ALLEN & OVERY

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How not to carry out dawn raids

Supreme Court sets new rules

Unannounced inspections of the Antimonopoly Office of the Slovak Republic (*dawn raids*) have recently become more and more frequent. They represent a very intrusive interference and certainly a most unpleasant encounter, as many Slovak undertakings already experienced first-hand.

The power of the Antimonopoly Office to carry out dawn raids is derived from Section 22a of the Slovak Competition Act[1]. However, many specific questions are not governed by the Act and thus the Antimonopoly Office has broad discretion in its practice. Particular limits should be based on case law, but only a few decisions on dawn raids have been issued by Slovak courts and even fewer have set particular rules governing the conduct of inspections (decisions of the Supreme Court in *ŠEVT*[2] and *AT Computer*[3]), while other decisions only address the procedural question of whether filing an action on unlawful interference must be preceded by a complaint under the Complaints Act[4] (*Datalan*[5] and *Stengl Consulting*[6]). More extensive case law exists on the European level (eg most recently, decisions of the Court of Justice of the EU in *Deutsche Bahn*[7] and *Nexans*[8], as well as decisions of the European Court of Human Rights *Vinci*[9] and *Delta pekárny*[10]. However, European case law cannot always be applied in Slovak settings concerning some specific procedures employed by the Slovak Antimonopoly Office.

[1] Act No 136/2001 Coll on the Protection of Competition, as amended
[2] Judgement of the Supreme Court of the Slovak Republic of 5 April 2011, file No. 3Sžz/1/2011
[3] Judgement of the Supreme Court of the Slovak Republic of 17 October 2013, file No. 4Sžz/1/2013
[4] Act No 9/2010 Coll on Complaints, as amended
[5] Judgement of the Supreme Court of the Slovak Republic of 4 November 2014, file No. 1Sžz/6/2014
Judgement of the Supreme Court of the Slovak Republic of 10 December 2014, file No. 10Sžz/5/2014
[6] Judgement of the Supreme Court of the Slovak Republic of 24 February 2015, file No. 1Sžz/10/2014
[7] Case C-583/13 P, Deutsche Bahn AG and Others v. European Commission [2015] ECR 404
[8] Case C-37/13 P, Nexans SA and Nexans France SAS v European Commission [2014] ECR 2030
[9] Case *Vinci v France*, Judgement of 2 April 2015 of Fifth Section of the European Court of Human Rights
[10] Case *Delta Pekárny a.s. v Czech Republic*, the Judgement of 2 October 2014 of the European Court of Human Rights

On this basis, two recent decisions of the Supreme Court regarding dawn raids carried out in Datalan[11] were very welcome. We would like to point out some of the key conclusions drawn by the Supreme Court.

The doors are open for those who complain

The Supreme Court resolved the much-discussed question of procedural admissibility of an action on protection against unlawful interference and held that the action must be preceded by a formal complaint. The subjective period for the submission of the action, however, does not lapse earlier than 30 days from the delivery of a formal response to the complaint.

Very importantly, according to the Supreme Court, the objective one-year period under Section 250v(3) of the Civil Procedure Code[12] starts only on the day of termination of the interference – in the opinion of the Supreme Court the interference continues while the information collected during a dawn raid is being reviewed. In other words, although the dawn raid was carried out more than one year ago, if the Antimonopoly Office is still reviewing and processing the collected information, the action is still admissible.

Objections, objections … even after the raid

The Supreme Court rejected the interpretation that if an undertaking did not raise objections during the dawn raid, it could not raise such objections later in the process. It emphasised that the dawn raid is a stressful moment which catches the undertaking by surprise and without any preparation. It is important for the undertaking to state all facts that occurred during the dawn raid in the minutes. However, as regards further objections against the authorisations, reasons for the dawn raid, procedural steps or other objections, it is not necessary to raise them during the dawn raid.

[11] Judgement of the Supreme Court of the Slovak Republic of 25 June 2015, file No. 5Sžnz/1/2015
Judgement of the Supreme Court of the Slovak Republic of 25 June 2015, file No. 5Sžnz/2/2015
[12] Act No 99/1963 Coll, the Code of Civil Procedure, as amended

The Antimonopoly Office cannot go fishing

The Supreme Court thoroughly examined the authorisations to carry out the dawn raid. To prevent so-called "fishing expeditions", the authorisations must be based on a reasonable suspicion of competition law infringements, they must contain a description of the suspected infringement, the relevant market, how the infringement was committed and a description of the aim of the inspection – what evidence the Antimonopoly Office seeks to find. In this case, the authorisations seem to have been fairly standard in accordance with previous practice of the Antimonopoly Office. According to the Supreme Court, this was too vague and general. Aside from that, the inspectors exceeded the scope of their authorization during the dawn raid and this was one of the reasons that the Supreme Court held that the dawn raid was unlawful.

Choose wisely

The Supreme Court further focused on the procedure employed by the Antimonopoly Office when selecting documents for review. In the case at hand, the inspectors identified a large amount of documents on the basis of relatively general keywords, copied the documents to disks, and subsequently reviewed them in their premises after the raid. The Supreme Court held that such procedure is unacceptable.

Firstly, the Supreme Court criticised the general nature of the keywords, which must have caught many irrelevant and private documents. Secondly, despite the fact that under the authorisations the dawn raid could have taken five days, the inspectors did not attempt to select the relevant data in the premises of the undertaking. As a result, they seized a large amount of irrelevant data and thus breached the principle of proportionality.

The Antimonopoly Office further manipulated the disks without clarifying how and where these copies were registered. The copies do not appear to be been included in the file maintained by the Antimonopoly Office. The Supreme Court held that this practice unacceptable. Also, the Antimonopoly Office did not submit these disks to the court together with the relevant file, but continued to review them pending the proceedings. The Supreme Court also held that this was unacceptable. Going forward, if the Antimonopoly Office wants to continue working with a file pending court proceedings, it will first have to submit the disks to the court and only then can it request the court to return them.

Review of private devices – not so easy

One of the questions that is frequently discussed concerning dawn raids is whether the inspectors are authorised to examine the private electronic devices of the undertaking's employees that are used for work purposes. In this case, the employee strongly objected to the inspection of his personal laptop and mobile phone, but eventually handed them over. The Supreme Court did not ban such practice across the board. However, for such conduct, the Antimonopoly Office must have sufficient and proportional reasons for such intervention. These reasons were not present in this case.

Miscellaneous misconduct

In conclusion, the Supreme Court mentioned some other mistakes committed by the Antimonopoly Office. For example, it criticised the method of keeping copied disks in ordinary envelopes with stamped tape, as this method was not functional enough and in one case the envelope was opened without breaching the tape. There was also an instance where the password to a computer containing the copied data was not recorded anywhere and the only employee who knew the password has now forgotten it.

Conclusion to a series of blunders

On the basis of the reasons stated above, the Supreme Court concluded that the Antimonopoly Office did not have the necessary documents to carry out the dawn raid, the dawn raid was unlawful, and the information obtained may not be used. The decisions are also important in a broader sense as they state that many aspects of the existing method of carrying out of dawn raids are inadmissible.

The practical impact of these decisions remains to be seen. The Antimonopoly Office will probably have to change its practice, even though the limits are not entirely clear in all aspects. In any event, future dawn raids are likely to be different in many ways. The limits formulated by the Supreme Court might also be important for dawn raids that have already been carried out. The unlawfulness of a dawn raid can contaminate the evidence obtained, which could also affect decisions on substantive competition law infringements.

Contact

If you would like to receive more detailed information on the new legislation or if you have any questions, we will be pleased to provide further advice.

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