undertaking's premises, the copy of the data still to be searched is secured by placing it in a sealed envelope and the undertaking will be provided with a duplicate. The Commission commits to return the sealed envelope to the undertaking or to invite the undertaking to attend the opening of the sealed envelope at the Commission premises and assist in the continued selection process.'

It is clear from the practice of the Commission and the AMO that both rely on the legality of the 'envelope procedure', similar to that which was confirmed by the Court in *AM&S*²⁵ and *Akzo Nobel*²⁶ with respect to legal professional privilege (LLP) issues. The rationale of this procedure seems to be that when the competition authority takes away documents in sealed envelopes, it creates a presumption that such documents are not in its full possession. Hence, it does not interfere with the LLP or fall outside the scope of the inspection.

2.2. DECISION IN *ŠEVT* CASE

Although the removal of a copy-image of an entire hard drive that also contained private documents and communications of employees was the main objection against AMO's inspection, the Supreme Court remained silent on this issue. In fact, it completely ignored this objection. The judgement was based on finding formal errors in the authorisation, an issue taken into consideration on an *ex officio* basis by the court (that fact was not subject to an objection by applicant). The Court did not give

²⁵ Case 155/79 *AM & S Europe v Commission* [1982] ECR 1575.

²⁶ Joined Cases T-125/03 and T-253/03 *Akzo Nobel Chemicals and Akcros Chemicals v Commission* [2007] ECR II-3523.

any guidance on this crucial issue, even though it had a rather good opportunity to do so. However, it is clear from the rationale of Slovak court actions against an illegal interference by public authorities that such an objection is admissible and that remedy against illegal actions during inspections could be sought separately from challenging the legality of an inspection order.

2.3. DECISIONS IN *NEXANS* AND *PRYSMIAN* CASES

The General Court rejected as inadmissible the objections of the applicants regarding the making of image-copies of entire hard drives and their physical removal from company premises in order to be inspected in Brussels. The General Court found that the challenged actions (taking away from the inspected premises) did not constitute a decision within the meaning of Article 230 Treaty Establishing European Community (now Article 263 TFEU). An answer to the question of the legality of the ‘envelope procedure’ regarding image-copies of whole hard drives was therefore not given, even in the form of *obiter dictum*.

The General Court suggested three situations when inspectors’ actions taken during an inspection can be challenged: action for annulment of the final decision on a competition law infringement, action for annulment of the procedural decision ordering to submit certain documents or information, and action against the Commission for non-contractual liability if the removal caused harm to the inspected company or other person. Thus, the Court not only refused to rule on the legality of the ‘envelope procedure’ regarding image-copies, but also took the view that there is no effective immediate remedy against actions of Commission inspectors during the inspection. This last conclusion could be more alarming than the stand taken in the case itself because it could result in the withholding, or at least limiting, of safeguards against abuse required by the principle of proportionality under Article 8(2) ECHR.

2.4. TAKING AWAY OF IMAGE-COPIES FROM THE PREMISES OF INSPECTED COMPANY AND THE ECtHR PERSPECTIVE (*BERNH LARSEN HOLDING* CASE)

What must be mentioned when dealing with the legality of taking image-copies of entire hard drives is a recent judgment of the European Court for Human rights (ECtHR) in the *Bernh Larsen Holding* case²⁷. This ruling could be relevant here from two points of view: first, it deals with the conformity of removing from company premises of a copy of an entire disk; second, the facts and legal basis of the case are very similar to those in *Nexans*, *Prysmian* and *ŠEVT*.

The applicants complained under Article 8 ECHR about a demand made by Norwegian tax authorities to submit for inspection, at the premises of the tax office, a backup copy of a computer server used jointly by three companies (in the context of a tax audit at Bernh Larsen Holding). The similarities with the above competition cases were as follows: there was no explicit legal provision empowering inspectors

²⁷ *Bernh Larsen Holding AS and Others v. Norway*, no. 24117/08, 14 March 2013.

to take away a copy of an entire disk²⁸, the copy also contained documents outside the scope of the tax audit and finally, the authorities used the ‘envelope procedure’.

First, the ECtHR found that, without any explicit provisions, the rationale of Norwegian tax law makes it possible to consider the contested actions of tax inspectors as ‘in accordance with the law’ in the sense of Article 8 ECHR.

Second, the ECtHR assessed the ‘envelope procedure’ as a sufficient safeguard to maintain proportionality of public interference into the private sphere. On the one hand, the intrusion was particularly far-reaching in that the backup contained copies of all existing documents on the server, including large quantities of material that was not relevant for tax assessment purposes, *inter alia*, private correspondence and other documents belonging to employees and persons working for three different companies. On the other hand, the ECtHR recalled various limitations in existence in Norwegian tax law to the effect that section 4-10 (1) Tax Assessment Act did not confer on tax authorities an unfettered (unencumbered) discretion, notably with regard to such matters as the nature of the documents that tax authorities were entitled to inspect, the object of requiring access to archives and of authorising the taking of a backup recording. Norwegian tax law contained the following limitations and safeguards in particular: a right to complain, the backup copy being placed in a sealed envelope that was deposited at the tax office pending a decision on the complaint, the right of the investigated subject to be present when the seal is broken (except where that would cause considerable delay); the duty of those responsible for the audit to draw up a report, the right of the investigated tax subject to receive a copy of the report; and the duty of the authorities to return irrelevant documents as soon as possible. After completing the review, the data copy would either have to be deleted or destroyed and all traces of the contents would have to be deleted from the tax authorities’ computers and storage devices. The authorities would also not be authorised to withhold documents from the material that had been taken away unless the tax subject agreed to it. The Court stressed additionally that the use of the disputed measure had in part been made necessary by the applicant companies’ own choice seeing as it opted for “mixed archives” on a shared server, making the separation of user areas and document identification more difficult for the tax authorities²⁹.

The administrative nature of the inspection and the administrative character of sanctions resulting from its obstruction was seen by the ECtHR as a further reason for a more lenient approach to the infringement of privacy. ‘It should also be observed

²⁸ Under section 4–10 (1) Tax Assessment Act (*ligningsloven*) of 13/06/80, tax authorities are authorised to order a taxpayer: ‘(a) To present, hand out or dispatch its books of account, vouchers, contracts, correspondence, governing board minutes, accountancy minutes and other documents of significance with respect to the tax assessment of the taxpayer and the audit thereof. ... (b) To grant access for on-site inspection, survey, review of the companies’ archives, estimation etc. of property, constructions, devices with accessories, counting of livestock, stock of goods and raw materials, etc.’ Under section 4–10 (3), when so required by the tax authorities, the taxpayer had a duty to attend an investigation as described in section 4–10 (1), to provide necessary guidance and assistance and to give access to office and business premises.

²⁹ *Bernh Larsen Holding AS and Others v. Norway*, no. 24117/08, § 173, 14 March 2013.

that the nature of the interference complained of was not of the same seriousness and degree as is ordinarily the case of search and seizure carried out under criminal law, the type of measures considered by the Court in a number of previous cases (see, for instance, the following cases cited above: *Funke*; *Crémieux*; *Miailhe*; *Niemietz*; *Société Colas Est and Others*; *Buck*; *Sallinen and Others*; *Wieser and Bicos Beteiligungen GmbH*; and also *Robathin v. Austria*, no. 30457/06, 3 July 2012). As pointed out by the Supreme Court, the consequences of a tax subject's refusal to cooperate were exclusively administrative³⁰.

It must be noted in conclusion that the *Bernh Larsen Holding* ruling was in fact opposed by the president of the chamber, Isabelle Berro-Lefèvre, as well as Judge Julia Laffranque. They both were of the opinion that the contested legislation was not sufficiently precise to support the approach of the Norwegian tax authorities. The measures taken were seen as non-proportionate to the objectives and interests of those being interfered with: 'In sum, we consider that the order to hand over a backup tape on which all or most of the companies' documents were kept greatly exceeded the wording of the legal provision, from which no such power could be deduced. We conclude that the domestic law does not indicate with sufficient clarity the scope and manner of exercise of the authorities' discretion in the area under consideration, and that the interference was in any event disproportionate. There has been a violation of Article 8 of the Convention'³¹. From the reasoning of the majority a tendency seems to be evident of taking into account the effectiveness of the investigation performed by administrative bodies. By contrast, the minority spoke in favour of scrutinising every instance of interference into an individual's rights and freedoms without regard to the effectiveness of the investigation or the comfort of public authorities.

In order to be legal under Article 8(2) ECHR, the following prerequisites for taking copies of entire storage media (also including data outside the scope of the investigation) are crucial in ECtHR's opinion: the possibility to make a copy of an entire storage media shall be clearly deducible from legislation, access to data other than that within the scope of the investigation shall be procedurally and technically limited, effective safeguards against abuse and judicial control shall be provided, all data outside the scope of the investigation shall be destroyed as soon as it is not necessary to hold the whole copy of the storage medium. Concerning requirements laid down by the ECtHR, judicial control shall be effective and immediate, that is, courts should be able to order, already in the early stage of the investigation, to preclude the use of a copy or to have it destroyed. Hence, the combination of the exclusivity of the powers of the Court of Justice of the EU to scrutiny Commission inspections in competition matters and the lack of the possibility to file an actions against Commission measures other than its decisions (confirmed by the General Court in *Nexans* and *Prysmian* cases) means that there is no immediate judicial remedy against actions performed by Commission inspectors during the inspection.

³⁰ *Bernh Larsen Holding AS and Others v. Norway*, no. 24117/08, § 173, 14 March 2013.

³¹ Dissenting Opinion of Judges Berro-Lefèvre and Laffranque, *Bernh Larsen Holding AS and Others v. Norway*, no. 24117/08, § 173, 14 March 2013.

IV. Conclusions

Both the General Court and the Slovak Supreme Court had in their respective cases an opportunity to scrutinize the practices of competition authorities (the Commission and the AMO respectively) regarding the reasoning of inspections as well as regarding powers of the competition authorities to remove an image-copy of an entire storage media (notwithstanding the fact that it contains data that is not within the scope of the inspection) from the premises of the inspected undertaking and to analyse it at the premises of the competition authority.

Although parts of the *Nexans* and *Prysmian* judgments concerning the reasoning of inspection decisions might cause unease for competition authorities, they have ultimately brought nothing new to the EU legal order and merely confirmed well-established jurisprudence. They do not make it so that the Commission must provide specified evidence of an infringement or that it is only allowed to inspect suspected offenders. These judgements mean only that the Commission shall diligently provide grounds for every part of its inspection decisions and that these grounds shall be based on relevant indicia. In other words, the Commission cannot base its reasoning on non-existing evidence.

The Commission shall refrain from ‘fishing expeditions’, that is, ungrounded inspections without a certain subject matter. However, this does not stop the authority from extending the scope of its investigation and inspections to other sectors or geographic areas than those specified in the leniency application or complaint (that might have caused the inspection in the first place). Still, an extension of such sort should be grounded in a sound economic analysis or other theory that makes it possible, on the grounds of existing indicia, to expect a broader scope of the infringement than that already known to the authority. Furthermore, the level of the precision of reasoning given grows in proportion to the seriousness of the interference into an individual’s rights. As a result, relevant grounds for an inspection (seen as a privacy intrusion) act as the basic safeguard against abuse. The necessity and proportionality of the measure must thus be evident from the reasoning of the inspection.

Though the Slovak Supreme Court analysed the formal prerequisites for an authorisation of inspections on its own initiative, it did little more but note that the Administrative Code shall be applied accordingly, and that the authorisation shall contain an official seal and evidence number. There is no reference here to reasons for the authorisation. The Supreme Court wasted therefore an opportunity to provide guidance on this problematic issue.

Neither the General Court nor the Slovak Supreme Court solved the problem or gave answers to the applicants’ complaints regarding the issue of making image-copies of entire hard drives. The General Court did it because it lacks competence in this matter (inadmissibility of such action according to EU law). The Supreme Court simply ignored this objection and no further ruling can be expected here because of the one-instance procedure applicable to the Slovak case. By contrast, *Nexans* appealed the 1st instance judgement of the General Court. It will be interesting to see what approach the Court of Justice will take when reviewing this matter in the future (case C-37/13 P).

The ECtHR found the ‘envelope procedure’ to be an efficient safeguard against abuse, but it also spoke of another necessary safeguard in this context – the availability of immediate judicial review of the procedure. It is unlikely that the Court of Justice will consider annulling a part of the General Court’s judgement on this ground because this issue does not seem to be mentioned in the appeal. So whilst the Court of Justice of the European Union opted for a narrower interpretation of the notion of the act reviewable by the action for annulment, the legality of the inspection procedure will be put in danger because of the lack of effective judicial remedy required under Article 8 ECHR designed to scrutiny performance of the inspection.

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