

### The Czech Constitutional Court rules that inspection at business premises of a company does not require a prior judicial authorization (Delta Pekarny)

**Czech Republic, Procedures, Investigations/Inquiries, Judicial review, ECHR, Rights of Defence, All business sectors**

Czech Constitutional Court (Ustavni soud), 26 August 2010, Case n° III. US 2309/09, Delta Pekarny Case

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#### Introduction

On 26 August 2010 the Czech Constitutional Court rendered a judgment whereby it rejected as manifestly ill-founded a constitutional appeal of business company Delta Pekarny (one of the largest companies on the bakery market in the Czech Republic) against the judgment of the Supreme Administrative Court of 29 May 2009, the judgment of the Regional Court in Brno of 27 September 2007, the decision of the Chairman of the Competition Office of 8 November 2006 and the decision of the Competition Office of 27 June 2006.

The first instance decision of the Competition Office imposed on Delta Pekarny a financial sanction of CZK 300,000 for obstructing inspection of the Competition Office in the company's business premises carried out in connection with an alleged concerted practice among several bakery companies aimed at parallel increase in prices for fresh bread and pastries and fresh and durable sweet pastry products.

In its judgment, the Constitutional Court upheld the rulings of the previous instances pursuant to which the investigation of the Competition Office in the business premises of the company did not require a prior judicial authorization, holding that such practice is compatible with both the constitutional order of the Czech Republic and the European Convention on Human Rights.

#### Summary of previous proceedings

The main circumstances of the case may be summarized as follows [1]. Within the course of an investigation into the alleged price-fixing concerted practice, the Competition Office carried out a raid on Delta Pekarny, one of the companies involved in the cartel. Its officials entered the business premises of the company in order to obtain and seize a number of documents that were assumed to contain evidence of the unlawful conduct. However, the managers declined to cooperate with the officials and provide them with the requested documents.

In specific terms, the CEO prevented the officials from reading his e-mail correspondence contained in his notebook by

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closing the notebook and leaving with it the premises of the company on the purported ground that he had to attend a business meeting. Another manager took away from the officials two printed e-mails that had been previously handed over to them on the ground that they represented private correspondence.

The Competition Office held that the conduct of the managers constituted an unlawful obstruction of its investigation violating Section 21 (4) a (5) of the Competition Act and imposed upon the company a fine of CZK 300,000. Delta Pekarny filed an appeal against the first instance decision of the Competition Office to its Chairman, but he affirmed. Similarly, the decisions of the Competition Office and its Chairman were subsequently affirmed by the Regional Court and Supreme Administrative Court.

Delta Pekarny invoked before the above stated domestic authorities a number of precedents of the European Court of Human Rights, the Court of Justice of the European Communities, the Czech Constitutional Court etc. The company relied particularly on the *Société Colas Est and Others v. France* judgment [2] in which the European Court of Human Rights had held that a dawn raid carried out by the officials of the French Department for Competition, Consumer Affairs and Fraud Prevention in the absence of a prior judicial authorization had violated the right of the applicant companies to respect for their homes.

However, all the Czech domestic instances declared that the European precedents, including the *Société Colas* judgment, were inapplicable to the case of Delta Pekarny and held that a raid carried out by the Competition Office did not require a prior judicial authorization. A dawn raid unauthorized by a judicial warrant, they concluded, was fully compatible with both the Czech constitutional order and Article 8 of the European Court of Human Rights [3].

Proceedings before the Constitutional Court

### **Arguments of Delta Pekarny**

As in the previous proceedings, Delta Pekarny based the argumentation contained in its constitutional appeal to a decisive degree on the reasoning of the European Court of Human Rights (hereinafter the "ECHR") in the *Société Colas* judgment. The company recalled the dictum of the ECHR pursuant to which the European Convention on Human Rights (hereinafter the "Convention") should be construed in a dynamic manner and emphasized that "the time has come to hold that in certain circumstances the rights guaranteed by Article 8 of the Convention may be construed as including the right to respect for a company's registered office, branches or other business premises" (para. 41 of the *Société Colas* judgment).

Further, the applicant company pointed to the conclusion of the ECHR pursuant to which the relevant legislation and practice pertaining to the competence of competition authorities to carry out dawn raids must afford "adequate and effective safeguards" against abuse (para. 48). In addition, Delta Pekarny stressed that the Competition Office, similarly as the French authorities in the *Société Colas* case, had very wide powers which gave it exclusive competence to determine the expediency, number, length and scale of inspections (para. 49).

Since the ECHR had held in the *Société Colas* judgment that the raids of the French competition authorities carried out without a prior judicial authorization could not be regarded as "strictly proportionate" to the legitimate aims pursued (para. 49), Delta Pekarny argued that the Czech Constitutional Court should adopt a similar position and hold that the inspection

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carried out by the Competition Office at Delta Pekarny's business premises without a prior judicial warrant had equally violated the company's right to respect for home guaranteed by Article 8 of the Convention.

### **Judgment of the Constitutional Court**

The Constitutional Court dismissed the constitutional appeal of Delta Pekarny as manifestly ill-founded on the basis of the following reasoning:

At the outset of its analysis, the Constitutional Court emphasized that its task is not to assume the role of the fourth instance and review the interpretation and application of the so-called "simple law". As the Constitutional Court held in this respect, its role is limited merely to "placing emphasis on the most important questions and correcting the most extreme excesses."

Having defined its role, the Constitutional Court found that no excesses that would violate the fundamental rights of the applicant company had been committed in the previous proceedings. However, in arriving at this conclusion, the Constitutional Court refrained from making an independent constitutional analysis of the issues raised by Delta Pekarny and confined itself to a mere proclamation that the lower instances had dealt satisfactorily with all objections put forward by the applicant company.

In particular, the Constitutional Court upheld the conclusion of the previous instances that the Société Colas judgment was inapplicable to the Delta Pekarny case since the two cases were distinguished by a number of different features. Among the most significant differences were the following:

First, the French legal regulation was said to be different since the competences of the French relevant authorities are wider than those of the Czech Competition Office. The wider scope of their competences follows, among others, from the fact that they are entitled to also seize documents, whereas the Competition Office possesses merely the right to make their copies. Furthermore, the Czech competition authority, unlike the French authorities, cannot arrest a person for the purpose of an investigation. Also, the French authorities may, unlike the Czech Competition Office, order the competent organ of the administration of postal services to open an envelope if there is a reasonable suspicion that it contains evidence of an anticompetitive conduct.

Second, the Czech Competition Office, unlike the French authorities, exceeded neither the scope of the investigation nor their statutory powers. Lastly, the Czech legal order allegedly provides to undertakings the possibility to challenge the inspection by way of a judicial action against unlawful interference and/or a judicial action for review of the administrative decision imposing the fine, whereas under French law it is possible to challenge the inspection only in the proceedings on the merits of the case.

Given these differences between the French and Czech regulation of dawn raids, the Constitutional Court held that the Société Colas judgment was inapplicable to the Delta Pekarny case and upheld the rulings of the lower instances pursuant to which an inspection carried out by the Competition Office in a company's business premises does not require a prior judicial authorization.

Concluding remarks

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The judgment of the Constitutional Court is rather disappointing. The Court utterly resigned at its role as the guardian of constitutionality and its reasoning offers no added value to the reasoning of the impugned decisions of the lower instances. The Constitutional Court completely refrained from making an independent analysis of the constitutional features of the case, confining itself merely to repetitive statements that the lower authorities had duly dealt with all objections of the applicant company.

Among the most controversial arguments (or, more precisely, statements) of the Constitutional Court is the assertion that the *Société Colas* judgment is inapplicable to the *Delta Pekárny* case due to significant differences between the two cases. However, a more realistic look on the two cases reveals that, in fact, there are no significant divergences. For instance, the fact that the Czech Competition Office may not seize documents during an inspection does not alter the fact that, in effect, it may gain possession of all information contained therein since it is empowered to make copies of all documents. Likewise, the fact that the French authorities may order opening of an envelope seems completely irrelevant for the purpose of the present case.

Notwithstanding the above conclusions of the Constitutional Court, the fact remains that the Czech Competition Office does possess very wide powers which enable it to determine the length of duration and scope of an on-premises investigation. Also, it is questionable to what degree the procedural safeguards mentioned by the Supreme Administrative Court may be regarded as "adequate and effective". The judicial action for review of the administrative decision imposing the fine represents merely an *ex post facto* review. The judicial action against unlawful interference is clearly inappropriate since, pursuant to domestic case-law, resort to it is possible only in a situation where the impugned interference still persists.

All in all, the poor reasoning of the Constitutional Court should prompt *Delta Pekárny* to take the case to Strasbourg. It would be interesting to see whether the ECHR would subscribe to the view that the Czech legal framework is to a decisive degree different from the French practice described in the *Société Colas* judgment, or whether it would hold that there are no significant divergences and conclude that the Czech practice violates Article 8 of the European Convention on Human Rights. In view of the present author, the latter view would be a more realistic one.

[1] In this Article, I deal only with the proceedings against *Delta Pekárny* the subject-matter of which was the competence of the Competition Office to carry out a raid in the absence of a prior judicial authorization. For a comment on the merits of the *Bakeries Case* as such, see the recent contribution of Tomáš &#268;ihula, Michal Forýtek, *A Czech Regional Court confirms CZK 53 million fine for the concerted practices of bakeries (Delta Pekárny, Odkolek and Penam)*, 21 October 2010, *e-Competitions*, n° 33085.

[2] For more details, see European Court of Human Rights, 16 April 2002, no. 37971/97, *Société Colas Est and Others v. France*, available at: <http://cmiskp.echr.coe.int/tkp197/p...>

[3] For a comment on the ruling to this effect of the Supreme Administrative Court, see Jiri Kindl, *The Czech Supreme Administrative Court clarifies rules applicable to dawn raids (&#171;Bakeries Cartel&#171;)*, 29 May 2009, *e-Competitions*, n° 28693.

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