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European Commission dawn raids – General Court annuls decisions ordering “fishing expeditions”

Peter Citron (Editor) (White & Case, Belgium) · Friday, November 16th, 2012

The EU’s General Court issued on 14 November two important judgments regarding the extent of the European Commission’s powers to dawn raid companies for suspected competition law infringements (Case T-135/09 *Nexans v Commission* and Case T-140/09 *Prysmian v Commission*).

The Court held that the European Commission must precisely delimit the products concerned by a dawn raid in the decision ordering the inspection, and went on to annul the Commission’s inspection decisions in both cases on the grounds that it considered that the Commission did not have reasonable grounds to launch inspections in relation to the broad category of products set out in the decisions, but only in relation to a sub-category of those products.

These judgments serve as an important warning to the European Commission that it may not conduct “fishing expeditions” on companies through its dawn raid procedure, and that the scope of its dawn raids must be limited to products where it has reasonable grounds for ordering an inspection.

The dawn raids in question

On 28 January 2009, the European Commission carried out dawn raids at the premises of Nexans in France, and Prysmian in Italy. The inspection decisions specified the scope of the inspection as being “*the supply of electric cables and material associated with such supply, including, amongst others, high voltage underwater electric cables, and, in certain cases, high voltage underground electric cables*”.

At Nexans, on the third day of the dawn raid, the inspectors discovered that the hard drive of one employee had been deleted following the start of the inspection. The inspectors recovered a number of deleted files from this hard drive. At the end of the dawn raid, the inspectors made a copy-image of the hard drive in question, and of a number of other documents. Two copies were placed in a sealed envelope which the inspectors took back to the Commission’s premises in Brussels. A third copy was given to Nexans’ lawyers. The envelopes were opened at the Commission’s premises a month after the dawn raid, in the presence of Nexans’ lawyers. The contents were examined, and the inspectors printed out those documents which they considered relevant for the scope of the investigation.

At Prysmian, a similar procedure was followed at the end of the raid. Copy-images of the hard disks of three individuals were made, and taken back to the Commission’s premises under sealed

envelope for review and sifting for relevance a month later. This was again carried out in the presence of Prysmian's lawyers.

Grounds of appeal

Both parties challenged the inspection decisions before the General Court. First, they claimed that the inspection decisions were imprecise in their delimitation of the products concerned. Second, they claimed that it was only in the high voltage underwater cable sector that the Commission had detailed information justifying a suspicion that the competition law rules had been infringed. To substantiate this assertion, Nexans relied on the Commission's press release following the raids, in which it declared that it had carried out inspections at the premises of undertakings engaged in the manufacture of cables in the high voltage underwater cable sector, and on the fact that during the inspection the Commission showed interest in certain employees working in the sector of high voltage underwater cable.

Both parties also challenged certain aspects of the inspectors' dawn raid procedure at the end of the raids, in particular the fact that the inspectors took away copy-images of files and documents for later review at the Commission's premises.

Court rulings

The Court noted that there is an obligation on the European Commission to specify the subject-matter and purpose of an inspection in its inspection decision. The reasons given for an inspection decision "*need not necessarily delimit precisely the relevant market*", but the Commission is required to state in the decision "*the essential characteristics of the suspected infringement, indicating inter alia the market thought to be affected*". The Commission must "*identify the sectors covered by the alleged infringement with which the investigation is concerned with a degree of precision sufficient to enable the undertaking in question to limit its cooperation to its activities in the respect of which the Commission has reasonable grounds for suspecting an infringement of the competition rules, justifying interference in the undertaking's sphere of private activity, and to make it possible for the Court of the European Union to determine, if necessary, whether or not those grounds are sufficiently reasonable for those purposes.*"

The Court ruled that by referring in the inspection decisions to all electric cables and all material associated with those cables, the Commission had met its obligation to define the subject-matter of its investigation.

However, the Court then reviewed whether the Commission had reasonable grounds to issue the inspection decisions in question – in light of their very broad scope. The Court closely reviewed the actual evidence which the Commission had at its disposal before the adoption of the inspection decisions, including evidence from a leniency application. It also considered the press release of 3 February 2009, as well as the identity of the employees in whom the inspectors took an interest during the inspection. On the basis of this evidence, the Court concluded that the Commission had not demonstrated that it had reasonable grounds for ordering inspections relating to all electrical cables and all material associated with such cables. It had reasonable grounds only for ordering inspections covering high voltage underwater and underground electric cables and material associated with those cables. The Court therefore annulled the Commission's inspection decisions in both cases.

The Court rejected both parties' challenge to the fact that the Commission took away copy images of documents and hard drives, in order to review them later at the Commission's premises. The

Court held that this conduct did not amount to an actionable measure capable of being challenged as such. Instead, the legality of the Commission's conduct could be examined in the context of an action challenging any final decision in the case adopted under Article 101 TFEU, or in an action for compensation brought against the Commission. Alternatively, the parties could have generated an early challengeable measure by refusing to allow the Commission to take away the copies in question or to answer oral questions, thus inducing the Commission to issue a formal decision imposing fines under Article 23(1) (c) and (d) of Regulation 1/2003.

What does this mean for the European Commission's dawn raid procedure?

Following these judgments, the European Commission is likely to draft its inspection decisions with increased attention to ensure that the scope of the investigation is clearly delimited, and only covers areas where it has grounds to suspect a competition law breach and where it therefore has a reasonable basis to launch an inspection.

The Court did not rule on what will happen to the evidence gathered by the Commission in the raids at Nexans and Prysmian. The outcome may not be as dramatic as might be assumed. It may well be open to the Commission simply to send the parties an Article 18 request for information, requesting them to confirm that this evidence may be kept on the file, or to produce "new" copies of the evidence that may be used instead. Whether the Commission is entitled to use its knowledge obtained during the dawn raids in order to open an investigation into cables other than high voltage underwater and underground electric cables is more open to debate.

It is regrettable that the General Court was not able to rule on the issue of whether the European Commission can effectively continue a dawn raid at its premises by copy-imaging documents for later review with the parties. This is an area where legal certainty would be very useful. Perhaps when the administrative procedure in the cables case has been completed, these points will return to the Court.

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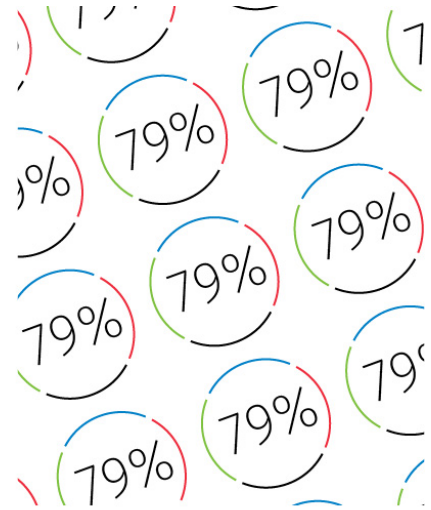
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