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Helene Andersson, *Dawn Raids under Challenge. Due Process Aspects of the European Commission's Dawn Raid Practices* Hart Publishing, 2018, 286 p.

The year 2018 brought about another important publication that approaches the issue of the European Commission's dawn raid practices in competition cases from a fundamental rights perspective. *Dawn Raids under Challenge* constitutes the doctoral dissertation of Helene Andersson, postdoctoral researcher and lecturer at the University of Stockholm who formerly worked for almost 12 years in a Swedish law firm. Thus, the Author's experience as practitioner and, in particular, her extensive expertise in cartel issues, undoubtedly constituted an added value to her academic research.

At the heart of this study lies the question whether it is possible to strike a balance between ensuring adequate fundamental rights protection and effective competition law enforcement. Each of the opposing interests carries a certain weight.

On the one hand, fundamental rights protection has been elevated to primary EU law through the Lisbon Treaty, and companies facing the Commission's investigations have a legitimate interest in safeguarding their rights. Indeed, dawn raids may cause irreparable damage to the companies inspected, in particular, measures undertaken by the officials in an abusive or arbitrary way may have a long-lasting and adverse impact on the companies' right to defence.

On the other hand, competition policy forms one of the cornerstones of the EU legal system and a successful dawn raid is quite often key to a successful investigation. Due to the speed of technological development, and the increasingly sophisticated methods applied by companies to conceal any unlawful contacts, the Commission is actually forced to constantly adjust and develop its investigatory methods. Thus, extending the scope of the protection of companies' rights, to go beyond what is necessary, may unduly hamper the work of the Commission and, consequently, significantly hinder the effectiveness of competition law enforcement.

The book is composed of three main parts that are further divided into chapters.

The first part – *Overview* (46 p.) consists of an introduction of the relevant background of the study. After having briefly identified the scope of the study, Andersson presents two 'weights on the balancing scale'. An overview of the EU competition law enforcement system (Chapter 2) is followed by a presentation of the framework for fundamental rights protection in the EU (Chapter 3). At the end of the first part, the Author ponders

over the question of a criminal nature of the sanctions imposed for infringements of EU competition rules (Chapter 4). In the original text of Andersson's doctoral dissertation, *Overview* also included a chapter on the principle of proportionality. The principle of proportionality constitutes a supreme guideline limiting the Commission's powers and its immense importance in the context of dawn raids is incontestable (a fact further confirmed by the case-law of relevant courts). Thus, I find it unfortunate that the original chapter was eventually removed from the book.

After having highlighted the inherent tension between the need for a well-functioning and effective competition law system and the necessity of safeguarding fundamental rights, the Author moves to the examination of the Commission's dawn raid practices in order to determine whether they meet the standard of the European Convention on Human Rights (hereinafter: ECHR) as required by Article 52(3) of the Charter of Fundamental Rights of the EU. Indeed, the second – part *The Inspection: Is There a Clash between EU and Convention Systems?* (183 p.) constitutes the core of the book in which Andersson provides a step by step analysis of several selected due process issues that arise in relation to dawn raids, that is, the right to enter (Chapter 6), including the right to privacy, (lack of) ex ante review of inspection decisions and standard of the ground for suspicion, dawn raids in sector inquiries (Chapter 7), measures taken during the inspection (Chapter 8), privilege against self-incrimination (Chapter 9), legal professional privilege (hereinafter: LPP) (Chapter 10), access to courts (Chapter 11) and dawn raids at non-business premises (Chapter 12). The analysis is based on a careful examination and comparison of the case-law of the European Court of Human Rights (hereinafter: ECtHR) and the Court of Justice of the European Union (hereinafter: CJEU).

With regard to the right to privacy, in the Author's view, the EU and ECHR systems appear to afford an equivalent standard of protection, acknowledging that legal persons do enjoy protection, but not necessarily to the same extent as natural persons.

In relation to the issue of ex ante review, neither the ECtHR nor the CJEU consider an ex ante review to form an absolute requirement as long as there are other procedural safeguards in place, in particular subsequent judicial review.

One of further safeguards available under the EU system is namely the obligation on the part of the Commission to state the reasons for an inspection. The conducted analysis shows that as long as the Commission has reasonable grounds to suspect an infringement, then the use of dawn raids will be regarded as meeting the suitability, necessity and proportionality *stricto sensu* tests. And a dawn raid carried out without reasonable suspicion, equaling to a so called fishing expedition, would constitute a breach of both Article 8 of ECHR and Article 7 of the Charter.

The examination of the question of dawn raids conducted within sector inquiries leads to the conclusion that absent any suspicion of wrongdoing, such dawn raids carried out based on a Commission decision are abusive and constitute an infringement of companies' right to privacy. The Author notes further that since the Pharma Sector Inquiry there has only been one sector inquiry (e-commerce) and finds that it would be unfortunate if the uncertainty regarding the lawfulness of such dawn raids led namely to the Commission's powers being on the brink of disuse.

Andersson discusses next the scope of the Commission's powers during the course of dawn raids and marks that, first, while it appears necessary to allow the Commission to carry out a rather broad search for information during the course of an inspection, the inspectors are not allowed to actively search for evidence of infringements unrelated to the subject-matter of the inspection and, second, the Commission is allowed to copy to file only material that relates to the subject-matter indicated in the inspection decision. As to the question of conformity of the EU system with the ECHR standard, the Author points out that despite the different approaches, both courts appear to take a rather flexible view and acknowledge that authorities may need broad, although by no means unrestrained, powers to access information and peruse documents. However, the ECtHR is willing to accept even far-reaching measures (like making IT copies of a company's servers and other storage media for subsequent review in Brussels) only provided that the safeguards against abuse or arbitrariness are considered effective and adequate, in particular the right to a proper judicial review of the measures taken during the dawn raids and application of the sealed envelope procedure. Neither of these is guaranteed under the EU system. Thus, the Author believes that while the Commission's practices appear both balanced and reasonably restricted, limited access to courts constitutes a weakness of the EU system that may affect the legitimacy of the Commission's enforcement practices.

The subsequent analysis of the scopes of the privilege against self-incrimination, being of relevance in antitrust cases due to the acknowledged criminal nature of fines imposed in antitrust proceedings, leads to the conclusion that the EU standard of protection appears to be slightly lower than the one enshrined in the ECHR. Nevertheless, prudent in her considerations, Andersson notes that – save for the limited possibilities to obtain a judicial review of questions posed in the course of an inspection – the EU standard might be accepted by the ECtHR since competition cases relate to legal persons (not natural) and fall outside the core meaning of 'criminal offence'. In the Author's view, the protection afforded by the CJEU strikes '*an acceptable, if not perfect, balance between the need for effective competition law enforcement and the protection against having to incriminate oneself*'. The existence of an absolute protection would go beyond what is necessary to safeguard the companies' right to defence and would unjustifiably hinder the performance of the Commission's duties under Regulation 1/2003.

The further examination of the protection of LPP in the EU leads Andersson to a firm conclusion that the scope of LPP granted by the CJEU is unjustifiably narrow, since it covers neither correspondence with non-EU lawyers (even those admitted to the bar) nor correspondence with external lawyers but unrelated to the investigation at stake. On the other hand, the Author believes that limitation of the privilege to cover only correspondence between a company and its independent counsels is both rational and logical. Furthermore, Andersson points at an important weakness in the ECHR system revealed in *Vinci Construction*, that is, the fact that the ECtHR, instead of being concerned by the sole fact of privileged documents being copied by the authority, focuses actually on the standard of judicial review of such a measure and the possible restitution of the contested documents. I fully agree with the Author's

view that ordering the restitution of any documents covered by LPP cannot constitute an effective remedy, since this would mean that the authorities would already have had time to peruse the privileged documents. And, as repeated after the president of the General Court in *Akzo, 'the mere disclosure of privileged documents may cause irreparable harm'*.

Access to courts appears to be a due process issue of key importance in the context of dawn raids. This chapter reveals significant discrepancies between the standard of protection afforded under the EU and the ECHR systems. In the current EU system, first, companies do not have a right to a timely, certain or effective judicial review of measures taken during the course of a dawn raid, and, second, EU Courts lack jurisdiction to direct the actions of the Commission. The ECHR standard in this regard should not be considered too high, since it would not result in unjustified hindrance to the performance of the Commission's duties under Regulation 1/2003. On the contrary, it actually allows a very flexible approach towards the investigative methods adopted by competition authorities.

Last but not least Andersson briefly examines the possibility to conduct dawn raids at non-business premises. The Author notes that the procedural safeguards regarding dawn raids of non-business premises are higher than those related to company premises (in particular the requirement of an authorization from a national court). Otherwise, considerations presented in the previous chapters are also applicable to cases regarding non-business premises, in particular as many of the ECtHR rulings have concerned natural persons.

In the third part of the book – *Summing up* (31 p.) the Author not only summarizes the conclusions presented at the end of earlier chapters relating to the identified due process issues but also *'joins the dots'*, that is, provides the answer to the main question of the study. Andersson concludes namely that, yes, it is possible to strike a balance between the conflicting interests of adequate fundamental rights protection and effective competition law enforcement. However, due to a number of concerns identified in the study, and some hurdles that have to still be overcome, such a balance does not exist currently/already. Having emphasized that striking a balance does not necessarily equate '*establishing conformity with ECHR law*', the Author divides the main concerns into two categories, namely those regarding, first, the limited access to courts, and, second, the scope of the LPP.

Since the Commission's powers to adopt intrusive investigatory measures need to be effectively counterbalanced by adequate safeguards against abuse or arbitrariness, in the Author's view, the sole limitation for companies to have measures taken on the basis of inspection decisions reviewed by the court (in particular making image copies of storage media for review at Commission headquarters) risks affecting the legitimacy of the entire dawn raid system.

As to the second category relating to LPP, the Author points out two limitations which do not serve the interest of proper administration of justice, and therefore result in the right of defence of companies being unjustifiably limited. Those are the exclusion of correspondence with external lawyers admitted to non-EU bars and of correspondence which is unrelated to the subject matter of the investigation.

Andersson presents her study in a scrupulous and objective way, acknowledging the importance of both interests concerned. Emphasizing the need of proper procedural safeguards being available to inspected undertakings, Andersson adds that *'it is equally important that they are not overprotective and constitute an unjustified hindrance to the Commission's work'.* In the Author's belief, that I fully agree with, founding and striking the requested balance will actually lead to a greater efficiency of the EU competition law enforcement system. By ensuring adequate fundamental rights protection, the enforcement system will not only gain further legitimacy, it will also be more effective as the Commission's actions will be less contestable on procedural grounds.

Having discussed the merits of the Andersson's study, some minor comments on the formal aspects of the book are to be made. For the sake of coherence, it would be preferable to unify, first, the order of the subchapters presenting the courts views, and, second, the names of such subchapters. In relation to some issues the Author starts her analysis with the ECtHR approach while in relation to others Andersson begins with the CJEU approach. However, it would be more logical to have a fixed order when it comes to the presentation of the case-law. Likewise, the Contents would have been more transparent and reader friendly if the titles of the subchapters presenting the courts' views and conclusions had been unified in all chapters of the second part of the book. Lastly, one may wonder why, on the one hand, three important due process issues – right to privacy, ex ante review and ground for suspicion, were combined into one long chapter (51 p.) and, on the other hand, the issue of dawn raids in sector inquiries (closely linked to the issue of ground for suspicion) was put into an individual chapter (of only 8 p.).

Those minor comments do not, however, compromise the high quality of the presented study which is followed by an important selection of Anglophone literature and relevant jurisprudence as well as a very useful index. I definitely recommend the reviewed book to both practitioners and researchers specializing in competition law.

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