



# Transfer of evidence from criminal procedures to the competition authority

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This contribution contains personal opinions and does not reflect the position of the Authority for Consumers & Markets

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# Two Dutch cartelcases

- Shipswaste cartel
  - Decision of 16 November 2011 case no 6929
  - Collection of shipswaste in the port of Rotterdam
- Road construction cartel
  - Decision of 29 October 2010 case no's 6494/6836
  - Construction of roads in the south of NL

# Evidence from criminal procedures used to start, and prove, competition cases

- Phone taps in two criminal investigations
- Public prosecutor transferred the evidence to the competition authority
- Public enforcement of competition law is exclusively administrative in NL.

# Right to respect for private and family life, art 8 ECHR

- Right to privacy applies to undertakings (ECHR *Société Colas Est*)
- Two separate instances of interference of the right to privacy
  1. Placing phone taps (*ECHR Klass and others v. Germany*)
  2. Transfer of the information to the Competition Authority (*ECHR Leander v. Sweden*)

# Interference with right to privacy can be justified

- Cumulative conditions to justify an interference:
  1. Is the interference in accordance with the “law”?
  2. Legitimate aim? Limited list:
    - ...
    - the economic well-being of the country
  3. Necessary in a democratic society?

# Interference with the right to privacy can be justified

- The “law” has to be adequately precise. (ECHR *Sunday Times, Groppera Radio AG v. Switzerland*)
- The conditions for placing phone taps have to be very precise (ECHR *Huvig & Kruslin v. France*, also: *Dragojevic v. Croatia*)
- A lighter interference requires a less precise norm (ECHR *P.G. & J.H. v. UK*)

# Rulings by the district court of Rotterdam (first instance) of 11 July 2013

- National procedure (soft law) requires a written motivation (balancing of interests) by the public prosecutor
- A prior written motivation was absent
- The evidence is inadmissible
- Fining decisions annuled

# Reversal by the court of appeals (second instance) of 9 July 2015

- Different interpretation of the national procedure. The law does not require a prior written motivation by the public prosecutor.
- The court applied the balance of interests test.
- The court concluded that the evidence is admissible.



# Concluding remarks

- It is relevant to consider the gravity of the interference with privacy
- The court retro-actively justified the transfer of evidence in both Dutch cases.
- Adequate judicial review afterwards can make up for the absence of prior judicial review. (*ECHR Delta Pekárny v Czech republic*)
- Contacts with other authorities. Creating awareness with competition law and procedure to transfer evidence