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A CRITICAL ANALYSIS OF THE INVESTIGATIVE AND PROCEDURAL POWERS OF THE EUROPEAN COMMISSION IN IMPLEMENTING COMPETITION LAW

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Abstract

This article critically discusses the powers held by the European Commission in enforcing competition law within Europe and in other territories. The article contains an analysis of current commentary of the enforcement of competition law and comparison between opinions that the Commission's powers are too great and suggestions that its powers are not potent enough to ensure competition is protected in Europe.

Keywords: Competition Law, European Law, Cartels, European Market.

Introduction

Competition law is an area which is concerned with maintaining a single European Market that is as close to a 'perfect market' or a 'free market economy' as possible. Although this 'perfect market' principle 'bears little relation to reality', many governments have provisions for competition policy, to help reach such ideals, and the means by which competition policy is implemented.¹ is known simply as competition law. A 'free market economy' is a concept originally attributed to Adam Smith, which involves a market where there are no artificial obstacles, such as price controls, meaning it can flourish through the natural fluctuation of supply and demand.² In the context of competition law, the 'free market' must also not be hindered by restrictions created by businesses within it that may conspire to 'fix prices'³ or distort the market in any other way. However, even the application of a 'free market economy' must utilise at least basic regulation and governmental influence, such as with the protection of personal rights of ownership through property law and transactional rules through contract law. Moreover, interference and regulation is also necessary where there are policy reasons to maintain it such as with the health sector and basic utility services. In

¹ Jones, A., and Sufrin, B., *EU Competition Law; Text, Cases and Materials* (2014, 5th Edition, Oxford University Press), p.1.

² Smith, A., 'The Wealth of Nations', (1776) reprinted in 1999 by Penguin Books.

³ An issue recognised by Smith also.

these situations, although it would be possible for private companies to make a profit whilst participating in the market, there are clear benefits to governmental intervention in maintaining a fair supply.

There are many reasons for a government to promote the exercise of a free market through enforcing competition law. Although the concept of a free market can be seen as 'stylised and abstract'⁴, the features of such a market are clearly beneficial. The main benefits include the presence of a multitude of buyers and sellers where the buyers can have clear access to information on particular products and new products can enter the market freely. As a result, competition law is partly based on the principle of protecting consumers and ensuring that they also receive a benefit at the same time as an undertaking. Part of the justification for merger control in competition enforcement is to prevent significant monopolies on a particular market; this in turn protects and supports innovation in products and services as where there is a monopoly, undertakings are not compelled to improve their products⁵. Therefore, by maintaining a market with many sellers from whom consumers can choose, products constantly improve to allow undertakings to gain an advantage over their competitors.

The goals of competition law also include the promotion of integration between Member States (MS's) and the 'promotion of effective and undistorted competition'⁶, however, it would appear that the most important goal is securing efficiency in the marketplace. Marketplace efficiency can be broken down in to three identifiable types; 'allocative', 'productive' and 'dynamic'. Allocative efficiency, a concept first developed by Vilfredo Pareto, outlines where the market price of a product is equal to its marginal cost. The resulting equilibrium ensures that only product for which there is already demand is created. The second principle is that of productive efficiency. This is similar to allocative efficiency as it results from a perfectly competitive market in which all manufacturers produce goods at the lowest price possible and so any improvements to the price of development are passed on to the consumer. Finally, dynamic efficiency is determined mostly by innovation but is still influenced by competitiveness. This concept of efficiency is argued to be delivered better by a monopolistic market⁷, which is an argument that many economists would disagree with and most enforcers of competition law would avoid. The confusion as to the most economically efficient and successful method of a market means that the enforcement of

⁴ Graham, C., *EU and UK Competition Law*, (2014, 2nd Edition, Pearson Publishing) p.20.

⁵ Motta, M., *Competition Policy* (CUP 2004) pp.56-7.

⁶ Bishop, S., and Walker, M., '*The Economics of EC Competition Law: Concepts, Application and Measurement. University Edition*'(2010, 3rd Edition, Sweet & Maxwell), p.5.

⁷ Schumpeter, J. A., '*Capitalism, Socialism and Democracy*'(1942, Routledge).

competition law cannot be seen as an exact science, as there will always be an argument that the wrong form of competition is being enforced. This creates difficulties for competition authorities such as the European Commission as the ‘trade-offs’ made between the different types of efficiency may have an adverse effect on the market.

Despite the confusion as to what specifically the Commission should be enforcing to protect the free market, there is still a need to maintain it using fair and effective enforcement of competition law. As a result, the European Commission has been granted a wide range of extensive powers to ensure the market is able to operate optimally. The significant impact the Commission can have on the progress of undertakings and the fines it can impose have fuelled criticism for the extent to which it should be able to exercise such powers. There is no doubt that the role carried out by the Commission is essential to protecting the European Market, and therefore care should be taken in recommending any restrictions of its powers, yet there is a clear need to examine how it implements such rules and whether there is always a benefit balanced against the adverse effects on undertakings.

Such powers that often come under scrutiny include the Commission’s investigatory abilities to demand information and conduct Dawn Raids at premises of undertakings. The disruption caused to employees and the negative publicity involved highlights the importance of maintaining efficient checks and balances on the actions and powers granted to the Commission. Following from such investigations, the Commission will often impose fines on undertakings for breaking either substantive competition law, in the form of anti-competitive behaviour, or procedural law, by not fully complying with the instructions of the Commission and its inspectors. An undertaking is capable of breaching competition law in a number of ways including by abusing its dominant position in the market, taking part in anti-competitive practices with other undertakings (cartels) or attempting mergers that would result in an unfair distortion on the market. The power held by the Commission to fine for procedural and substantive breaches of competition law is an interesting and controversial area as it clearly needs to have the ability to fine undertakings in order to both punish and deter, however the extent to which it should be able to do this for minor procedural breaches that may have had no impact on the market is controversial.

1 Powers of Investigation

Request for information

In order to perform its job as an enforcer of competition policy through prohibiting anti-competitive activity, the Commission has been granted certain powers of investigation as

'detection of infringements of competition rules is difficult'⁸ in its very nature. The success of recent enforcement of competition law by the Commission has '...been largely dependent on efficient and effective investigatory tools'.⁹ These powers have often come under scrutiny for being too broad and too far reaching. As will be examined later, it is arguable that the balance between effective enforcement of competition law and the adequate protection of the fundamental rights of natural and legal persons has not yet been achieved, meaning that some form of development in the way of safeguarding the powers of the Commission and National Competition Authorities (NCA's) in a more efficient manner is still needed.

Under the Modernisation Regulation,¹⁰ it has been outlined that complaints concerning breaches of competition law¹¹ can be made to either the Commission or the NCA in the area, both of which can undertake investigations and formal proceedings against undertakings. The national courts are then able to hear cases involving breaches of Articles 101 and 102 Treaty on the Functioning of the European Union (TFEU). After investigative proceedings have begun, the Commission can 'by simple request or by decision, require undertakings and associates of undertakings to provide all necessary information' including the MS's government and NCA's¹², as a right given under Article 18¹³ of the Regulation. This created some confusion at the time, as the term 'necessary information' was ambiguous and required defining by the court. In *SEP*¹⁴, the undertaking brought an action to annul a Commission decision after being '...condemned...for failing to comply with a request for information',¹⁵ the General Court¹⁶ (GC) stated that the term must be interpreted with reference to the purposes for which the Commission was conferred its powers of investigation and the information must be related to the presumed infringement at that stage of proceedings,¹⁷ which was upheld by the Court of Justice of the European Union (CJEU)¹⁸.

Many agree that these '*...formal powers are crucial for obtaining information when undertakings do not provide it voluntarily*'¹⁹ however, this is the first area of concern with

⁸ Fairhurst, J., *Law of the European Union*, (2012, 9th Edition, Pearson Education Ltd), p.743.

⁹ Anderson, H., 'Dawn Raids under challenge', (2014) 35(3) *ECLR* 135, p.135.

¹⁰ Council Regulation (EC) No 1/2003, OJL1, 4.1.2003 pp1-25.

¹¹ Complainants should provide the Commission/NCA's with any and all relevant information in their possession. See Form C (Annex to Reg.773/2004) and Section 13.D, p.1071.

¹² Council Regulation (EC) No 1/2003, OJ L1, 4.1.2003 pp1-25, Article 18(6).

¹³ *Ibid*, Article 18.

¹⁴ Case T- 39/90, *SEP v. Commission* [1991] ECR II-1497.

¹⁵ Ezrachi, A., *EU Competition Law; An Analytical Guide to the Leading Cases*, (2014, 4th Edition, Hart Publishing), p.502.

¹⁶ Previously the Court of First Instance.

¹⁷ Case T- 39/90, *SEP v. Commission* [1991] ECR II-1497, at para.29.

¹⁸ Case C- 36/92P, *SEP v. Commission*, [1994] ECR I-1911.

¹⁹ Jones, A., and Sufrin, B., *EU Competition Law* p.939.

regards to the powers of the Commission. This is because the Commission itself has discretion as to what information it deems relevant for its investigation and can issue fines to anyone who fails to comply with a request by giving misleading or incorrect information.²⁰ The maximum fine has been raised from previous years in the new Regulation to a total of 1% of the undertaking's turnover in the preceding business year,²¹ indicating the importance of fair application of this right. The increase was an attempt to combat the difficulty caused by inflation that had 'eroded the effectiveness of the penalties provided'²² in the previous regulation, which outlined a specific monetary value. Therefore it could appear that the percentage outlined does not raise the fine value on the undertaking but simply maintains a steady representation of their liability. 1% appears to be a nominal fine considering the size and turnover of some of the undertakings in question. The failure to disclose information after a request or demand should surely bring with it a higher fine, as otherwise there is a possibility for undertakings to avoid liability for the actual infringement of competition law that brings with it much higher fines.

Despite the possible shortcomings of the Commission's fining ability regarding a request or demand for information, recent judgments by the GC have supported and upheld the investigative powers of the Commission.²³ The GC has held that the Commission has the ability to request information where it reasonably expects it will determine that an alleged infringement took place, and that the Commission is not obliged to have any information establishing the existence of infringement prior to a request for information from an undertaking. Although this indicates an extreme strength on the Commission's part, as there is little need for thorough investigation prior to a request, it would appear that such a decision is fair in that it would be unreasonable to expect the Commission to be able to obtain documents that incriminate an undertaking without information directly from it. However, the cases above at least outline that, although the Commission's request for information can be broad and that there is still some uncertainty as to the parameters of what they can request, it cannot go on a 'complete fishing expedition' as the court is likely to hold that the request was not necessary.²⁴ A decision for the demand of information under Article 18(3) must contain specific information including its legal basis; the purpose of the investigation and the information required of the undertaking. The decision must also clearly

²⁰ Regulation 1/2003, Article 23(1)(a).

²¹ For fines, generally see Section 8.G, p.994 ff.

²² Riley, A., 'Saunders and the power to obtain information in Community and United Kingdom competition law', (2000) 25(3) *EL. Rev* 264, p.265.

²³ Cases T-292/11, T-293/11, T-297/11, T-302/11, T-305/11 and T-306/11, 14 March, 2014.

For a summary on the outcome of these cases see: 'European Commission welcomes General Court judgments confirming its investigatory powers.', [Comp. Law. 2014, 35\(6\), 174](#)

²⁴ Jones, A., and Sufrin, B., *EU Competition Law* p.940.

include a time limit along with a warning of the fines the undertaking will be liable for if it does not comply and a notice specifying that the decision can be reviewed by the court.²⁵ These strict specifications mean that the Commission would appear to be restricted in exercising its powers. These safeguards mean that the undertaking subject to a request or demand is entitled to a judicial remedy if they feel that a request has been made with no reasonable suspicion on the part of the Commission, as these legal reasons would need to be outlined in the request.

Dawn Raids

Along with the powers of the Commission to request or demand information from undertakings and other relevant parties, the ‘most powerful weapon available...is by far the powers to carry out unannounced inspections, dawn raids’.²⁶ Under Article 20 of the Regulation, the Commission may ‘conduct all necessary inspections of undertakings or associations of undertakings’²⁷ which are usually undertaken by the relevant NCA’s with its authorisation. There are two types of inspections available, either a ‘voluntary’ inspection²⁸ which poses little in the way of criticism and complaint as, although it requires officials to produce written authorisation, undertakings are under no legal obligation to comply with the inspectors. However, the second form of inspection, known as a ‘mandatory inspection’ or ‘Dawn Raid’ requires²⁹ that the Commission must have a Decision beforehand. This allows the Commission’s inspectors to enter the undertaking’s premises; homes of directors, managers or staff that may have business records; examine copy and remove documents and check emails³⁰. Under the new Regulation, these activities that the Commission were empowered to perform are extended to be able to conduct interviews and seal off the premises or certain records³¹ in order to ‘protect competition effectively’³². These ‘Dawn Raids’ do not require advance notice³³ to be given to the undertaking but it is obliged to cooperate. They do not require the presence of a lawyer and generally the inspectors will only wait a short time before beginning their examination of documents and records. As a result, they can be extremely disruptive to a company both in the business sense and

²⁵ Regulation 1/2003, Article 24.

²⁶ Anderson, ‘Dawn Raids’, p.135.

²⁷ Regulation 1/2003, Article 20(1).

²⁸ Article 20(3).

²⁹ Article 20(4).

³⁰ These powers were originally set out in regulation (Art 14(1) Regulation 17/62).

³¹ Regulation 1/2003, Article 20(2).

³² Fairhurst, *Law of the European Union*, p.743.

³³ Case 136/79 *National Panasonic (UK) Ltd v Commission* [1980] ECR 2033.

personally for members of staff subjected to such a frightening experience.³⁴ Furthermore, these 'Dawn Raids' are a frequent tactic used by the Commission and NCAs and there are many recent examples of such cases in the UK³⁵. Many consider that '...community competition law seems to have given more prominence to the effectiveness of the Commission's inspections than the protection of the rights of defence of undertakings'³⁶ and therefore the powers of inspection held by the Commission in relation to Dawn Raids is an area worth investigating as it would appear that, despite frequent outcry and complaints from companies, their powers are becoming stronger and they are more willing to inspect than ever.

Recent case law indicates that the Commission has developed its scope in relation to the requirement to obtain a decision before conducting a Dawn Raid. This is a particular area for concern that requires examination. The French NCA's case of *Société Colas Est*³⁷ indicated in 2004 that where an inspection had no prior Decision it had violated Article 8 of the ECHR (right to respect of private and family life). This judgment was based on the fact that there were few safeguards in place during the inspection and cases since have extended the Commission's ability to Dawn Raid properties without prior authorisation. This case raised the question of whether ex ante control on inspections is 'necessary for a system to meet the requirements of art.8'³⁸ as despite the ruling that the excessive inspections had violated the ECHR, the undertakings still suffered great detriment at the time of the inspections, which cannot be rectified.

Since 2004, other cases such as *Bernh Larsen Holding AS*³⁹ have supported and developed the idea of an 'overall assessment rather than viewing a prior judicial authorisation as an absolute requirement'.⁴⁰] In *Deutsche Bahn AG*⁴¹ the GC declared outright that there was no absolute need for judicial authorisation as long as there are effective safeguards in place during the inspections. The court specified that these safeguards included: the requirement

³⁴ In response to the increased use of Dawn Raids by the Commission and NCA's, some companies offer 'Dawn Raid Response Services' to help companies cope with the disruption caused. See for example: http://www.macroborts.com/content/content_431.html accessed on 02.02.2015.

³⁵ An investigation into oil company practices led to inspections at Shell's London Office and BP along with others. See <http://www.guardian.co.uk/business/2013/may/14/bp-shell-oil-price-rigging>, accessed online 02.02.2015

³⁶ Berghe, P. and Dawes, A., 'Powers of inspection', p.423.

³⁷ *Société Colas Est v France* (2004) 39 EHRR 17, See Buyse, A., 'Strings attached: the concept of 'home' in the case law of the European Court of Human Rights.' (2006) 3, *ECHR* 294-307.

³⁸ Anderson, 'Dawn Raids' p.136.

³⁹ *Bernh Larsen Holding AS v Norway* (24117/08) (2014) 58 E.H.R.R. 8

Anderson, 'Dawn Raids' p.137.

⁴¹ *Deutsche Bahn AG v Commission of the European Communities* (T-289/11) September 6, 2013 at [66]-[78].

for the Commission to provide reasons for their decision to inspect; the effective restrictions governing inspectors during dawn raids; the Commission may not use force during an inspection; National Authorities have the right to intervene or enforce the inspection; and, most notably, the undertaking is entitled to request a judicial review after the inspection.⁴² Although at the time it would have appeared that these safeguards counterbalanced the reduced requirement for a Decision from the Commission and ensured that the rights of undertakings were protected during investigations, subsequent cases would show otherwise. In the case of *Ravon*,⁴³ the appellant appealed against a warrant and inspection of his premises and home.⁴⁴ The courts saw these appeals as inadmissible because they were 'not empowered to review measures taken by the tax authorities once inspections had been affected'.⁴⁵ The judgement in relation to a tax authority is relevant to the progression of competition inspection powers as 'the powers of inspection of the French authorities in tax matters are similar in many ways to those of the European Commission in competition proceedings'.⁴⁶ Ravon could not review the legality of the inspections in court as no criminal charges were brought against him or his company. This quite clearly contravenes the principle of an appellant having access to a judicial review after such an inspection and the ECtHR agreed and decided that Art 6(1) of the ECHR had been infringed; they also stated that the right to judicial access 'implies with respect to premises searches, that the persons sought may obtain an effective judicial review in fact and law'⁴⁷ and that the presence of judicial authorisation for an inspection does not compensate for a lack of review. This case indicates the importance of a judicial review both in tax and competition inspections and highlights the need for such a review in the safeguards offered during a 'Dawn Raid'. The concept that the French in particular tried to adopt in preventing a judicial review where there was no infringement by an undertaking has been challenged on other occasions in competition law scenarios by the Strasbourg court who have stated unequivocally that such a restriction of review is an infringement of Article 6(1) as seen in *Primagaz*.⁴⁸

Despite the developments by the Strasbourg court to create an effective balance between the powers of inspection granted to the Commission and NCAs, by allowing them to inspect without a decision as long as there are effective controls in place to safeguard the rights of

⁴² *Deutsche Bahn AG v Commission of the European Communities* (T-289/11) September 6, 2013 at [74].

⁴³ *Ravon v France* (18497/03) Unreported February 21, 2008.

⁴⁴ The inspection was in relation to tax laws, however the court decision is equally relevant to competition inspections.

⁴⁵ Anderson, 'Dawn Raids' p.137, paraphrasing transcript of *Ravon v France* (18497/03) at [8]-[10]

⁴⁶ Berghe, P. and Dawes, A., 'Powers of inspection' p.408.

⁴⁷ *Ravon v France* (18497/03) at para [30].

⁴⁸ *Primagaz* (29613/08) December 21, 2010. See also *Société Canal Plus v France* (29408/08) Unreported, December 21, 2010.

the undertaking, the GC appears to not accept such developments in relation to the ex post control through judicial review. In the case of *Nexans*⁴⁹ and *Prysmian*⁵⁰ the GC annulled part of the inspection decisions⁵¹ on the grounds that they were too broad, yet did not allow the measures to be challenged regardless of the unlawful segments of the decisions. The court said that these individual measures could only be challenged when the undertakings came to challenge the final decision by the Commission, which had not yet been presented. This contradicts the standpoint taken by the Strasbourg court and has been criticised by commentators as ‘not satisfactory’ partly because it does not allow undertakings a reasonable time in which to file for judicial review, as the decisions by the Commission can take years.

Although the difficulties in ensuring the safeguards for undertakings and their rights is a key issue which needs more investigation and reform on the part of the Commission, one area in which it is argued that ‘Dawn Raids’ and their disruption are ‘sine qua non for effective competition law enforcement’⁵² is concerned with the current Leniency Notice.⁵³ The fines undertakings are liable to differ depending on whether they have infringed competition law or impeded investigations. The Leniency Notice allows undertakings an opportunity to reduce their fine if they come forward with information on a known anti-competitive cartel that they are involved with. If undertakings did not expect their collusion and documents linking them to such activity to be discovered outside of their offices, there would be no incentive to come forward with information (which is often vital to the Commission to proceed with their investigations). Therefore it is argued that the use of the Leniency Notice only works where ‘one cartel member... believes that the cartel risks being detected and punished without leniency’⁵⁴ as the fear of detection is sufficient to encourage the use of provided leniency regimes.

Electronic Data

Along with the ability to Dawn Raid premises without a decision and the hefty fines available for undertakings that do not comply with investigatory obligations, the Commission has also attempted to ‘to bolster its enforcement armoury and to minimise the risks of crucial

⁴⁹ *Nexans France SAS* [2013] 4 CMLR 6.

⁵⁰ *Prysmian and Prysmian Cavi e Sistemi Energia v Commission* (T-140/09) [2012] Unreported, November 14, 2012.

⁵¹ The court likened the measures under question to copy hard drives and computer files to the inspection decision and so treated them as one and the same.

⁵² Anderson, ‘Dawn Raids’ p.135.

⁵³ Commission Notice on Immunity from Fines and reduction of fines in cartel cases, OJ 2006, C 298/17

⁵⁴ Anderson, ‘Dawn Raids’ p.135.

electronic data going astray'⁵⁵ by introducing revised guidelines on Dawn Raid inspections in 2013⁵⁶. These guidelines allow official inspectors to request the temporary blocking of email accounts, administrator access rights to computers and other electronic forms of inspection such as on laptops and mobile phones.⁵⁷ Commentators such as Wood see this extension of the Commission's inspectorial rights as an attempt to combat the 'major enforcement headaches for competition authorities'⁵⁸ created through the increased reliance of businesses on electronic data and communication. The Commission enforces this form of obligation on undertakings through Regulation 1/2003 under Article 23(1)(c) in which businesses are required to 'submit to an inspection'. The definition and scope of 'submitting' to such an inspection in relation to electronic information recently came under scrutiny in the case of *Energeticky a prumyslový a EP Investment Advisors v Commission*⁵⁹ which took place before the introduction of the new regulations concerning electronic information.

In *Energeticky*, the undertaking was subject to a 0.25% fine of their turnover based on two infringements of electronic inspection obligations. Although the Commission concluded that there had not been a breach of Article 101 or 102 TFEU, the act of intentionally obstructing investigations by diverting emails and of unblocking an email account⁶⁰ were seen as 'serious' incidents that required a penalty. Wood argues that the actions of employees of the company simply 'inconvenienced the inspectors'⁶¹ rather than a serious infringement and so their fine was based on a desire to deter unhelpful conduct instead of reflecting their level of culpability. Therefore it would appear reasonable to assume that when the undertaking appealed to the GC they were likely to receive at least some form of reduction in their fine. However, instead of reducing Energeticky's fine, the GC suggested that to 'submit' to an inspection had a wider meaning than first thought. They chose to increase the benchmark of compliance to a higher level as it encompasses adherence to both oral and written

⁵⁵ Wood, A., 'Submitting to an inspection during a Competition investigation: the General Court's ruling in Case T-272/12 *Energeticky a prumyslový a EP Investment Advisors v Commission*', (2014), 19(2), Cov. LJ. 65, para70.

⁵⁶ See the European Commission's revised explanatory note of 18 March 2013 concerning the conduct of an inspection in execution of a Commission decision under Article 20(4) of Council Regulation 1/2003, available at

http://ec.europa.eu/competition/antitrust/legislation/explanatory_note.pdf, last visited on 02.03.15.

'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' (Explanatory Note).

⁵⁷ Inspectors can also disconnect running computers from the undertakings networks; remove and re-install hard drives from computers and search other forms of electronic devices such as DVDs, CDs and USBs.

⁵⁸ Wood, , 'Submitting to an inspection', p.66.

⁵⁹ *Energeticky a prumyslový a EP Investment Advisors v Commission* (Case T-272/12) [2015] 4 CMLR2

⁶⁰ A member of staff un-blocked an email account that had been blocked and diverted on the request of the inspector.

⁶¹ Wood, 'Submitting to an inspection', p.68.

instructions by the inspectors at the premises as well as proactive cooperation. This supported what was already stated in Article 23(1)(c) that there is no need for any adverse consequences as a result of the lack of cooperation to be proven for there to be an infringement. The decision of the GC and the new guidelines on the obligations placed on undertakings in relation to electronic information would appear to be extremely unforgiving and imperious.

Although some argue that the European Commission's efforts to include more specific information on this increasingly important part of its inspections are to be welcomed'.⁶² Wood makes a clear argument for the difficulties such powers pose to undertakings, as there appears to be a very low threshold for negligence placed on them by the GC. This not only gives inspectors unmitigated control over the actions of representatives of a business, it also 'makes no allowance for the frailties of the human condition'⁶³ and creates difficulty for these representatives to prove months later that they were not uncooperative; when the communication is mainly oral. As Wood puts it, it is 'easy for issues to be forgotten, for misunderstandings to occur, for internal communications to break down'⁶⁴ in the dramatic and unsettling environment of a Dawn Raid on their offices. Considering the fines that the Commission can place on undertakings for lack of cooperation it is arguable that there should be much clearer guidance on where an undertaking will be held liable for such an infringement and there should be a greater obligation on the inspectors to document all requests made in order to safeguard the rights of an undertaking. Wood also argues that the Commission should balance the powers that have been granted to them by making provisions under Article 23(1)(c) to require evidence that the actions of an undertaking have 'actually or potentially prejudiced the overall investigation'.⁶⁵ However, as information regarding a breach of competition law could potentially be 'relocated or deleted with a touch of the keyboard or button'⁶⁶ it is clearly tricky to establish where a breach may have resulted in the loss of information if there was no prior knowledge of it in the first place. Therefore, it would appear that there is not a simple method of 'balancing' the powers of the Commission's official inspectors with the rights of defence of the undertakings in relation to the ever changing use of electronic devices and communication. As a result of the decision in *Energeticky* businesses will 'ability of a business to advance credible explanations for its

⁶² Kovacs, C., 'Fiat lux...? - The European Commission's updated explanatory note on dawn raids', (2014) 35(4), ECLR 162, para.165.

⁶³ Wood, 'Submitting to an inspection', p.69.

⁶⁴ Ibid, para.69.

⁶⁵ Ibid, para.71.

⁶⁶ Ibid, para.66.

conduct during an on-site investigation will be hampered⁶⁷ and so, until this decision is appealed or another is made against it, businesses will have no choice but to take extra precautions to ensure that they do not act uncooperatively with inspectors.

2 Suggested Improvements

Despite the arguments put forward for the importance of increasing the Commission's powers of investigation, many still believe that it has 'chosen to ignore the criticisms levelled against its powers' and that it is 'only a matter of time before changes will have to be made'⁶⁸ to align such powers with the ECHR and allow adequate protection for undertakings. This is because the investigative procedures of the Commission, most notably 'Dawn Raids' are well known for their 'long-lasting negative effects on the company...both in relation to the often massive negative publicity...and in relation to the very time consuming internal investigations'⁶⁹ that undertakings feel are necessary to follow up such intrusions. The Commission warns undertakings of the risk of breaching Competition law as investigations are not only 'time-consuming and costly for companies' but the 'resulting media coverage, both general and specialised, could have a detrimental impact' and 'they may face hostility from clients and consumers who feel cheated'.⁷⁰ Although this warning is in relation to an actual breach of competition law, the same detrimental publicity will still be present simply for the publication of a Dawn Raid at the premises of a business.

Some changes have been suggested by critics of the current investigatory system that may enhance the protection of undertakings during and after inspections. Berghe and Dawes recommend an enhancement of the powers of the President of the GC. The GC currently has 'exclusive competence'⁷¹ to review the assessments made by the Commission in relation to an inspection by examining the Statement of Reasons in a Decision. The President is empowered to suspend a Decision⁷² made by the Commission before an inspection takes place. It is arguable that an undertaking should be entitled to immediately request the President to order the suspension of an inspection when the Commission officials are '*at its doors*'. This would obviously be beneficial to an undertaking as they are then entitled to an immediate judicial remedy that would bring a halt to an inspection which may have otherwise impeded their business. There are two clear difficulties with such a

⁶⁷ Wood, 'Submitting to an inspection', pp.70-71.

⁶⁸ Berghe, P. and Dawes, A., 'Powers of inspection', p. 23.

⁶⁹ Anderson, 'Dawn Raids' p.135.

⁷⁰ 'Compliance Matters: What companies can do better to respect EU competition rules' publication, 2012, p.12 available at <http://bookshop.europa.eu/en/compliance-matters-pbKD3211985/?CatalogCategoryID=8BYKABstR7sAAAEjupAY4e5L>, accessed last 02.03.15.

⁷¹ Berghe, P. and Dawes, A., 'Powers of inspection', pp.410.

⁷² Article. 278 TFEU, previously Article 242 EC.

change in procedure that are already outlined by Berghe and Dawes. Currently interim measures such as a suspension of an investigation can only be made by parties that have challenged the legality of the Commission's Decision. Therefore, if this power were given to the GC President, an undertaking will need to have already challenged the legality of the Decision and applied for annulment to be entitled to lodge a request for a suspension of an inspection. If an undertaking has not yet challenged the Decision, then it is stipulated that they would need to lodge two different actions to the GC simultaneously, which would be unreasonable as an application for annulment would take such a length of time to compile and lodge that it would frustrate the overall intended purpose of filing both actions. Therefore, the bureaucratic system currently in place would prevent an undertaking from protecting their rights even with an improvement to the powers of the General Court in reviewing the Commission's actions. Berghe and Dawes have proposed that an applicant should be allowed to file 'one-page applications' that can be completed swiftly in order to protect their rights in time for a decision by the President to be made during a Dawn Raid. They would then be entitled to supplement this single page document before lodging judicial proceedings. Although this would solve the issue of undertakings being able to file for interim measures to suspend an inspection as it happened, it does nothing to address the difficulties that would consequently be faced by the President.

If undertakings were entitled to lodge such a request to the President, a decision would be expected within a matter of hours in order to take effect sufficiently. As Berghe and Dawes outline, this would mean proceedings would be 'mainly oral and not written'.⁷³ The matter of a strict and short time limit along with a lack of definite documentation to record such decisions would create obvious practical problems. Competition law would not be the only area to have such demanding time restrictions however, as their article raises the issues of deportation of illegal aliens and halting of construction work also requiring speedy decisions for interim measures. Yet Berghe and Dawes do not seem to have considered the impact that Dawn Raids on undertakings suspected to be involved in a cartel may have on such quick decisions. As there is an issue of undertakings communicating the occurrence of Dawn Raids to other members of a cartel, and therefore giving them advanced notice to destroy essential evidence to an investigation, it is often the case that inspections are carried out on multiple premises simultaneously. Therefore it is possible that several undertakings may lodge requests for the suspension of an inspection to the President of the GC at once. Such an overwhelming deluge of documentation may mean that it is virtually impossible for the President to return decisions to all of the undertakings in a reasonable time. Therefore it is

⁷³ Berghe, P. and Dawes, A., 'Powers of inspection' pp.422.

arguable that such a system would not be efficient and have little impact on protecting the rights of undertakings during inspections. Nevertheless it is possible that in such a scenario the facts of the objections may be very similar for each of the undertakings, as the fictional situation would involve members of the same cartel and therefore the same offences. As such, it may be less demanding for the President to issue responses to all of the undertakings at once, as a review of the facts would not take as long to complete.

Overall, the Commission is entitled to effective powers to obtain information relevant to their investigations in order to enforce competition law and deter infringement. The use of Dawn Raids has a clear impact on the Commission's ability to detect infringement of Articles 101 and 102 whilst the powers to request or demand information and the controls used by Inspectors during Dawn Raids allow for the preservation of important documents. The expansion of the Commission's powers to include electronic information appears to be a positive step in enforcing competition law. There is an ever-present need to ensure the protection of the rights of undertakings both in relation to the ECHR as well as general rights to a fair trial and judicial review regarding such actions. The delicate balance between the powers of the Commission and its inspectors and the rights of undertakings has most definitely not been reached yet. It would appear that such a balance would benefit from extra safeguards for undertakings through requirements on inspectors to record requests and answers during Dawn Raids, so as to allow for appeals after fines have been imposed. Although compliance is vital during inspections, the Commission must ensure that it promotes discretion on the part of its inspectors in relation to the circumstances of each Dawn Raid. Inspectors are active participants in far more Dawn Raids than the employees of an undertaking; therefore even with support of specialised legal advisors, consideration should be made for the vulnerable situation in which employees find themselves.

3 Powers to Fine:

Procedural Infringement

Along with the extended powers of the Commission to inspect the premises of undertakings and request information, their powers to fine those that do not comply with such demands and actions under Article 23 of Regulation 1/2003 is another area that has fuelled debate among onlookers. Many have commented on the recent development of investigations and some have noted that 'tough enforcement against cartels has resulted in some eye-watering fines'.⁷⁴ This has led to appeals to the GC for reduced fines and much criticism of the powers that the Commission grants itself in its ability to fine for substantive and procedural

⁷⁴ Jenkins, T., 'Competition law in Europe: what to expect in 2014' (2014) 35(6), *ECLR* 274, at para.[274].

infringements of competition law. There have also been complaints that the fines are fair for infringement of Articles 101 and 102 TFEU, but not proportionate in relation to procedural offences such as hampering investigations.

The first area of concern in relation to the Commission's power to fine undertakings is their ability to fine based on procedural infringements. Under Article 23(1) of Regulation 1/2003, the Commission may impose fines up to and not exceeding 1% of the total turnover of the preceding business year. Examples of such fines include the first ever fine for such an infringement; *E.ON*⁷⁵, which was fined €38million for obstruction when the Commission discovered seals affixed to the premises during a 'Dawn Raid' had been tampered with. Other examples include where an inspector is impeded from access to premises during a Dawn Raid, even when only for a short period of time⁷⁶, and where email accounts were not blocked and diverted to specified locations on the inspector's command⁷⁷. All of which accumulates to a startling picture of the powers held by the Commission to punish undertakings even before they are found to have infringed Articles 101 or 102. Although it would appear heavy handed of the Commission to impose such fines, it is arguable that without such a deterrent on undertakings to hinder the investigations of the Commission, there would never be opportunity to find conclusive proof of infringements of competition law. If every undertaking were to refuse inspectors entry during 'Dawn Raids' and ignore their obligations during investigations, it is likely that the majority of incriminating material would conveniently disappear.

The power to fine for infringement of procedural rules requires further investigation. At present there is little requirement for evidence that an infringement of this sort has had an impact on an investigation and a possible finding of an infringement. Therefore it would seem that this is an area where new guidelines could be put in place to require an inspector to give proof that information may have been lost through 'evidence' that seals etc. have been tampered with. The requirements cannot be too stringent as the improvements to information storage through electronic data collection, emails and databases may make it difficult for inspectors to prove that there were documents of value that have been lost when the process can be instantaneous.

⁷⁵ E.ON Energie AG, COMP/B-1/39.326, European Commission, [2008] OJ C240/6. See also the similar case of Suez Environnement [2011] OJ C251/4. (C(2011)3640 final) where a tampered seal led to a fine.

⁷⁶ EPH and Others, COMP/39.793, European Commission.

⁷⁷ KWS's fine was increased by 10% because a lawyer refused the inspectors entry based on the fact that there were no documents related to Bitumen on the premises- Bitumen, Case COMP/F/38.456, European Commission, [2007] OJ L196/40.

Substantive Infringement

Along with the possibly heavy handed approach taken by the Commission to impose fines for procedural breaches, the fines for substantive breaches of competition law are also contentious. The original Regulation 17⁷⁸ gave no explanation for how fines were to be imposed other than the maximum threshold. There was no ‘indication in the regulation whether the purpose of the fine is deterrence, punishment, ensuring the offence does not pay, or some combination of these and perhaps other factors’.⁷⁹ It is possible to argue that this early lack of boundaries and guidelines was effective, if not too powerful, in allowing the Commission as much freedom to impose fines as it saw fit.

However, it could now be contended that the new Regulation⁸⁰ increased the potency of the Commissions fine-giving capacity by aiming to ‘increase the deterrent effect’⁸¹ fines have on undertakings. As Spink argues, it is clearly ‘necessary to ensure that an undertaking does not profit from an infringement’⁸² and so an increased fine that considers the ‘level of...ill-gotten gain’⁸³ may be more likely to deter undertakings from participating in a cartel when they have conducted a ‘cost-benefit’ analysis of their situation. An example of an eye-watering fine by the Commission can be found after the investigation into a possible abuse of a dominant position by Intel⁸⁴ in 2009. After being found to have committed abuses of competition law in the form of hidden rebates to manufacturers and payments to manufacturers to delay the launch of competitor’s products, Intel were fined a total of €1.06 Billion. Such a hefty fine would obviously have an impact on the decisions of undertakings when considering either participating in a cartel or abusing a dominant position.

This aim for deterrence is focused on preventing undertakings from ‘ever entering into seriously illegal conduct’ by imposing an ‘entry fee’ in cartel cases of between 15-25% on top of the infringement fine, no matter the duration of the infringement. Additionally, the new Commission Guidelines⁸⁵ on the method of setting fines allow it to increase this fine by up to 100% where it is found that an undertaking has re-offended in the context of competition law. This means that where an undertaking enters into an anti-competitive agreement they will be given a fine of at least 15% of their profits on the product in question for the preceding year

⁷⁸ Council Regulation (EC) No 17 OJ P13, 21.2.1962, p.204, Article 17, Article 15(2).

⁷⁹ Jones, A., and Sufrin, B., *EU Competition Law* p.1000.

⁸⁰ Council Regulation (EC) No 1/2003, OJ L1, 4.1.2003 pp1-25.

⁸¹ Fairhurst, J., *Law of the European Union*, (2012), p.751.

⁸² Spink, ‘Enforcing EC Competition Law: Fixing the Quantum of Fines’ (1999) *JBL* 219 , p.227.

⁸³ 21st Report on Competition Policy, 1991, point 139.

⁸⁴ European Commission Press Release Database, IP/09/745, Brussels, 13 May 2009,

http://europa.eu/rapid/press-release_IP-09-745_en.htm

⁸⁵ Commission [Guidelines on the method of setting fines](#) imposed pursuant to Article 23(2)(a) of Regulation (EC) No [1/2003](#)[Official Journal C 210 of 1.9.2006].

but this fine could increase dramatically depending on the circumstances, for example in 2008 Saint Gobain⁸⁶ were fined a total of €896 million after its basic fine for infringement of Article 101 was increased by 60% because it was known to be a ‘repeat offender’ in competition law.

Under the Guidelines, a ‘wide margin of discretion’ is given to the Commission when calculating the fines for undertakings. Although Notices and Guidelines are not legally binding, *Dansk Rorindustri*⁸⁷ does highlight the legal effect of the fining Guidelines. It was stated that by adopting the Guidelines, the Commission has imposed limits on its discretion⁸⁸. Further, that if the Commission were to depart from following its own Guidelines on setting fines then it may be in breach of the principles of equal treatment and legitimate expectations. This ties in with the importance of certainty for undertakings to know what they are letting themselves in for when taking part in a cartel or other infringement. These principles are not strict rules of law, however they have nevertheless been described as ‘rules of practice from which the administration may not depart in an individual case without giving reasons that are compatible with the principle of equal treatment’.⁸⁹

Although the combination of such fines can add up to a substantial and possibly crippling amount for the undertaking, indicating that the Commission could have the power to ‘make-or-break’ a business, the knowledge that the Penalty Guidelines impose a cap on the fine of no more than 10% of the offender’s previous year turnover worldwide would show that the Commission would not damage or alter the condition of the market by applying competition law.⁹⁰ Despite the possibility of a hefty fine being placed on an undertaking, the fact that the Commission calculates such fine based on the ‘particular circumstances of the case’ and ‘the context in which the infringement occurs’ as well as insuring that ‘its actions have the necessary deterrent effect’⁹¹ highlights that it is using its given discretion to assign a fine based on many factors, rather than a blanket system which means that the fines given are both fairer, and not binding on future cases. The Guidelines themselves specify that the Commission will take into account factors such as mitigating or aggravating circumstances

⁸⁶ European Commission Press Release Database, IP/08/1685, Brussels, 12 November 2008, http://europa.eu/rapid/press-release_IP-08-1685_en.htm

⁸⁷ *Dansk Rorindustri A/S and others v Commission*, Joined Cases C-189, 202, 2050208, 213/02P, Court of Justice, [2005] ECR I-5425.

⁸⁸ Ibid at paras 209-211.

⁸⁹ Case C-397/03 P, *Archer Daniels Midland Company v Commission* [2006] ECR I-4429, para 91

⁹⁰ Examples of where a fine had to be reduced to fall within this 10% cap include: ‘Perosa’ in the Organic Peroxide cartel in 2003.

⁹¹ *Musique Diffusion Francaise SA v Commission*, Joined Cases 100/80 to 103/80, Court of Justice, [1983] ECR 1825, [1983] 3 CMLR 221, at paras [106-107].

and the undertaking's ability to pay⁹², all of which demonstrate the reasonable steps taken by the Commission to impose fines that meet the need to deter future infringement and protect competition in the common market.

The more recent comments made in *Dansk Rorindustri* also support the Commission's duty to consider the context and 'gravity of infringements' when calculating a fine. This 'gravity' can be based on 'numerous factors, such as the particular circumstances of the case, its context and the dissuasive effect of fines'⁹³ with particular circumstances outlined by AG Tizzano. These factors include the volume and value of the products in question along with the size and economic strength of the undertaking and therefore the influence it can have on the market. Tizzano continued his list of considerations that should be made by the Commission in calculating a fine with the particular conduct of the undertaking in the infringement and the benefit they obtained from the anti-competitive activities⁹⁴.

The example of *Saint Gobain* highlights the importance of discretion with regards to the circumstances of each case. The infringement related to a cartel between four car glass producers who were found to be infringing competition law through price fixing and market/customer sharing between 1998 and 2003 with the total fine reaching just over €1.3 Billion. Unsurprisingly Saint Gobain received the largest fine due to their status as a 'repeat offender' whilst Pilkington received €370 million as a basic fine. Asahi and Soliver however received reduced fines by the Commission. Asahi's fine was reduced by 50%, to €113.5 million as the information it provided was relevant and helpful in uncovering the total infringement. Soliver received the lowest fine out of the four with just €4.4million as it had not fully participated in all of the activities of the cartel.

The time limitations placed on the Commission in relation to when they can fine an undertaking may also indicate that their powers are safeguarded effectively. Under Article 25 of Regulation 1/2003 the Commission can wait no longer than 3 years after a procedural infringement to fine an undertaking, or 5 years for all other infringements and penalties. This would indicate, not only that the Commission is under particular pressure to ensure that it investigates infringements in a speedy and efficient manner, but also that their ability to fine is not as sweeping as it would appear at first glance. The fact that the time limit does not run from the first day of infringement but from the latest day, means that the infringement is

⁹² Points 28, 29 and 35.

⁹³ *Dansk Rorindustri A/S and others v Commission*, Joined Cases C-189, 202, 2050208, 213/02P, Court of Justice, [2005] ECR I-5425, AG Tizzano, paras 68-69.

⁹⁴ Ibid.

committed over a period of time. This is considered a continuous infringement of competition law and so a fine can be imposed later than initially expected.⁹⁵ Therefore it would appear that even where the Commission is restricted in its ability to enforce competition law through the restriction of its powers, the court has managed to ensure that the Commission retains its powers despite the safeguards.

When considering the implications of the Commission's discretion in relation to procedural and substantive fines, it would appear that there is no outright evidence that its powers are too great. Instead, it would seem that there is no conclusive answer as to the effectiveness of the Commission's powers to fine undertakings that strikes a fair balance between the rights of an undertaking and the aim to reduce anti-competitive behaviour. The fact that there is still confusion as to the effectiveness of fines indicates that there is a requirement of a systematic evaluation of the impact of fines and leniency on the activity of undertakings.

Conclusion

It is clear that the European Commission holds very broad powers in relation to the enforcement of competition law. Of course such powers are essential in achieving the aim of protecting the European free market from distortion or abuse of dominant position, however the extent to which these powers can influence the functioning of businesses is an issue that deserves further analysis, not just from critics of the current implementation of competition law but also by the Commission itself.

When examining the powers held by the Commission to investigate a possible breach of competition law two main areas of concern are apparent. These relate to the Commission's powers to request or demand information from undertakings and the right to perform Dawn Raids on undertaking's premises. It would appear that the Commission's ability to obtain information from undertakings through requests and demands is entirely reasonable. The Commission is at an immediate disadvantage in relation to the information it holds on undertakings that may have infringed competition law. Without the ability to demand information from these businesses under the threat of fine for the breach of competition procedural rules, there would be no way for it to effectively investigate the actions of undertakings in the European market.

Dawn Raids are the main cause of alarm by critics due to their naturally intrusive nature. The ability of official inspectors sent by the Commission or NCAs to halt the machinery of a

⁹⁵ CASE- Marine Hoses Case COMP/39406. European Commission, [2009] OJ C168/6

business in the form of blocking emails, interviewing employees, confiscating hard-drives and cordoning off areas of their workplace is extensively disruptive to warrant further assessment by the Commission. Although the Commission's ability to conduct Dawn Raids is vital to its capacity to investigate the actions of undertakings, discover infringements of competition law and prevent further infringement, the extent to which it should be able to disrupt a business during working hours demonstrates the fact that there should be efficient safeguards in place for the businesses in question and adequate transparency. Although there have been suggestions to improve the protection of undertakings through allowing them to file for a suspension of investigations with the President of the GC, it would appear that there is yet to be a sufficient answer to this problem. There are many difficulties with such a suggestion including the huge workload that would be placed on the President and the short time-limit to which they would be subject. The problem has become even more complicated than originally thought with the improvements made to electronic communication and data storage. Therefore the prospect of limiting the Commission's ability to investigate premises at short notice to prevent the loss of data could be extremely unwelcome.

As such, it may be more reasonable to propose that the methods through which the Commission investigates the breach of competition law by undertakings should not alter. Instead, there should be a less complicated and fairer approach to ex post judicial review that can be sought by undertakings and they should be entitled to adequate compensation for the interruption to their business where no breach has been found. Of course, if the Commission later finds that there was in fact a breach of competition law which took place before and during the investigations in question, such compensation would be claimed back along with the fine.

The fines that the Commission is capable of imposing on undertakings for a substantive breach of competition law or a procedural breach during investigations have also come under scrutiny by critics. The hefty fines that have been enforced against undertakings that have breached competition law in recent years have fuelled the need to further investigate the powers granted to the Commission. From a closer examination, it would appear that the fines imposed against undertakings for substantially breaching competition law are more than justified by the Commission and may indeed be seen as too low with the use of the Leniency Programme.

Although it is clear that the threat of possible Dawn Raids, has had a significant impact on the amount of information the Commission holds and the discovery of many cartels, the

significant reduction if not immunity from fines based on the Leniency programme can be seen as a weakness of enforcement. There is clearly a need to reconcile the effectiveness of leniency with the deterrence needed to prevent future infringement. The automatic 'entry fee' of 15-25% on top of the general infringement fine goes some way to achieving this. It still appears that there is not an effective balance between fair punishment for infringement despite leniency, and incentive to reveal participation in a cartel.

Finally, although the presence of the Leniency Notice may indicate that the Commission is not utilising its fining powers efficiently to punish undertakings, almost the opposite can be said for the fines imposed for procedural infringements. At first glance these fines appear to be an overreaction by the Commission where the infringement seems accidental or minor. However, when considering that such minor infringements of procedural obligations may result in the complete destruction of any information that may link an undertaking to participation in anti-competitive activity, it seems that such fines are justified. As with the difficulties outlined in relation to restricting the Commission's powers to Dawn Raid premises, the resulting fines after such Dawn Raids, where an undertaking is argued to have not 'fully cooperated', would appear to pose a similar problem. There is very little an official inspector can do to prove that undertakings employees have destroyed evidence after the fact, therefore it is the undertaking's employees that are subject to obligations to ensure that such a suspicion never arises. If they ensure that they comply with all of the instructions set forward by the inspectors and prepare in advance for investigations, then there is no risk of being subject to a procedural fine. Despite the evidence that the Commission has not granted itself powers that are too great when enforcing competition law, it is still advisable that it conduct an internal investigation into taking a less aggressive approach in relation to Dawn Raids.