ACM has Imposed a Fine of 1.84 million Euros for Deleting WhatsApp Chat Conversations During a Dawn Raid

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Dawn raids may become a nerve-racking experience for companies that are under scrutiny of competition authorities and their employees. During a dawn raid, which is performed without prior notice, employees of the relevant undertaking who lack proper training may act in a way that can expose their companies to monetary fine. Dawn raids are often problematic for the companies, since employees may tend to hide or destroy evidence, due to their lack of knowledge of the fact that they should fully cooperate with the competition authority, when an on-the-spot inspection is being conducted. The evidence, which is concealed or destroyed during an on-the-spot inspection, eventually costs the company under scrutiny a monetary fine, even if such evidence is not related with or could not be used as a proof as to an anti-competitive conduct at all.
A recent example from Netherlands reveals that the rules against obstruction of on-the-spot inspections are enforced rigidly.

Background of the Decision

On 11.12.2019, the Netherlands Authority for Consumers and Markets ("**ACM**") announced that it had imposed a fine amounting to 1.84 million Euros against a company for obstructing an on-the-spot inspection. ACM indicated that relevant statutes were violated by the employees of the respective company, who deleted WhatsApp chat conversations and left several WhatsApp groups during the on-the-spot inspection[1].

In a press release, the ACM further emphasized that all companies are required to co-operate with ACM investigations and evidence cannot be destroyed, withheld or disposed of. In the press release, it was reminded that the ACM is authorized to perform dawn raids (or on spot inspections) if there is a suspicion that the Dutch Competition Act is violated.

It should be noted that the ACM determined the amount of fine (1.84 million Euros) by reducing the base fine by 20% based on the fact that the company had fully cooperated with the investigation to an extent reaching beyond its legal obligations. The cooperation included the company's efforts to determine and restore deleted materials, as well as acknowledgment of the facts and legal assessment, and accepting a simplified procedure and level of fine to be imposed.

Lastly, ACM announced that the name of the company will not be disclosed until the investigation is closed.

Similar Cases

The ACM's decision is not the first example of a fine imposed on an undertaking for deleting or concealing potential evidence and there is a widespread consensus that if undertakings under scrutiny act in a way that hampers investigation (i.e. trying to hide or delete data that could be used as evidence) conducted by the competition authorities, such undertakings shall be fined. As stated by the Articles 20 (2) and (4) of the Regulation 1/2003 on the Implementation of the Rules on Competition Laid Down in Articles 81 and 82 of the Treaty ("**Regulation 1/2003**"), undertakings are obliged to cooperate with Commission officials during an inspection by giving accurate information and granting access to all documents relevant to the antitrust investigation.

Directorate General of Competition of the European Commission ("**DG Comp**") pursues a no-tolerance policy, if the investigative powers of the Commission are unlawfully challenged by the undertakings under scrutiny. For instance, in 2012, the European Commission had imposed a total of 2.5 million Euros fine on *Energetický a průmyslový holding* and *EP Investment Advisors* for failing to block an e-mail account and diverting incoming e-mails[2]. Additionally, it should be noted that the European Union's General Court upheld the Commission's Decision and held that failing to block an e-mail account and diverting incoming e-mails constitute an obstruction in themselves and the Commission does not need to show that any document was actually removed or manipulated to determine that the inspection was obstructed[3].

A similar approach was adopted by the General Court of the European Union in its judgement[4] dated 15 December 2010 upholding European Commission's decision concerning *E.ON Energie AG*, wherein a fine of 38 million Euros was imposed to the relevant undertaking, since it was determined that a seal, which had been affixed to one of its offices by the Commission during an inspection, had been broken.

It is also noteworthy to mention that the General Court has rejected the application for annulment of Commission's *E.ON Energie AG Decision*, on the ground that the Commission was entitled in law to consider in the present case that, at the very least, the seal had been negligently broken. As per the E.On Energie AG v. European Commission Decision, the General Court emphasized that it is not for the Commission to demonstrate that the room, which was sealed was actually entered[5] and E.ON Energie was required to take all necessary measures to prevent any tampering with the seal, having been clearly informed of the significance of the seal and the consequences of any breach.

As a final note, it should also be mentioned that the Turkish Competition Authority ("**TCA**") shares a similar notion with the European Commission and the General Court by setting forth instances of rigid enforcement, when on-the-spot inspections are unlawfully interrupted. In a recent decision[6] wherein the TCA tried to determine whether an on-the-spot inspection by the TCA was obstructed by Unilever, Unilever's conduct was deemed a violation of the Act on the Protection of the Competition ("**Competition Act**") and Unilever was imposed an administrative fine amounting to %0,5 of its 2018 turnover generated in Turkey.

In the relevant decision, the TCA indicated that it was not allowed to examine the e-mail archives concerning Unilever Turkey's employees, for the reason that such a process should be conducted by taking consent from Unilever's Global Office. Consequently, the TCA was allowed to examine the e-mail archives after approximately eight hours from the initiation of the on-the-spot inspection, due to the fact that the necessary consent was given in delay by Unilever Global. The TCA concluded that Unilever's conduct should be deemed as obstruction of the on-the-spot inspection, referring to a decision given by Council of State[7], which is the highest administrative court in Turkey, that deemed a forty minutes delay of TCA's on-the-spot inspection as an obstruction, for the reason that such a period is sufficient for an undertaking to remove evidence.

Conclusion

With the increasing digitization of businesses and the use of the internet for facilitating commercial relations, competition authorities are aware of the fact that potential evidence may as well be gathered from all sources including digital data such as WhatsApp chats, as opposed to conventional sources such as personal planners or e-mail archives. Eventually, competition authorities have a disposition to search, collect or make mirror copies of the digital data, even though it may be deemed as confidential or private. However, confidentiality or privacy of the data is not a sufficient excuse if the Authority is taking necessary procedural safeguards, namely, the seizure of data should not be widespread and indiscriminate and the attorney-client privilege should be respected, as per the Vinci vs. France[8] case of the European Court of Human Rights.

Foregoing cases demonstrate the significance of proper competition law training for all undertakings since there is no room for tolerance from the perspective of the competition authorities, when their investigative powers are contested unlawfully even if the undertaking under scrutiny have not been involved in any anti-competitive conducts. It is of utmost importance for undertakings to inform their employees about the consequences of concealing or deleting any data or documents, during the course of an on-the-spot inspection.

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[1]https://www.acm.nl/en/publications/acm-has-imposed-fine-184-million-euros-deleting-whatsapp-chat-conversations-during-dawn-raid

[2] https://ec.europa.eu/commission/presscorner/detail/en/IP_12_319

[3]http://curia.europa.eu/juris/document/document.jsf?text=&docid=160101&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=894174

[4] http://curia.europa.eu/juris/liste.jsf?language=en&jur=C,T,F&num=T-141/08&td=ALL

[5] Case T-141/08, E.On Energie AG v. European Commission, para. 218.

[6] Turkish Competition Authority's decision dated 07.11.2019 and numbered 19-38/584-250.

[7] Decision of the Council of State, 13th Chamber, dated 22.03.2016 and No. E: 2011/2660, K: 2016/775.

[8] https://hudoc.echr.coe.int/eng#%20