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Dawn raids - EU's highest court prevents circumvention of the ban on using dawn raids for fishing expeditions

Peter Citron (Editor) (White & Case, Belgium) · Friday, June 19th, 2015

The Court of Justice of the European Union has now delivered its judgment in the Deutsche Bahn^[1] case. This case concerns important practical principles which govern the conduct of European Commission dawn raids (on-the-spot surprise inspections used to investigate possible infringements of the EU competition rules). In particular, the case focusses on what inspectors can do with documents that they have found during an inspection which do not relate to the subject matter of their inspection, but indicate separate unrelated anti-competitive behaviour.

Business should review their dawn raid procedures to ensure that they reflect the best practice established by this judgment, in particular regarding the control of the scope of an inspection.

The dawn raids in question

In March 2011, the European Commission conducted a dawn raid on the premises of Deutsche Bahn AG ("DB") and some of its subsidiaries on the grounds that DB might allegedly have abused its dominant position by giving preferential rebates to its subsidiaries when supplying operators with electric traction. During this dawn raid, the inspectors found documents which to the European Commission seemed to indicate the possibility of a further allegation of anti-competitive conduct, this time in relation to a different line of business involving the strategic use of DB infrastructure managed by one of its subsidiaries, DUSS. In order to gather evidence of the possible second allegation, the European Commission adopted a new inspection decision whilst the inspectors were still at DB's premises. In July 2011, the European Commission adopted a third inspection decision, allowing it to return to DB's premises to seek further evidence relating to possible allegations of competition law infringements by DUSS.

DB contested the legality of the three inspection decisions before the General Court. According to DB: (i) the European Commission should have obtained a judicial warrant in order to ensure that the inspection was subject to judicial control, and (ii) the second and third inspections were based on information obtained illegally during the first inspection. The General Court dismissed these arguments in their entirety. It held that there is no need for the European Commission to obtain judicial authorisation

prior to a dawn raid, and that documents discovered by accident which indicate a separate infringement may be used as evidence of that infringement as long as the proper procedural requirements are followed.

DB lodged an appeal with the Court of Justice of the European Union seeking that the General Court's judgment be set aside and the European Commission's inspection decisions be annulled.

Requirement of prior judicial authorisation

DB argued that various articles of the Convention for the Protection of Human Rights and Fundamental Freedoms ("ECHR") and the Charter of Fundamental Rights of the European Union (the right to the inviolability of private premises and the right to fundamental judicial protection) had been infringed as the three inspection decisions had been taken without prior judicial authorisation.

The Court dismissed these arguments and agreed with the General Court. In particular, it held that the existence of post-inspection judicial review of an inspection decision by the European courts is "capable of offsetting the lack of prior judicial authorisation" and is capable of constituting a fundamental guarantee to ensure the compatibility of an inspection decision with the ECHR.

Documents relating to separate anti-competitive conduct

The Court upheld DB's argument that there had been irregularities vitiating the conduct of the first inspection.

The Court concluded as follows:

- The European Commission is prevented from going on 'fishing expeditions'. *"Information obtained during investigations must not be used for purposes other than those indicated in the inspection warrant or decision."*
- This rule does not, however, prevent the European Commission from starting new inquiries when it makes an "accidental" discovery. *"...(I)t cannot be concluded... that the Commission is barred from initiating an inquiry in order to verify or supplement information which it happened to obtain during a previous investigation if that information indicates the existence of conduct contrary to the competition rules in the Treaty. Such a bar would go beyond what is required to safeguard professional secrecy and the rights of defence and would thus constitute an unjustified hindrance to the Commission in the accomplishment of its task of ensuring compliance with the competition rules..."*
- In this case, it seems that, immediately before the inspection took place, all the European Commission inspectors had been specifically informed about the contents of another complaint against DB which had been received by the Commission. *"That prior information, which was not part of the general background information on the case but rather pertained to the existence of a separate complaint, is unrelated to the subject-matter of the first inspection decision. Accordingly, the lack of reference to that complaint in the description of the subject-matter of that inspection decision infringes the obligation to state reasons and the rights of defence of the undertaking concerned."* For this reason, the Court held that the first inspection was vitiated by

irregularity, and that the General Court had erred in law in holding that the pre-inspection briefing was based on valid reasons for providing the inspectors with “general background information” on the case.

Impact

This judgment provides welcome clarification on the scope and limits of the European Commission’s ability to use documents which fall outside the scope of the inspection decision.

The judgment emphasises the importance for dawn raid defence teams to monitor very closely that officials keep their searches within the scope and subject matter of their entry decision. Investigation decisions tend to be broadly written and may cover multiple product markets and types of conduct. In view of this complexity, it is important to ensure that adequately trained staff and lawyers are available on the spot to deal with issues of relevance and scope during a dawn raid.

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