

# DIGITALISATION OF THE PRELIMINARY INVESTIGATION PHASE, FUNDAMENTAL AND HUMAN RIGHTS AND THE PRINCIPLE OF OPENNESS – BALANCING CONFLICTING INTERESTS IN THE REVIEW OF LARGE DATA SETS

RIINA AUTIO\*

*The EU courts have divided an investigation into two distinct stages with different aims: the preliminary investigation phase and the contradictory phase. This paper examines issues related to the digitalisation of the preliminary investigation phase, from screening and open source intelligence to data processing during unannounced inspections or dawn raids. The question is how rights of defence are secured without jeopardising an investigation where data sets have grown beyond anything previously known. Within the context of the principle of openness of government activities in Finland and Sweden, the author sets out to find how the main rule of openness is balanced with the objectives of the preliminary investigation phase. The article examines case-law and literature, complemented with public statements from competition authorities, to find that a fair balance between conflicting interests has been achieved thus far. Examples of open questions currently subject to debate do, nonetheless, range from using personal apps for detection to whether national identity as per Article 4(2) of the Treaty on European Union can tip the balance between confidentiality of correspondence and cartel enforcement categorically in favour of the former. The Court of Justice will likely have to address the issue of national identity in the ongoing Ronos case.*

## 1 INTRODUCTION

The EU courts have divided an investigation into two stages. In *Czech Railways*, the Court specified that the preliminary investigation phase and the contradictory phase should be seen as two distinct stages with different aims. The relevant timeline for detailed information concerning an investigated suspicion begins with a Statement of Objections (SO) being sent to the undertaking in question; the first part of the contradictory phase.<sup>1</sup> This article focusses on the first of the two phases. The focus is on, firstly, unannounced inspections or ‘dawn raids’. Secondly, activities often included in the preliminary investigation phase preceding a possible inspection are discussed, as these may in part guide decisions on case prioritisation and the focus of inspections.

---

\* Senior Adviser, Finnish Competition and Consumer Authority.

<sup>1</sup> Case T-621/16 *České dráhy v Commission* EU:T:2018:367 paras 85 and 86; Case T-402/13 *Orange v European Commission* EU:T:2014:991 para 78; Case T-99/04 *AC-Treuband AG v Commission* EU:T:2008:256 para 48. See also Riina Autio, ‘Drawing the line at dawn raids: European courts’ decisional practice on procedural issues arising from competition authorities’ unannounced inspections’ (2020) 41(6) *European Competition Law Review* 297, 303.

Digitalisation is not only a question of substantive law, but also one of considerable interest from the point of view of practical procedure. The shift from business documents on paper to electronic working environments is reflected in investigations of suspected competition restrictions. In the preliminary investigation phase in particular, the change means the Competition Authority (CA) also needs to discover new tools suited for new challenges, not least the fast-growing data sets relevant to such investigations. These include, to name but a few examples, screening tools, Open Source Intelligence (OSINT) and new technical solutions to reviewing large data sets.

There is a public interest in openness of government activities, but also a public interest in uncovering infringements. Uncovering infringements is only possible where enforcers can ensure that unannounced inspections, for instance, may be carried out without a potential target being informed beforehand. Details of tactical consequence such as precise search methods being made public may also make it too easy to conceal evidence of illegal conduct.

The present article first provides a brief overview of relevant legislation, from the Fundamental Rights Charter and the Human Rights Convention to EU Regulation 1/2003 and Directive 2019/1 to the Finnish Openness Act and duty to register information. The article then moves onto questions related to digital aspects of cartel detection, followed by observations on balancing the principle of openness with the interest of uncovering infringements and concluding remarks. Cartel detection is used as the primary context, as dawn raids are the presumption in cartel cases.<sup>2</sup>

## 2 LEGISLATION

### 2.1 THE CHARTER

The rule of law and respect for human rights are included in the founding values of the EU as established in Article 2 of the Treaty on European Union (TEU).<sup>3</sup> As indicated in Article 6(1) TEU, the Charter of Fundamental Rights of the European Union (the Charter) has the same value as the Treaties.<sup>4</sup> Article 7 of the Charter safeguards everyone's right to respect for their private and family life, home and communications. Article 47 of the Charter provides for the right to an effective remedy and to a fair trial.

As per Article 51(1) of the Charter, the provisions of the Charter bind the Member States when implementing Union law. Article 52(3) states that in so far as the Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms ('ECHR' or 'the Convention'), the meaning and scope of those rights shall be the same as those laid down by the Convention. Article 52(4) further specifies that, in so far as the Charter recognises fundamental rights as they result from the constitutional traditions common to the Member States, those rights shall be interpreted in harmony with those traditions.

Article 53 of the Charter stipulates that nothing in the Charter shall be interpreted as

---

<sup>2</sup> Finnish Competition and Consumer Authority, 'Kartellit ja muut horisontaaliset kilpailunrajoitukset' <[www.kkv.fi/kilpailuasias/kartellit/](http://www.kkv.fi/kilpailuasias/kartellit/)> accessed 01 June 2024.

<sup>3</sup> Consolidated version of the Treaty on European Union [2012] OJ C326/13.

<sup>4</sup> The Charter of Fundamental Rights of the European Union [2012] OJ C326/391.

restricting or adversely affecting human rights and fundamental freedoms as recognised, in their respective fields of application, by Union law and international law and by international agreements to which the Union, the Community or all the Member States are party, including the European Convention for the Protection of Human Rights and Fundamental Freedoms, and by the Member States' constitutions. This article hereby refers to relevant provisions in the Convention in the context of applicability to the EU and its Member States as provided for in the Charter.

## 2.2 THE CONVENTION

The Convention for the Protection of Human Rights and Fundamental Freedoms has been applied in a number of cases challenging the legality of inspection decisions or of inspections themselves. Typical questions raised with the ECtHR involve confidentiality of correspondence and adequate judicial safeguards, as in frequently cited cases such as *Société Colas*<sup>5</sup> or *Vinci*.<sup>6</sup>

Article 6 ECHR establishes the right to a fair trial. This includes, *inter alia*, the right to a fair and public hearing within a reasonable time by an independent and impartial tribunal, the right to be informed promptly and in detail of the nature and cause of the accusation, and the right to defend oneself through legal assistance of one's own choosing.

Article 8 ECHR sets out the right to respect for private and family life. In the context of unannounced inspections perhaps the most relevant aspect of this protection is the right to respect for one's correspondence. Paragraph 2 of Article 8 specifies that there shall be no interference by a public authority with the exercise of this right except such as is *in accordance with the law* and is *necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country*, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

Article 13 ECHR establishes the right to an effective remedy. Everyone whose rights and freedoms as set forth in the Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.

Article 8 was at the core of the *Delta Pekárny*,<sup>7</sup> *Vinci*,<sup>8</sup> *Janssen Cilag*<sup>9</sup> and *Kesko Senukai*<sup>10</sup> cases in the ECtHR. The issue of respect for one's correspondence is typically linked to claims of not having had access to a fair hearing by an impartial tribunal and of having been denied an effective remedy. Electronic data specifically is discussed in each of these cases.<sup>11</sup>

---

<sup>5</sup> *Société Colas Est and others v France*, App no 37971/97 (ECtHR, 16 April 2002).

<sup>6</sup> *Vinci Construction et GTM Génie Civil et Services v France*, Apps nos 60567/10 and 63629/10 (ECtHR, 02 April 2015).

<sup>7</sup> *Delta Pekárny a.s. v Czech Republic* App no 97/11 (ECtHR, 02 October 2014).

<sup>8</sup> *Vinci Construction et GTM Génie Civil et Services v France* (n 6).

<sup>9</sup> *Janssen Cilag s.a.s. v France* App no 33931/12 (ECtHR, 21 March 2017).

<sup>10</sup> *UAB Kesko Senukai Lithuania v Lithuania* App no 19162/19 (ECtHR, 4 April 2023).

<sup>11</sup> See eg *Delta Pekárny a.s. v Czech Republic* (n 7) para 9; *Vinci Construction et GTM Génie Civil et Services v France*, (n 6) para 10; *Janssen Cilag s.a.s. v France* (n 9) para 4; *UAB Kesko Senukai Lithuania v Lithuania* (n 10) para 9.

In *Roquette Frères*,<sup>12</sup> the Court of Justice reviewed its position in the earlier *Hoechst*<sup>13</sup> judgment and, referring to the ECtHR *Société Colas* judgment,<sup>14</sup> determined that the protection of the home provided for in Article 8 of the ECHR may in certain circumstances be extended to cover business premises.<sup>15</sup> However, the Court also highlights that in light of *Niemietz* rights of interference provided for in Article 8(2) ECHR may be more far-reaching in the case of business premises than where protection of the home is assessed in relation to other premises.<sup>16</sup>

It thereby appears well-established case law that the applicability of Article 8(1) ECHR extends beyond the individual home to business premises. Right to respect for private correspondence may thereby cover business correspondence. As established by the ECtHR already in *Niemietz* in 1992, however, the exception for interference by a public authority provided for in Article 8(2) may be more far-reaching in the case of business premises than a place of private residence.

### 2.3 REGULATION 1/2003

Regulation 1/2003 is the primary legislative instrument for enforcing the EU competition rules.<sup>17</sup> Article 11 covers cooperation between the Commission and the competition authorities of the Member States and stipulates, inter alia, that the competition authorities of the Member States shall, when acting under Article 101 or Article 102 of the Treaty on the Functioning of the European Union (TFEU),<sup>18</sup> inform the Commission in writing before or without delay after commencing the first formal investigative measure. This information may also be made available to the competition authorities of the other Member States.<sup>19</sup> National competition authorities may also exchange between themselves information necessary for the assessment of a case that they are dealing with under Article 101 or Article 102.<sup>20</sup>

Article 12 further regulates exchange of information, specifying that, for the purpose of applying Articles 101 and 102 TFEU, the Commission and the competition authorities of the Member States shall have the power to provide one another with and use in evidence any matter of fact or of law, including confidential information. Information exchanged shall only be used as evidence in respect of the subject-matter for which it was collected by the transmitting authority. However, where national competition law is applied in the same case and in parallel to Community competition law and does not lead to a different outcome, information exchanged may also be used for the application of national competition law.

These provisions are of interest in the present context, as CAs may exchange

---

<sup>12</sup> Case C-94/00 *Roquette Frères* EU:C:2002:603.

<sup>13</sup> Joined Cases 46/87 and 227/88 *Hoechst v Commission* EU:C:1989:337.

<sup>14</sup> *Société Colas Est and others v. France* (n 5).

<sup>15</sup> *Roquette Frères* (n 12) para 29; *Hoechst v Commission* (n 13); *Société Colas Est and others v France* (n 5) para 41.

<sup>16</sup> *Roquette Frères* (n 12) para 29. Judgment *Niemietz v. Germany*, 16.12.1992, para 31.

<sup>17</sup> Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty [2003] OJ L1/1 (Regulation 1/2003).

<sup>18</sup> Consolidated version of the Treaty on the Functioning of the European Union [2012] OJ C326/47.

Regulation 1/2003 contains references to earlier numbering of the Treaty provisions, which are cited here using current numbering to avoid confusion.

<sup>19</sup> Regulation 1/2003 Art 11(3).

<sup>20</sup> *ibid* Art 11(4).

information during the preliminary investigation phase. Information may also be used as evidence not only by the collecting authority, but also by other EU CAs. The implications of the difficult balancing act that each CA faces when working with investigative tools not necessarily considered by the legislator may not be limited to a single national jurisdiction.

Article 20 establishes the Commission's powers of inspection. This includes the power to examine the books and other records related to the business under investigation, irrespective of the medium on which they are stored.<sup>21</sup>

In order to ensure that Member States are also able to efficiently enforce EU competition rules, Directive 2019/1 was drafted. In this present context, the Directive is largely in line with the Commission's powers.

#### 2.4 DIRECTIVE 2019/1

Directive 2019/1, also known as 'ECN+', was to be implemented in Member States by 4 February 2021 with the aim to level the playing field of EU competition enforcement by way of minimum harmonisation.<sup>22</sup> Article 6 of the Directive covers powers to inspect business premises.

From the perspective of the present article, the provisions of Article 6 concerning platform neutrality, the access principle and continued inspections are of particular interest.<sup>23</sup> Member States are obliged to ensure that national administrative competition authorities are empowered to examine the books and other records related to the business irrespective of the medium on which they are stored, and to have the right to access any information which is accessible to the entity subject to the inspection. Member States shall also empower CAs to continue making searches for information and the selection of copies or extracts at their own premises. These aspects were also highlighted in public communications made in relation to implementation in Sweden.<sup>24</sup>

#### 2.5 FINNISH OPENNESS ACT AND THE DUTY TO REGISTER INFORMATION

The Finnish principle of openness of government activities and the Swedish principle of transparency each provide far more public access to public documents than in many other Member States. In Finland, the legislation was changed from a presumption of secrecy for documents concerning international relations to a presumption of public access in response to requirements of transparency for EU documents.<sup>25</sup> Membership has thereby solidified the

---

<sup>21</sup> Regulation 1/2003 Art 20(2)(b).

<sup>22</sup> Directive (EU) 2019/1 of the European Parliament and of the Council of 11 December 2018 to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market [2019] OJ L11/3 (Directive 2019/1); Riina Autio, 'Harmonising Dawn Raids in a Global Village: The ECN+ Directive and Negotiating Legal Certainty Within Fragmented European Administrative Procedure' (2022) 6(2) *Market and Competition Law Review* 125, 136.

<sup>23</sup> Directive 2019/1 Arts 6(1)(b) and 6(1)(c).

<sup>24</sup> Government Offices of Sweden, Lagrådsremiss (draft legislative proposal), 'Konkurrensverkets befogenheter' (2 October 2020) <<https://www.regeringen.se/rattsliga-dokument/lagratsremiss/2020/10/konkurrensverkets-befogenheter/>> accessed 01 June 2024. See also Autio, 'Harmonising Dawn Raids in a Global Village' (n 22) 137.

<sup>25</sup> Government Proposal 30/1998, 88–89.

guiding principle that not only parties to an investigation, but also journalists and citizens ought to be able to observe how decisions are being made or how resources are being used within government activities.

The Finnish Act on the Openness of Government Activities (Openness Act 621/1999) is based on the core objective expressed in Section 3:

The objectives of the right of access and the duties of the authorities provided in this Act are to promote openness and good practice on information management in government, and to provide private individuals and corporations with an opportunity to monitor the exercise of public authority and the use of public resources, to freely form an opinion, to influence the exercise of public authority, and to protect their rights and interests.

The publicity of official documents is thus a strong main rule. Exceptions are classified into (1) confidentiality based on an individual assessment that justifies a presumption of harm, and (2) confidentiality based on the nature of the type of information as such. Business secrets are an example of the first category. This type of information shall not be kept confidential in circumstances such as fulfilment of the legal obligations of an undertaking. Examples of the latter category include information on an individual's health or use of health services, a psychological test or aptitude test on a person, political beliefs of private individuals or the financial status of a natural person.<sup>26</sup>

Section 42 of the Finnish Administrative Procedure Act (434/2003) stipulates that any details of orally submitted claims and evidence that may influence the decision to be made on the matter shall be registered or otherwise recorded. This duty to register information is complementary to the principle of openness, as any claims or evidence that may have influenced decisions made must be recorded in the register of a public authority such as the CA. This ensures that even information that is not available to the general public may be assessed in court or by the Chancellor of Justice, should a claim be made to call into question whether the CA has carried out its duties in accordance with the law.

In the *French Supermarkets* case, the Commission conducted inspections to investigate suspected concerted practices contrary to Article 101 TFEU, effectively exchanges of information, in the markets for the supply of fast-moving consumer goods, for the sale of services to manufacturers of branded goods and for consumer sales of fast-moving consumer goods. The targeted undertakings sought for the inspection decisions to be annulled.<sup>27</sup> The Court of Justice found that the Commission had failed to properly record interviews that constituted 'the essential elements of the indicia on which the Commission's [inspection] decisions are based'.<sup>28</sup> The Court annulled the inspection decisions that were not based on

---

<sup>26</sup> Government Proposal 30/1998, 88, 99.

<sup>27</sup> Case C-682/20 P *Les Mousquetaires and ITM Entreprises v Commission* EU:C:2023:170; Case C-690/20 P *Casino, Guichard-Perrachon and Achats Marchandises Casino v Commission* EU:C:2023:171; and Case C-693/20 P *Intermarché Casino Achats v Commission* EU:C:2023:172.

<sup>28</sup> The Court of Justice of the European Union, 'The Court sets aside in part the judgments of the General Court and, consequently, annuls the decisions of the Commission ordering inspections at the premises of a number of French undertakings in the distribution sector on account of suspicions of anticompetitive practices' (Press release No 44/23, Luxembourg, 9 March 2023)

sufficiently serious indicia as could be confirmed in the Commission's documentation.

This type of situation ought to be easier to avoid in a legal system with an established duty to register 'information applicable to all to central government authorities, municipal authorities, autonomous institutions governed by public law, the agencies operating under Parliament, and the Office of the President of the Republic', as per Section 2 of the Finnish Administrative Procedure Act. Worth noting, however, is a key consideration assessed differently in the Court of Justice as compared to the General Court judgment. The question was whether the Commission's obligation to record steps taken in order to collect information relating to the subject matter of an investigation is linked to the formal opening of an investigation. The General Court stated that there is a difference between the requirements posed to the Commission's collecting of evidence before and after an investigation has been formally opened. From this, the General Court deduced that the Commission was not required to record the interviews in question.<sup>29</sup> The inspection decisions were annulled in part, due to an unduly broad scope. The Court of Justice, however, ruled the General Court erred in this respect.<sup>30</sup>

### 3 DIGITAL DETECTION

#### 3.1 SCREENING

Many CAs have hired data scientists in recent years. One of the reasons for doing so has been an increasing interest in screening projects and tools.<sup>31</sup> The Organisation for Economic Co-operation and Development (OECD) provides a useful definition: "Data screening tools in competition investigations are empirical methods that use digital datasets to evaluate markets and firms' behaviour in them, identify patterns and draw conclusions based on specific tested parameters".<sup>32</sup> The OECD notes that screens are most commonly designed to detect cartels. The typical example is bid-rigging. According to the definition of the OECD:

Bid rigging (or collusive tendering) occurs when businesses, that would otherwise be expected to compete, secretly conspire to raise prices or lower the quality of goods or services for purchasers who wish to acquire products or services through a bidding process. Public and private organizations often rely upon a competitive bidding process to achieve better value for money. Low prices and/or better products are desirable because they result in resources either being saved or freed

---

<[https://curia.europa.eu/jcms/jcms/p1\\_3876635/en/](https://curia.europa.eu/jcms/jcms/p1_3876635/en/)> accessed 01 June 2024. The same inspections were subject to a complaint in the ECtHR that was dropped following the judgments of the Court of Justice, decision *S.A. Casino, Guichard-Perrachon et S.A.S. A.M.C. v France* App no 59031/19 (ECtHR, 07 September 2023).

<sup>29</sup> Case T-254/17 *Intermarché Casino Achats v European Commission* EU:T:2020:459 paras 190–193.

<sup>30</sup> Case C-693/20 P *Intermarché Casino Achats SARL v European Commission* (n 27) paras 122–125.

<sup>31</sup> The author is by no means an expert on screening. I will only make some very general comments in this respect, in the interest of providing a competition lawyer's view to some current issues that merit further debate elsewhere.

<sup>32</sup> OECD, 'Data Screening Tools for Competition Investigations' (2022) OECD Competition Policy Roundtable Background Note 6.

up for use on other goods and services. The competitive process can achieve lower prices or better quality and innovation only when companies genuinely compete (i.e., set their terms and conditions honestly and independently). Bid rigging can be particularly harmful if it affects public procurement. Such conspiracies take resources from purchasers and taxpayers, diminish public confidence in the competitive process, and undermine the benefits of a competitive marketplace.<sup>33</sup>

In Finland, the public sector spends an average of 31 billion euros each year on products and services acquired from the private sector.<sup>34</sup> According to Aaltio et al ‘cartels can result in a significant change in the distribution of bids’.<sup>35</sup>

Aaltio et al recently found that data screens with moderate data demands may be used to identify collusion in public procurement.<sup>36</sup> The study used data on 4,983 bids from 1,008 tenders for state-level asphalt paving contracts in Finland and Sweden between 1994–2019 and 1993–2009 respectively.<sup>37</sup>

The OECD has also looked at data screening tools for competition investigations, including screening processes relying on machine learning.<sup>38</sup> The OECD notes that ‘there is no single perfect screen able to identify all violations in all markets’, but suggests that ‘machine-learning techniques can optimise the prediction of whether a conduct is consistent with collusion’.<sup>39</sup> The OECD also stresses that the results of screening are more likely to be useful for ‘the opening of investigations and the prioritisation of cases’, as a finding of infringement is subject to a higher standard of proof.<sup>40</sup>

In a nutshell, screening may give a CA useful information on whether collusion is likely in a given market. This is only possible if there is ‘sufficient, relevant and accurate’ data available to analyse.<sup>41</sup> The Finnish CA has worked towards a better availability of procurement data by identifying possibilities for updating a widely used procurement tool to facilitate use of the data generated for screening.<sup>42</sup> Aaltio et al found that screens trained on data from the Finnish asphalt cartel were notably less successful in identifying the Swedish cartel, operating at the same time period, and vice versa.<sup>43</sup> On the other hand, Huber et al

---

<sup>33</sup> OECD, ‘Guidelines for Fighting Bid Rigging in Public Procurement’ (2009) 1

<<https://www.oecd.org/competition/fightingbidrigginginpublicprocurement.htm>> accessed 01 June 2024.

<sup>34</sup> Tuomas Hiiamo, Jan Jääskeläinen, and Reyes Willka, ‘Kilpailu julkisissa hankinnoissa’ (2023) 9

Tutkimusraportteja 9. See also Ministry of Economic Affairs and Employment of Finland, ‘Innovative public procurement as an innovation policy instrument’ <<https://tem.fi/en/innovative-public-procurement>> accessed 01 June 2024.

<sup>35</sup> Aapo Aaltio, Riku Buri, Antto Jokelainen, and Johan Lundberg, ‘Complementary bidding and cartel detection: Evidence from Nordic asphalt markets’ (2023) Finnish Competition and Consumer Authority Working Papers 1/2023, 3.

<sup>36</sup> *ibid.*

<sup>37</sup> Aaltio et al (n 35) 9–10.

<sup>38</sup> OECD, ‘Data Screening Tools for Competition Investigations’ (n 32).

<sup>39</sup> OECD, ‘Data Screening Tools for Competition Investigations’ (n 32) 16.

<sup>40</sup> *ibid.* 27.

<sup>41</sup> *ibid.* 19; OECD, ‘Ex officio cartel investigations and the use of screens to detect cartels’ (2013) Background Note, 38

<[http://www.oecd.org/officialdocuments/displaydocument/?cote=DAF/COMP\(2013\)14&docLanguage=En](http://www.oecd.org/officialdocuments/displaydocument/?cote=DAF/COMP(2013)14&docLanguage=En)> accessed 01 June 2024.

<sup>42</sup> Finnish Competition and Consumer Authority, ‘Harmaa talous ja hankinnat’ (2019), 29–34.

<sup>43</sup> Aaltio et al (n 35) 28.



found that ‘machine learning approaches originally considered in Swiss data perform very well in Japanese data when using the latter to both train and test predictive models for classifying tenders as collusive or competitive’.<sup>44</sup>

Various factors may affect the way a cartel either stands out in screening data or remains undiscovered. In the case of the Nordic asphalt cartels, many aspects were highly similar and there was data on a fair number of tenders. Regardless, the results produced by the screen differ, possibly because in Finland there was a single ringleader to the cartel and in Sweden four undertakings were active in decision-making.<sup>45</sup> It may be easier to spot anti-competitive behaviour where winning bids are consistently isolated or consistently clustered in a particular pattern, as opposed to a situation where the cartelists make cover bids that do not always follow the same pattern.<sup>46</sup> A cover bid is made to create the illusion of fierce competition.<sup>47</sup> Procurement units often notice something is not quite right if, for instance, the same four firms always bid for tenders or if there are always bids submitted late or otherwise failing to meet basic requirements. It is much harder to uncover collusion when there are cover bids made close to the price of the winning bid.

While cartel screening has taken great strides in recent years, one must remain mindful of the fact that no single screen is suited for all markets or cases. The similarities between the Finnish and Swedish asphalt cartels are striking. This striking similarity is yet not enough to mean that utilising the dataset from one cartel as training data would produce an identical result from screening for the purpose of detecting the other. In these markets, meetings twice a year were sufficient for bid-rigging in public procurement to run efficiently for years.<sup>48</sup> It stands to reason that a market such as Foreign Exchange spot trading, where the commercial value of the sensitive information shared expires in minutes or at most hours, will likely require a very different approach.<sup>49</sup>

### 3.2 OSINT

Open source intelligence is of particular importance in ex officio investigations. Within the context of cartel enforcement, investigations typically arise in one of two situations. In the first situation, the CA for example receives a tip-off reporting a suspected cartel or finds news reports indicating possible cartel activity. This type of suspicion leads to an investigation ex officio, which is to say by the authority’s own (not a cartel’s) initiative. In the second situation, a cartelist files a leniency application, that is to say they admit to their participation in a cartel in exchange for immunity from fines or a reduction of fines that may

---

<sup>44</sup> Martin Huber, David Imhof, and Rieko Ishii, ‘Transnational Machine Learning with Screens for Flagging Bid-Rigging Cartels’ (2022) 185(3) *Journal of the Royal Statistical Society Series A: Statistics in Society* 1074, 1105.

<sup>45</sup> Aaltio et al (n 35) 7, 19.

<sup>46</sup> Aaltio et al (n 35) 4, 7–8.

<sup>47</sup> OECD, ‘Guidelines for Fighting Bid Rigging in Public Procurement’ (n 33) 2, 13.

<sup>48</sup> Aaltio et al (n 35) 6–7.

<sup>49</sup> European Commission, ‘Antitrust: Commission fines UBS, Barclays, RBS, HSBC and Credit Suisse € 344 million for participating in a Foreign Exchange spot trading cartel’ (Press Release IP/21/6548, 2 December 2021) <[https://ec.europa.eu/commission/presscorner/detail/en/ip\\_21\\_6548](https://ec.europa.eu/commission/presscorner/detail/en/ip_21_6548)> accessed 01 June 2024. Commission case AT.40135 FOREX (Sterling Lads) 02 December 2021, para 159.

be imposed for the cartel later on. In cases initiated by way of leniency applications, specifically so-called type I applications,<sup>50</sup> the CA typically has more specific information allowing for targeted inspections. In an investigation initiated ex officio, knowing where key persons are likely to be located (e.g., main offices, another branch office, home office) or how to enter a building, what personnel, documents and data and systems are likely to be encountered may be difficult to anticipate.<sup>51</sup>

The Commission cites ‘intelligence collected through publicly available information’ as a possible starting point for an ex officio investigation.<sup>52</sup> It should be noted that a finding of infringement, as with screening, suggests a higher standard of proof than initial prioritisation decisions or opening an investigation.

Open source intelligence has been defined as ‘intelligence produced from publicly available sources that is collected, exploited, and disseminated in a timely manner to an appropriate audience for the purpose of addressing a specific intelligence requirement’.<sup>53</sup> In the particular context of dawn raids, such sources may include material such as news items, the web sites of undertakings or public statements made by representatives of an undertaking.

The discussion has been raised in the Nordics also on whether or not public officials may make use of social media or apps to gather data for enforcement purposes. In Finland, there has been public debate concerning use of an app designed to locate hunting dogs, as police officers have used their personal apps to locate individuals for the purposes of checking licenses for instance.<sup>54</sup> The Swedish CA has referred to use of OSINT, also in the context of ex officio investigations.<sup>55</sup> There is nothing explicitly in Finnish legislation at least to either allow or prohibit the use of such tools for investigation purposes.

Open source intelligence can be the thing that makes or breaks the outcome of the dawn raid, as knowing the roles or locations of key individuals or what information to search for and where is essential to the success of an unannounced inspection. This is true whether the information gathered is useful for confirming or disproving the suspicion of an infringement. Open source intelligence may also dramatically reduce the duration of the inspection, or even the amount of data ending up in the case file. This is because a better understanding of the market in question and the activities and individuals involved therein, can help narrow down what documents and data may be relevant.<sup>56</sup>

---

<sup>50</sup> Leniency applications made before an investigation is initiated are considered type I, while leniency applications providing significant new evidence once the CA is already investigating the cartel in question are considered type II.

<sup>51</sup> For OSINT use by the Spanish CA, see Cristina Vila, Floriane Sement, ‘Digitalization of competition authorities’ (*Competition Law Blog*, 2021) <[www.cuatrecasas.com](http://www.cuatrecasas.com)> accessed 25 March 2024.

<sup>52</sup> Commission, ‘Ex officio investigations’ <[https://competition-policy.ec.europa.eu/antitrust/ex-officio-investigations\\_en](https://competition-policy.ec.europa.eu/antitrust/ex-officio-investigations_en)> accessed 01 June 2024.

<sup>53</sup> Isabelle Böhm and Samuel Lolagar, ‘Open source intelligence’ (2021) 2 *International Cybersecurity Law Review* 317, 318.

<sup>54</sup> Markku Sandell, ‘Poliisin mukaan koirien ja metsästäjien seurantaan tarkoitettut paikannustiedot ovat avointa tietoa – oikeusoppinut kritisoi’ (*Yle*, 04 October 2023) <<https://yle.fi/a/74-20052260>> accessed 01 June 2024. See also Evgeniya Kurvinen, Matti Muukkonen, and Tomi Voutilainen, ‘Hallintoasian selvittämisvelvollisuus ja siihen liittyvä tiedonhankinta’ (2022) 3 *Oikeus* 381.

<sup>55</sup> Konkurrenssverket, ‘Konkurrens- och upphandlingstillsyn 2019’ Rapport 2020:3, 17.

<sup>56</sup> Section 37 of the Finnish Competition Act empowers officials carrying out an inspection to examine the business correspondence, accounts, data processing records, any other records and data of the undertaking or

### 3.3 DATA PROCESSING DURING UNANNOUNCED INSPECTIONS

In the reality of present-day working environments, CAs no longer have any realistic option to avoid electronic data in various forms and on various data bases, carriers and platforms. The Swedish CA has relied to a significant extent on e-mail correspondence in, for instance, the 2022 taxi case.<sup>57</sup> In recent cases from the Finnish CA, penalty payment proposals to the Market Court in cartel cases include evidence such as metadata from spreadsheets, deleted messages, and WhatsApp messages.<sup>58</sup> The Commission's Forex cases (*Sterling Lads*,<sup>59</sup> *Three-Way Banana Split*,<sup>60</sup> *Essex Express*)<sup>61</sup> relied mainly on chats that had occurred in professional chatrooms.<sup>62</sup>

The amounts of data processed during unannounced CA inspections can be overwhelming both for the CA and for the undertaking inspected and its counsel. The particular challenges related to electronic working environments have been discussed in the OECD, amongst other forums. The Brazilian CA in this context referred to the challenge of handling data collected during inspections in a timely manner, providing the example of a bid-rigging case involving 50 terabytes of digital evidence.<sup>63</sup> This, in paper terms, may be estimated as hundreds of millions of pages.<sup>64</sup> This is worth noting as the challenges related to large data sets are shared by CAs worldwide. Many undertakings operate simultaneously in a number of jurisdictions and may face parallel investigations in the EU and elsewhere. A far smaller data set has been considered as a large amount of information in the ECtHR, as discussed below.

In the Lithuanian case of *Kesko Senukai*, the CA copied over 250 gigabytes of data.<sup>65</sup> To clarify the proportions of the Brazilian example given above, one terabyte equals 1000

---

association of undertakings under investigation which may be relevant to the supervision of compliance with the Competition Act or the provisions issued under it, and to take copies thereof.

<sup>57</sup> Konkurrensverket, 'Beslut om konkurrensskadeavgift; Konkurrensbegransandesamarbete-taxibranschen' Dnr 569/2020, 2.10.2022.

<sup>58</sup> Riina Autio, 'Competition authority dawn raid procedure since documents and data moved from stacks of paper to cloud servers' (2023) 3 *Liikejuridiikka* 8, 30.

<sup>59</sup> Commission Decision of 2 December 2021 relating to a proceeding under Article 101 of the Treaty on the functioning of the European Union and Article 53 of the EEA Agreement (CASE AT.40135 – FOREX – STERLING LADS) [2022] OJ C185/60.

<sup>60</sup> Commission Decision of 16 May 2019 relating to a proceeding under Article 101 of the Treaty on the Functioning of the European Union and Article 53 of the EEA Agreement (Case AT.40135 – Forex-Three Way Banana Split) [2020] OJ C226/5.

<sup>61</sup> Commission Decision of 16 May 2019 relating to a proceeding under Article 101 of the Treaty on the Functioning of the European Union and Article 53 of the EEA Agreement (Case AT.40135 – Forex-Essex Express) [2020] OJ C219/8.

<sup>62</sup> European Commission, 'Antitrust: Commission fines UBS, Barclays, RBS, HSBC and Credit Suisse € 344 million for participating in a Foreign Exchange spot trading cartel' (n 49). On the Commission's Forensic IT procedures, see Dirk Van Erps and Nathalie Jalabert-Doury, 'Digital evidence gathering: An up-date' (2013) 2 *Concurrences* 213.

<sup>63</sup> Latin American and Caribbean Competition Forum, 'Session I: Digital Evidence Gathering in Cartel Investigations - Contribution from Brazil' DAF/COMP/LACF(2020)13, 2–3. Autio, 'Competition authority dawn raid procedure' (n 58) 31.

<sup>64</sup> Ariana Tadler et al, 'E-DISCOVERY TODAY: The Fault Lies Not In Our Rules...' (2011) 4(2) *The Federal Courts Law Review* 4, 6. See also University of Alaska Anchorage, 'How many files can I store?' (20 April 2020) <<https://service.alaska.edu/TDClient/36/Portal/KB/PrintArticle?ID=95>> accessed 01 June 2024.

<sup>65</sup> *UAB Kesko Senukai Lithuania v Lithuania* (n 10) para 9.

gigabytes. The 250 gigabytes discussed in *Kesko Senukai* included the entire mailbox contents from the computers of five employees.<sup>66</sup> The Competition Council argued that ‘the Law on Competition had entitled it to examine, copy and seize any documents which were relevant to the investigation and which might have evidentiary value [...] and that it had not copied any documents that were obviously unrelated to the subject of the investigation’.<sup>67</sup> The targeted undertaking had requested any information not related to the subject of the investigation be returned to it or removed from the Competition Council’s storage devices, or otherwise destroyed.<sup>68</sup> The Competition Council replied that the information obtained had been assessed as necessary for the investigation and could only be removed from the investigation file following a well-founded request indicating within seven days the exact information to be removed and the grounds for its removal.<sup>69</sup> The ECtHR did not consider placing the task of examining each document and providing justification for its exclusion from the investigation file solely on the applicant company proportionate considering the large amount of data involved.<sup>70</sup>

In this respect, it is worth noting that the Finnish CA at least highlights the difference between temporary copies on the one hand, and documents and data copied into the case file on the other. Temporary copies are made so that documents and data in electronic format may be searched using digital forensic software and on devices a CA uses specifically for electronic inspections. This facilitates the use of search functions designed for investigative procedures and means the inspectors will not have to take hold of directors’ or employees’ devices for the entire duration of an inspection.<sup>71</sup> The Finnish CA’s explanatory note on inspections of business premises states that the Finnish Competition and Consumer Authority (FCCA) may make temporary copies of data, or ask the undertaking to make such copies, in order to identify relevant documents and data in a centralised manner with as little strain to business functions as possible. Temporary copies of electronic data may be inspected in the Authority’s own premises using separate computers and in rooms with restricted access. Search terms or other factors are used for the purpose of only copying documents and data into the case file that may be relevant to the investigation and that is not legally privileged. At the end of an inspection, all the data carriers where temporary copies have been stored are overwritten in a manner that does not allow for the material to be recovered.<sup>72</sup> The Swedish CA gives similar indications.<sup>73</sup> Since the *Kesko Senukai* inspection in 2018, the Lithuanian CA has also published an explanatory note on inspection procedure,

---

<sup>66</sup> *ibid* para 14.

<sup>67</sup> *ibid* paras 18–19.

<sup>68</sup> *ibid* para 24.

<sup>69</sup> *ibid* para 25.

<sup>70</sup> *ibid* para 123.

<sup>71</sup> Riina Autio, ‘Explaining Dawn Raids: A Soft Law Perspective into European Competition Authorities’ Explanatory Notes on Unannounced Inspections’ (2020) 11(9) *Journal of European Competition Law & Practice* 475, 482.

<sup>72</sup> Finnish Competition and Consumer Authority, ‘Esite KKV:n toiminnasta Kilpailulain 35 §:n mukaisilla yritystarkastuksilla’ (2017, 2021, 2022), 10.

<sup>73</sup> Konkurrensverket, ‘Gryningsräder inom konkurrenstillsynen - Sökning i datorer och annan digital lagring’ <[www.konkurrensverket.se/konkurrens/tillsyn-arenden-och-beslut/utredningsatgarder/gryningsrader/](http://www.konkurrensverket.se/konkurrens/tillsyn-arenden-och-beslut/utredningsatgarder/gryningsrader/)> accessed 01 June 2024.

part of which appears to address the issues raised in *Kesko Senukai*.<sup>74</sup>

Lately, the possibility of so-called virtual inspections has raised some discussion. The term refers to remote data collection, or in other words remote access to inspect data.<sup>75</sup> It is important to note that also during inspections carried out using remote access, there need to be adequate procedures in place to enable the target of the inspection or their counsel to safeguard the target's rights of defence.

In Finland, 'continued' inspections were made possible through legal reform in 2019. The term refers to the power to continue making searches for information and the selection of copies or extracts at the premises of the FCCA. During the COVID-19 pandemic, the FCCA carried out inspections using a so-called two-room model for the part of the inspection carried out at the premises of the Authority.<sup>76</sup> This means that the inspector goes through the electronic data collected as temporary copies, such as whole email boxes, in one room. Counsel is in another room at FCCA premises, and has a view of the inspector's computer screen, a view of the room the inspector is in, and a voice connection that may be muted on either side. This means that counsel is able to make comments in real time concerning the documents and data as the inspector views them. They are able to ensure that only officials named in the inspection decision have access to the data, and both inspector and counsel are able to consult a colleague without leaving the room and without being heard, if necessary. Forensic IT specialists may be called in to assist on either side of the connection.

A similar set-up could be a possible way of ensuring virtual inspections do not restrict the possibility of the undertaking targeted supervising the inspection as it is carried out. National procedural law may, of course, vary where it comes to the practicalities of inspection procedure.

### 3.4 CASE C-619/23 *RONOS* AS AN EXAMPLE OF NATIONAL DIFFERENCES

The *Ronos* case<sup>77</sup> should be an interesting one to follow, as the request for a preliminary ruling, lodged on 6 October 2023, concerns the conflict between powers to obtain information during a dawn raid as required by Directive 2019/1 on the one hand, and a degree of protection of correspondence higher than that required by the Charter or the Convention, in the Bulgarian Constitution, on the other. The subject matter of the request for a preliminary ruling under Article 98(1) of the Rules of Procedure of the Court of Justice is a

---

<sup>74</sup> Konkurencijos Taryba, 'Konkurencijos Taryba publishes explanatory note on inspections performed at business premises' (last updated 29 April 2020), para 20 <<https://kt.gov.lt/en/news/konkurencijos-taryba-publishes-explanatory-note-on-inspections-performed-at-business-premises>> (2020) accessed 01 June 2024. Also of interest within the context of the present article, para 12 covers the access principle and para 15 the power to conduct continued inspections.

<sup>75</sup> Autio, 'Harmonising Dawn Raids in a Global Village' (n 22) 145; Pedro Suárez Fernández, Pablo González de Zárate Catón, and María Allendesalazar Rivas, 'Spain' in Nathalie Jalabert-Doury (ed), *Competition Inspections in 21 jurisdictions: A Practitioner's Guide* (Institute of Competition Law, New York, 2022) 260.

<sup>76</sup> Riina Autio, 'Yllätystarkastusten jatkaminen Kilpailu- ja kuluttajaviraston omissa tiloissa – varhaisia kokemuksia jatkettusta tarkastuksesta' (*FCCA blog*, 17 February 2023) <<https://ajankohtaistakilpailusta.fi/2023/02/17/yllatystarkastusten-jatkaminen-kilpailu-ja-kuluttajaviraston-omissa-tiloissa-varhaisia-kokemuksia-jatketusta-tarkastuksesta/>> accessed 01 June 2024. See also Finnish Government Proposal 72/2002 vp, 94.

<sup>77</sup> Case C-619/23 *Ronos* (case in progress).

decision by the Bulgarian Commission on Protection of Competition (Komisia za zashtita na konkurentsia; 'KZK'). The KZK found a procedural infringement of the national competition law on the ground of a failure to comply with the obligation to cooperate with an inspection.

The KZK conducted an unannounced inspection at Ronos to investigate suspected bid-rigging. The examination of the managing director's laptop indicated the use of an app commonly used in Bulgaria for private calls and messages. The app linked to the one mobile phone used by the managing director. About half-an-hour after the inspector got access to the managing director's laptop, the inspector proceeded to review the correspondence accessible on the mobile phone and took screenshots of content relevant to the investigation.

Some four hours later, the KZK inspectors found almost all of the relevant correspondence had been deleted. The request for a preliminary ruling does not specify whether the KZK had exported the screenshots made previously prior to the correspondence accessible on the mobile phone being deleted.

Ronos and two natural persons present during the inspection were fined for obstructing the inspection. All three brought actions before the referring court (Administrativen sad Sofia-Oblast) against the KZK procedural fines.

The referring court highlights that the mobile phone in question contained, apart from business correspondence, private correspondence. The referring court notes that there is no contradiction between the inspection powers provided for in national competition law and the procedural safeguards for privacy as provided for in Article 3 of Directive 2019/1 and thereby in Article 7 of the Charter or Article 8 of the ECHR.

The Constitution of Bulgaria, however, provides Bulgarian citizens with stronger safeguards to protect the inviolability of their correspondence than EU law. The fundamental right to inviolability of correspondence may, as per the Bulgarian Constitution, be limited only with the authorisation of a judge and for a single purpose – to uncover or prevent serious criminal offences.<sup>78</sup> The referring court also points out that although bid-rigging is undoubtedly amongst the most serious forms of infringement of competition law, it is not a criminal offence within the meaning of the Criminal Code of Bulgaria.

The reason for the Bulgarian legislator having explicitly opted for stronger safeguards for privacy is, according to the referring court, bound up with Bulgarian national identity within the meaning of Article 4(2) TEU. According to the request, the Bulgarian Committee for State Security (Darzhavna Sigurnost) carried out large scale inspections of correspondence and operational surveillance of citizens without due cause during the period from 1944 to 1990. The national need for a higher standard of protection for privacy arises from this background.

According to the referring court:

Determining the relationship between Member States' constitutional law and EU law is therefore essential to the present request for a preliminary ruling. The present case requires clarification of the relationship between the safeguards for

---

<sup>78</sup> Konstitutsia na Republika Balgaria Article 34, see request for a preliminary ruling in Case C-619/23 *Ronos* para 12.

fundamental rights enshrined in the Constitution of Bulgaria and the provisions of EU law which it is for the national court to apply.<sup>79</sup>

The questions put to the Court of Justice are the following:

1. Is Article 6 of Directive (EU) 2019/1 of the European Parliament and of the Council of 11 December 2018, read in conjunction with Article 3 thereof, and in the light of Article 4(2) of the Treaty on European Union, to be interpreted as limiting the powers of a national competition authority, when conducting an inspection, to access private correspondence, the inviolability of which is guaranteed by the Member State's constitution, when the grounds for restricting the right to freedom and confidentiality of correspondence, enshrined in the constitution itself, are not in place?
2. Is Article 6 of Directive (EU) 2019/1 of the European Parliament and of the Council of 11 December 2018, read in conjunction with Article 3 thereof, and in the light of Article 4(2) of the Treaty on European Union, to be interpreted as meaning that, when an inspection is conducted by the national competition authority, a person who is asked to provide access to a data carrier is entitled to refuse access to content which forms part of his or her private correspondence, given that the inviolability of private correspondence is guaranteed by the Member State's constitution and that the grounds for restricting the right to freedom and confidentiality of correspondence and other communications, enshrined in the constitution itself, are not in place?

In the view of the referring court:

An arrangement (even where enshrined in law) which limits the fundamental right to inviolability of correspondence for any reason other than those specified in the Constitution of Bulgaria is not only unlawful but unconstitutional. Therefore, it is not possible to assess the proportionality and appropriateness of such a limitation provided for by law, whatever the public, State or other high-level interest it is intended to serve.<sup>80</sup>

The referring court therefore considers it necessary to request a preliminary ruling to address the conflict whereby the national court is obliged to disapply EU law it is simultaneously bound to uphold.

The case is of interest from a Finnish perspective since Section 10(4) of the Finnish Constitution (731/1999) is not very far from the Bulgarian provision.<sup>81</sup> The Finnish provision states:

---

<sup>79</sup> Request for a preliminary ruling in Case C-619/23 *Ronos* para 22.

<sup>80</sup> *ibid* para 14.

<sup>81</sup> For a comment from a Serbian law firm, see Nikola Ivković and Vuk Leković, 'Privacy Boundaries: The Ronos Case and Implications for Antitrust Enforcement' (*Gecic Law*, 12 March 2024) <<https://geciclaw.com/privacy-boundaries-the-ronos-case-and-implications-for-antitrust-enforcement/>> accessed 01 June 2024.

Limitations of the secrecy of communications may be imposed by an Act if they are necessary in the investigation of *crimes that jeopardise the security of the individual or society or the sanctity of the home, at trials and security checks, during deprivation of liberty, and for the purpose of obtaining information on military activities or other such activities that pose a serious threat to national security.*

At present, although there has been some debate over whether some competition infringements might constitute fraud,<sup>82</sup> competition infringements are neither explicitly mentioned in the Finnish Criminal Code (39/1889), nor has the fraud theory been tested in practice.

The preliminary ruling in *Ronos* shall have broader implications than merely the outcome of the Bulgarian fining decisions in the case in question. Without the possibility of examining correspondence, and correspondence such as may be found in mobile apps in particular, competition enforcement is scarcely possible in present-day Europe.<sup>83</sup> On the other hand, if secondary EU legislation is found to stand higher in the hierarchy of sources of law than national constitutions even where there is a strong argument in favour of national identity demanding stronger safeguards to fundamental rights, the implications extend beyond competition enforcement.

It seems likely the Court will need to consider earlier rulings in cases concerning criminal matters like *Melloni* and *M.A.S.*<sup>84</sup> On the one hand, the primacy reasoning of the Court in *Melloni* seems straightforward. The Court found already in *Internationale Handelsgesellschaft* that recourse to the legal rules or concepts of national law in order to judge the validity of measures adopted by EU institutions would have an adverse effect on the uniformity and efficacy of EU law, and therefore the validity of an EU measure or its effect within a Member State cannot be affected by allegations that it runs counter to either fundamental rights as formulated by the constitution of that State or the principles of a national constitutional structure.<sup>85</sup> Rauchegger also suggests *M.A.S.* upholds the Court of Justice's

<sup>82</sup> Juha-Matti Mäntylä, 'KKV esittää kartellien kriminalisointia – Emeritusprofessori: Se on kuin petos, josta ei joudu henkilökohtaiseen vastuuseen' (*Yle*, 04 September 2018) <<https://yle.fi/a/3-10386082>> accessed 01 June 2024; Seppo Mölsä, 'Miksi kartelli on petos, mutta ei rikos?' (*Rakennuslehti*, 23 October 2016) <[www.rakennuslehti.fi/blogit/miksi-kartelli-on-petos-mutta-ei-rikos/](http://www.rakennuslehti.fi/blogit/miksi-kartelli-on-petos-mutta-ei-rikos/)> accessed 01 June 2024.

<sup>83</sup> See eg The Netherlands Authority for Consumers and Markets, 'The ACM has imposed a fine of 184 million euros for deleting whatsapp chat-conversations during dawn raid' (11 December 2019) <[www.acm.nl/en/publications/acm-has-imposed-fine-184-million-euros-deleting-whatsapp-chat-conversations-during-dawn-raid](http://www.acm.nl/en/publications/acm-has-imposed-fine-184-million-euros-deleting-whatsapp-chat-conversations-during-dawn-raid)> accessed 01 June 2024; Bulgarian Commission on Protection of Competition, 'The CPC imposed a pecuniary sanction and fines on natural persons for failure to comply with the obligation for cooperation with the Commission in the exercise of its powers' (11 October 2022) <[www.cpc.bg/en/news-11389?returnUrl=page%3d2](http://www.cpc.bg/en/news-11389?returnUrl=page%3d2)> accessed 01 June 2024.

<sup>84</sup> Case C-399/11 *Stefano Melloni v Ministerio Fiscal* EU:C:2012:600; Case C-42/17 *M.A.S. and M.B.* EU:C:2017:564. See also Vanessa Franssen, 'Melloni as a Wake-up Call – Setting Limits to Higher National Standards of Fundamental Rights' Protection' (*European Law Blog*, 10 March 2014) <<https://europeanlawblog.eu/2014/03/10/melloni-as-a-wake-up-call-setting-limits-to-higher-national-standards-of-fundamental-rights-protection/>> accessed 01 June 2024.

<sup>85</sup> Case 11/70 *Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel* EU:C:1970:114 para 3; Case C-409/06 *Winner Wetten GmbH v Bürgermeisterin der Stadt Bergheim* EU:C:2010:503 para 61.



longstanding principle that EU law enjoys primacy over domestic constitutional law. Member States cannot give precedence to a domestic standard of fundamental rights protection because it offers better protection for individuals or because it is part of their national identity.<sup>86</sup>

As noted by de Boer, the opinion of the Advocate General in *Melloni* also addresses the issue of creating a safe haven for those wanting to escape prosecution within the Union, thus undermining the effectiveness of EU law.<sup>87</sup> Furthermore, in *M.A.S.*, the issue related to shared competence under Article 4(2) TFEU.<sup>88</sup> Establishing the competition rules necessary for the functioning of the internal market, as is the case with Directive 2019/1, falls within the exclusive competence of the Union, as per Article 3(1) TFEU.

On the other hand, there are significant differences between *Ronos* and earlier cases. Unlike *Internationale Handelsgesellschaft*, the issue is not one of a voluntarily assumed commitment<sup>89</sup> nor one of placing the interest of certain traders above the public interest of the EU as a whole.<sup>90</sup> The constitutional aspect in *Melloni* was based on an interpretation of a constitutional court, whereas in *Ronos* the conflict is with the constitution itself. The national identity argumentation was not present in *Melloni*, and the AG opinion in *Melloni* at least appears to leave the door open for making such a case.<sup>91</sup> Similarly, in *M.A.S.*, Advocate General Bot called into question whether the application of a limitation period long enough to protect the financial interests of the Union could be defined as conflicting with the Italian national identity. The referring court made this argument relying on the national constitution and the principle of legality. The Advocate General's opinion states: 'a Member State which considers that a provision of primary law or secondary law adversely affects its national identity may [...] challenge it on the basis of the provisions laid down in Article 4(2) TEU'.<sup>92</sup> In *M.A.S.*, the Advocate General did not consider this to be the case.<sup>93</sup> The Court of Justice was able to give a ruling without addressing the issue of national identity. The national identity aspect as described by the referring court in *Ronos* appears to be clear.

On the one hand, Directive 2019/1 harmonises powers to inspect data precisely such as is at issue in *Ronos*. On the other hand, the compelling argumentation for consideration of national identity is not present in previous cases. It is true that the argument was put forward in *M.A.S.*, but why particular limitation periods ought to be considered part of national identity was not explained. In *Ronos*, however, national identity is clearly linked to higher safeguards for confidentiality of communications even in the case of public enforcement. It is difficult to see how the case could be resolved without addressing the issue of national identity.

---

<sup>86</sup> Clara Rauchegeger, 'National constitutional rights and the primacy of EU law: *M.A.S.*' (2018) 55(5) Common Market Law Review 1521, 1546.

<sup>87</sup> Nik de Boer, 'Addressing rights divergences under the Charter: *Melloni*?' (2013) 50(4) Common Market Law Review 1083, 1088; *M.A.S. and M.B.* (n 84) paras 103 and 120.

<sup>88</sup> *M.A.S. and M.B.* (n 84) para 43.

<sup>89</sup> *Internationale Handelsgesellschaft* (n 85) para 18.

<sup>90</sup> *ibid* para 24.

<sup>91</sup> *Melloni* (n 84) paras 137–141; see also de Boer (n 87) 1090 and 1097.

<sup>92</sup> *M.A.S. and M.B.* (n 84) para 175.

<sup>93</sup> *ibid* para 176. The Advocate General in both *M.A.S.* and *Melloni* was Bot. See also de Boer (n 87) 1098 and 1100.

#### 4 BALANCING THE PRINCIPLE OF OPENNESS WITH THE PERFORMANCE AND PURPOSE OF AN INSPECTION

The Finnish principle of openness of Government activities was discussed above. The Openness Act, does, however, also provide for limited instances of confidentiality.

Section 24 of the Finnish Openness Act contains a provision to protect the confidentiality of documents containing information in inspections or other statutory supervisory tasks of an authority, if access would compromise the performance of the inspection or its purpose. The same section protects the confidentiality of documents concerning the relationship of Finland with a foreign state or an international organisation; the documents concerning a matter pending before an international court of law, an international investigative body or some other international institution. It also protects the confidentiality of documents concerning the relationship of the Republic of Finland, Finnish citizens, Finnish residents or corporations operating in Finland with the authorities, persons or corporations in a foreign state, if access to such documents could damage or compromise Finland's international relations or its ability to participate in international co-operation.

The broad principle of openness is thereby balanced with considerations shielding inspections and international cooperation. This is also important in the context of preliminary investigations, as they may require participation from more than one EU CA.

Also, in the context of Commission investigations, it has been confirmed in *Orange*<sup>94</sup> that it is not until the beginning of the *inter partes* administrative stage that the undertaking concerned is informed of all the essential evidence on which the Commission relies at that stage and that that undertaking has a right of access to the file. Consequently, it is only after notification of the statement of objections that the undertaking concerned is able to rely in full on its rights of defence, given that were those rights to be extended to the period preceding the notification of the statement of objections, the undertaking concerned would already be able, at the preliminary investigation stage, to identify the information known to the Commission, and hence the information that could still be concealed from it.<sup>95</sup> Requiring the Commission to indicate the indicia leading it to consider that competition rules have possibly been infringed during the preliminary investigation stage would upset the balance between preserving the effectiveness of the investigation and upholding the rights of defence of the undertaking concerned.<sup>96</sup>

From this perspective, the details of an investigation in the preliminary phase appear to be well shielded. Once a CA has submitted an SO to an undertaking suspected of an infringement, the undertaking also has broad access to evidence in order to safeguard its rights of defence in the contradictory phase. The ruling in *French Supermarkets* stresses that where the Commission considers the possibility of using the information resulting from its exchanges with third parties for the purposes of adopting an inspection decision, it is required

---

<sup>94</sup> Case T-402/13 *Orange v European Commission* EU:T:2014:991.

<sup>95</sup> *AC-Treuhand AG v Commission* (n 1) para 48 and the case-law cited; *Orange v European Commission* (n 94) para 78; *České dráhy v Commission* (n 1) paras 85 and 86.

<sup>96</sup> *Orange v European Commission* (n 94) para 81.

to record those exchanges.<sup>97</sup>

## 5 CONCLUSIONS

The interaction between a principle of openness or transparency of public administration such as in Finland or in Sweden, the protection of fundamental and human rights on a national or on an EU level, and broad powers to safeguard competition in the internal market raises a number of questions. Where does one strike the balance between protection of privacy and the public interest of uncovering competition restrictions? How may we secure the rights of defence without jeopardising an investigation where data sets have grown beyond anything previously known?

The decisional practice of the ECtHR related to dawn raids reflects beyond a doubt the fact that electronic data is essential for unannounced inspections in present-day Europe. This fact also highlights the importance of rulings made, currently awaited in the Bulgarian *Ronos* case pending in the Court of Justice.

Transparency is key. If CAs are collecting data in order to investigate suspected competition infringements, they also need to be able to provide a record of what has been done and how it has led to taking further steps. This is the case for the Commission and in Finland at least. At the same time, some details of tactical consequence must remain confidential.

In order to maintain a balance of outcomes, one needs to be aware of the many and varied links between national legislation, international legislation, agreements and co-operation, and rulings from not only national courts but also the EU courts and the ECtHR. The rate of developing new investigative tools and approaches must follow the rate of development of technology in business use. The rate of assessing best practices for procedures largely unregulated must, in turn, follow suit. Research into these issues is very much needed. Taking into account the realities of the activities in question, an inherently cross-border subject of regulation would undoubtedly benefit from combining different points-of-view, including those of Fundamental and Human Rights Law, Administrative Law, EU Competition Law, and national Constitutional and Criminal Law from more than one Member State.

---

<sup>97</sup> Case C-693/20 P *Intermarché Casino Achats SARL v. European Commission* (n 27) paras 122–125; Case C-682/20 P *Les Mousquetaires and ITM Entreprises v Commission* (n 27) para 163.

## LIST OF REFERENCES

- Aaltio A, Buri R, Jokelainen A and Lundberg J, 'Complementary bidding and cartel detection: Evidence from Nordic asphalt markets' (2023) Finnish Competition and Consumer Authority Working Papers 1/2023
- Autio R, 'Explaining Dawn Raids: A Soft Law Perspective into European Competition Authorities' Explanatory Notes on Unannounced Inspections' (2020) 11(9) Journal of European Competition Law & Practice 475  
DOI: <https://doi.org/10.1093/jeclap/lpaa044>
- —, 'Drawing the line at dawn raids: European courts' decisional practice on procedural issues arising from competition authorities' unannounced inspections' (2020) 41(6) European Competition Law Review 297
- —, 'Harmonising Dawn Raids in a Global Village: The ECN+ Directive and Negotiating Legal Certainty Within Fragmented European Administrative Procedure' (2022) 6(2) Market and Competition Law Review 125
- —, 'Competition authority dawn raid procedure since documents and data moved from stacks of paper to cloud servers' (2023) 3 Liikejuridiikka 8
- Böhm I and Lolagar S, 'Open source intelligence' (2021) 2 International Cybersecurity Law Review 317  
DOI: <https://doi.org/10.1365/s43439-021-00042-7>
- de Boer N, 'Addressing rights divergences under the Charter: *Melloni*' (2013) 50(4) Common Market Law Review 1083  
DOI: <https://doi.org/10.54648/cola2013108>
- Hiilamo T, Jääskeläinen J, and Willka R, 'Kilpailu julkisissa hankinnoissa' (2023) 9 Tutkimusraportteja 9
- Huber M, Imhof D, and Ishii R, 'Transnational Machine Learning with Screens for Flagging Bid-Rigging Cartels' (2022) 185(3) Journal of the Royal Statistical Society Series A: Statistics in Society 1074  
DOI: <https://doi.org/10.1111/rssa.12811>
- Kurvinen E, Muukkonen M, and Voutilainen T, 'Hallintoasian selvittämismäärä ja siihen liittyvä tiedonhankinta' (2022) 3 Oikeus 381
- Rauchegger C, 'National constitutional rights and the primacy of EU law: *M.A.S.*' (2018) 55(5) Common Market Law Review 1521  
DOI: <https://doi.org/10.54648/cola2018121>

Suárez Fernández P, González de Zárate Catón P, and Allendesalazar Rivas M, 'Spain' in Nathalie Jalabert-Doury (ed), *Competition Inspections in 21 jurisdictions: A Practitioner's Guide* (Institute of Competition Law, New York, 2022)

Tadler A et al, 'E-DISCOVERY TODAY: The Fault Lies Not In Our Rules...' (2011) 4(2) *The Federal Courts Law Review* 4

Van Erps D and Jalabert-Doury N, 'Digital evidence gathering: An up-date' (2013) 2 *Concurrences* 213