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It's a new dawn, it's a new day

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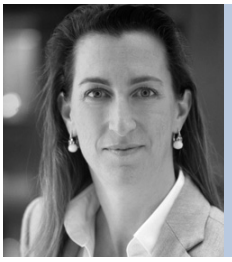

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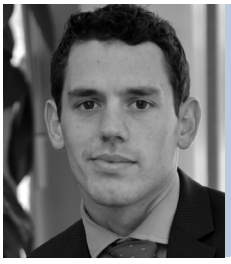

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RECENT DECISIONS OF THE EU COURTS once more show that the way undertakings respond to dawn raids can have a significant impact in terms of fines. At the same time they also clarified the rights of companies being investigated. The European Commission in its turn recently revised its explanatory note on inspections.[1] It is therefore worthwhile to look at these current developments.

THE COMMISSION'S INSPECTION DECISION

In exercising its powers, the Commission is of course under a duty to state the subject matter of its inspection.[2] In the recent judgment in *Nexans v Commission* [2012] and *Prysmian v Commission* [2012], the General Court examined in detail what this means in practice. It annulled part of the Commission's decision to raid two manufacturers of undersea cables on suspicion that the companies had been running a cartel on the market for high-voltage cables.

Nexans and Prysmian claimed the decisions to inspect were imprecise as to the product markets and alleged that the vague wording affected their rights of defence. The Commission's inspection decisions said the product market was:

> '... supply of electric cables and the materials associated with such supply, including, amongst others, high voltage underwater electric cables and, in certain cases, high voltage underground electric cables'.[3]

The General Court ruled that this was not worded too vaguely:

> '... by referring in the inspection decision to all electric cables and all the material associated with those cables, the Commission has met its obligation to define the subject matter of its investigation'.[4]

It further clarified that the Commission is not required to define precisely the market covered by its investigation, provided the decision specifies the inspection's subject matter and purpose. However, the General Court emphasised that the Commission must have 'reasonable grounds for suspecting an infringement of competition rules' before deciding to inspect a company. In this case, the General Court said that:

> '... it must be found that the Commission has not demonstrated that it had reasonable grounds for ordering an inspection covering all electric cables and the material associated with those cables'.[5]

It therefore annulled the inspection decisions in so far as they concerned electric cables other than high-voltage underwater and underground electric cables and associated materials. What implications this will have on the Commission's fining decision remains to be seen, but the judgment certainly demonstrates that it is important to study the Commission's mandate in detail.

THE COMMISSION'S POWERS OF INSPECTION AND COMPLIANCE

The explanatory note sets out a number of already established issues, such as the main principle that undertakings are legally obliged to submit to the Commission's inspection decision.[6] At the same time, it outlines the inspectors' powers, which include the right to enter any premises of undertakings and examine records related to the business (irrespective of the medium in which they are stored) and take copies or extracts from such records.

Interestingly, the explanatory note specifically sets out that the presence of an undertaking's lawyer is not a legal condition for the validity of the inspection. Inspectors can enter the premises and begin the inspection without waiting for the undertaking's consultation with lawyers. Only short delays will be accepted.

Entering premises

The fact that the presence of a lawyer is not necessary for an inspection to be lawful was highlighted in the judgment in *Koninklijke Wegenbouw Stevin v Commission* [2012]. During the Commission's inspection in 2002, Koninklijke Wegenbouw Stevin (KWS) had refused Commission officials entry into the building for 47 minutes and demanded they await the arrival of external lawyers. Access was only granted on arrival of the police, called by the Dutch officials at the request of the Commission. Later, external lawyers refused the Commission access to a company director's office on the grounds that there were no documents relating to bitumen

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within. In 2006, the Commission fined KWS €27.36m for its role in the Dutch bitumen cartel and this sum included an uplift of more than €2m for obstruction of the dawn raid.[7] KWS appealed this decision arguing *inter alia* that it had merely exercised its rights of defence when insisting that a lawyer be present during the inspection.

The General Court found that the Commission should at least have been able to enter the premises, serve the inspection decision and take charge of IT and telephone systems to ensure there was no destruction of evidence or communication with competitors. While it recognised that lawyers have an important role in defending undertakings' rights already at the stage of the inspection, it also emphasised that the company could have discussed matters with a lawyer over the phone and that the *effet utile* of the Commission's right to carry out unannounced inspections would be lost if the Commission could not enter premises without a lawyer being present.

Further, the Court stressed that the Commission's inspection decision permitted entry into the company's premises during the office's normal business hours and to examine all books and business records so that it was not lawful for the company to refuse entry to certain rooms.

Given the repeated obstructions and the importance of Commission inspections in enforcing EU competition law, the General Court considered the 10% uplift in fines to be proportionate.

Therefore, it seems advisable to allow inspectors to enter the premises and let them make sure that no electronic or other evidence is tampered with and that the undertaking does not try to warn competitors. If the inspectors are comfortable that the company is not trying to obstruct its investigation, they may be willing to wait with the examination of documents until the undertaking's lawyer arrives.

Sealing premises

Another judgment, this time from the Court of Justice of the European Union (the CJEU)[8], concerned fines imposed by the Commission because of the breaking of a seal put in place by the Commission during an inspection. In 2006, the Commission carried out unannounced inspections at the premises of energy companies in Germany including E.ON. During the inspection the officials exercised their right to place a seal on an office door, which they also locked, in order to secure documents found.

The security seal displayed a specific warning that breach of the seal could result in fines. On the second day the Commission found the seal had been broken. A 'void' message was clearly evident over the entire surface of the seal. The seal had also been displaced by about 2mm upwards and sideways, evidenced by traces of adhesive on the door and door frame.

E.ON denied breaking the seal, but the Commission did not consider E.ON's explanations valid and fined it €38m. The General Court dismissed E.ON's appeal on the grounds that it was not necessary for the Commission to prove how the seal was actually broken, that someone actually entered the sealed room or that evidence had actually been tampered with. Further, the level of the fine was considered proportionate. E.ON then further appealed to the CJEU, which upheld the Commission's fine.

The CJEU held that:

> '... if an undertaking could challenge the probative value of a seal by alleging the simple possibility that it might have been defective, the Commission would be completely deprived of the possibility of using seals. Therefore, such an argument, unsupported by any evidence establishing a defect in the seal at issue, cannot be accepted.'[9]

The CJEU also emphasised that given fines for an infringement of competition rules can go up to 10% of a company's turnover, a fine of €38m, which represented no more than 0.14% of E.ON's annual turnover, could not be considered excessive. Rather, a significant fine was deemed necessary in order to ensure the deterrent effect of that penalty.

Seizing IT data

The Commission's right to inspect an undertaking's IT environment and storage media and to take electronic copies of such information is of central importance for the Commission's investigations and its scope continues to be challenged before the EU courts.

In the *Nexans/Prysmian* case, the General Court was asked to declare unlawful the Commission's decision to remove copies of certain electronic files for later review at its offices. The applicants claimed that the Commission lacked the right to copy the files for later examination. They argued that the documents should have been reviewed at the undertakings' premises allowing the Commission only to take a copy of those documents relevant for the purposes of the investigation.[10]

On hearing the arguments, the General Court accepted the Commission's assertion that the actions for annulment under the inspection decision were inadmissible. It qualified the contested acts as intermediate measures paving the way for the adoption of a fining decision. Intermediate measures are not challengeable in so far as they are not capable of producing binding legal effects capable of affecting the applicant's interests by bringing about a distinct change in their legal position. Therefore, the General Court ruled that the legality of the contested acts could only be examined in the context of an action challenging the Commission's final decision under Article 101(1) of the Treaty on the functioning of the European Union.[11] Nexans appealed to the CJEU on these matters but a decision on the merits may

only occur if and when the Commission's fining decision will be appealed.

In light of the increasing importance of the issue, the Commission dedicated a large part of the update of its explanatory note to the gathering of electronic evidence:

- The explanatory note makes clear that inspectors are not limited to using search tools provided by the undertaking's IT environment but can use their own forensic IT tools (software and/or hardware) to copy, search and recover data provided that they respect the integrity of the undertaking's systems and data. Once the inspection ends, all of the inspectors' forensic IT tools containing the undertaking's data are cleansed, ie, the data is completely removed in a way that does not allow reconstruction by any known technique.

- Inspectors can also use hardware (hard disks, CD-ROMs, DVDs, USB keys, connection cables, scanners, printers, etc) provided by the undertaking but are not obliged to do so. The undertaking's storage media that will be examined can be kept by inspectors until the end of the inspection. They may be returned earlier, for instance after an authentic duplicate of the investigated data has been made.

- Undertakings may have to provide appropriate representatives to assist the inspectors, not only for explanations on the organisation of the undertaking and its IT environment, but also for specific tasks such as the temporary blocking of individual e-mail accounts, disconnecting computers from the network, removing and re-installing hard drives from computers and providing 'administrator access rights' support.

- Undertakings must not negatively interfere with the searching of IT data and it is the undertaking's responsibility to instruct its employees accordingly.

The practical relevance of the latter obligation was highlighted in March 2012 when Czech firm EPH was fined €2.5m by the Commission for tampering with access to e-mail accounts during a dawn raid.[12]

The inspectors had requested to block e-mail accounts of key persons until further notice. This was done by setting a new password only known to the inspectors. The inspectors discovered, however, that the password for one account had been modified in order to allow the account holder to access the account. They also found out that one of the employees had requested the IT department to divert all e-mails arriving in certain blocked accounts away from these accounts to a computer server. The company admitted that this happened for at least one e-mail account. As a result, the incoming e-mails were not visible in the inboxes concerned, they could not be searched by inspectors and their integrity could be compromised.

Joaquín Almunia, Commission vice president in charge of competition policy, said:

> 'Company information is nowadays essentially stored in IT environments like e-mail systems and can be quickly modified or deleted. This decision sends a clear message to all companies that the Commission will not tolerate actions which could undermine the integrity and effectiveness of our investigations by tampering with such information during an inspection.'[13]

There can be no doubt that the Commission is serious about protecting the integrity of its investigations. Considering the amounts of fines imposed for the obstruction of dawn raids it looks like money invested in educating employees how to comply with dawn raids is money well invested.

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NOTES

1) European Commission, explanatory note to an authorisation to conduct an inspection in execution of a Commission decision under Article 20(4) of Council Regulation No 1/2003, revised on 18 March 2013 (the explanatory note).
2) According to Article 20(4) of 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 (Regulation No 1/2003), the decision 'shall specify the subject matter and purpose of the investigation'.
3) *Nexans v Commission*, paragraph 46.
4) *Nexans v Commission*, paragraph 53.
5) *Nexans v Commission*, paragraph 91.
6) Article 20(4) of Regulation No 1/2003.
7) *Dutch Bitumen* [2007], paragraph 19.
8) *E.ON Energie v Commission* [2012].
9) *E.ON Energie v Commission*, paragraph 108.
10) *Nexans v Commission*, paragraph 130.
11) *Nexans v Commission*, paragraph 132.
12) *EPH & ors* [2012], paragraph 20. On 12 June 2012 EPH appealed the decision to the General Court (*Energetický a průmyslový and EP Advisors v Commission* [2012]).
13) Commission Press Release IP/12/319 of 28 March 2012.

Dutch Bitumen (case COMP/38.456) Commission decision 2007/L 196/40 [2007] OJ L196/44

Case T-272/12 Energetický a průmyslový and EP Advisors v Commission [2012] OJ C250/31

Case C-89/11 P E.ON Energie v Commission (Court of Justice of the European Union, 22 November 2012)

Case COMP/39.793 EPH & ors [2012] OJ C316/8

Case T-357/06 Koninklijke Wegenbouw Stevin v Commission (General Court of the European Union, 27 September 2012)

Case T-135/09 Nexans v Commission (General Court of the European Union, 14 November 2012)

Case T-140/09 Prysmian v Commission (General Court of the European Union, 14 November 2012)