European Commission Fines: The Procedure Counts Too

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We all know that procedure is important. But surely the European Commission only imposes fines for procedural breaches in really extreme situations, correct?

Not necessarily. Several recent cases demonstrate an increased Commission appetite to tackle procedural violations and an apparent policy focus on such cases.

The Basis for Fines

Article 23 of Council Regulation 1/2003 sets out the European Commission's fining powers for procedural violations during an investigation of potential breaches of Articles 101 and 102 of the Treaty on the Functioning of the European Union[1]. Fines can reach up to 1 percent of a company's total group turnover, whether the breach is intentional or negligent.

E.ON: Who Broke That Seal?

The granddaddy of the recent cases is E.ON. During a dawn raid (formally known as an "inspection") at the premises of E.ON Energie AG (E.ON) in May 2006, a seal was affixed to a room so as to secure overnight documents collected in the course of the raid. When the Commission returned the next day, the seal had been broken. As the documents had not yet been indexed, the Commission was unable to ascertain whether and (if so) which documents had been (re-)taken by E.ON.

The Commission imposed a fine of EUR38 million on E.ON in January 2008[2] for this interference. Although clearly a significant amount, the Commission had actually reined itself back as the figure was well lower than the theoretical maximum. This was explained by the fact that this was the first time that a seal had been broken by a company subject to an inspection and that a fine had been imposed under Regulation 1/2003 concerning obstruction or interference. Nevertheless, EUR38 million clearly was intended to send a strong deterrent message. E.ON, inevitably, appealed to the European General Court seeking annulment of the decision or a reduction of the fine.

In December 2010, the court upheld the fine in full, ruling that the Commission had been entitled to consider that, at the very least, the seal had been negligently broken. E.ON 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.

The General Court also ruled that the fine imposed on E.ON, which amounted to approximately 0.14 percent of its group turnover, was not disproportionate to the infringement given the particularly serious nature of breaking a seal, the size of the company and "the need to ensure a sufficiently dissuasive effect of the fine so as to ensure that it is not advantageous for a company to break a seal affixed by the Commission during its inspections"[3].

The Commission welcomed the ruling[4], commenting that "the judgment sends a clear signal to companies that any steps, be they intentional or negligent, that undermine the integrity and effectiveness of inspections will not be tolerated". Its actions since January 2008 have backed up these words.

Sanofi-aventis: Show Me Your Warrant

Sanofi-aventis was raided by the Commission in January 2008. In June 2008 the Commission opened an investigation concerning Sanofi-aventis' alleged obstruction of the raid[5]. According to the Commission, the company refused to let Commission officials examine and take a copy of documents (the normal procedure under Commission raids) until the French authorities produced a national search warrant.

[1] Articles 101 and 102 set out, respectively, the basic bans on anti-competitive agreements and abuse of a dominant position within the European Union.

[2] Case COMP/B-1/39.326 – E.ON Energie AG, 30 Jan.2008.

[3] Case T-141/08 *E.ON Energie v Commission*. *See also* General Court press release No 120/10 of 15 Dec. 2010. E.ON reportedly plans to appeal the General Court's judgment to the European Court of Justice.

[4] European Commission press release MEMO/10/686 of 15 Dec. 2010.

[5] European Commission press release IP/08/357 of 2 June 2008.

Commission raids at business premises can be carried out by officials who have suitable authorization, in which case there is no obligation to submit to the investigation, or can be carried out on the basis of a Commission decision, in which case there is an obligation to submit. Most raids are carried out on the basis of a decision. Such a raid can be backed up by a national regulator (including the police) where the company opposes the raid and this assistance may require a national authorization (for example from a judge). However, this does not mean that a company may oppose the Commission's raid. It is still obliged to submit or put itself at risk of a fine.

J&T Group: Don't Read That E-mail

In May 2010, the Commission announced that it was investigating two companies active in the electricity and lignite sectors in the Czech Republic which had been the subject of inspections in November 2009[6]. A formal statement of objections (SO) was then issued to Energetický a průmyslový holding and J&T Investment Advisors in December 2010[7]. In an SO the company is informed in writing of the case against it and is given an opportunity to reply in writing and to present its case at an oral hearing. It is also at this stage able to examine the documents in the Commission's investigation file.

The issue is again whether the companies obstructed the Commission during the raid. More particularly, the Commission is concerned by "the failure to block [access to] an e-mail account, the failure to open encrypted e-mails [so as to allow review by the Commission] and the diversion of incoming e-mails". E-mail searches are of course often of key importance during a raid, and it is not surprising that the Commission treats, as it seems to be doing, interference with e-mails as similar to shredding hard copy documents.

Suez Environnement: Who Broke That Seal (2)?

Just a few days after announcing the J&T Group investigation, in June 2010, the Commission revealed a further investigation of a procedural breach[8]. This time Suez Environnement of France was suspected of breaking a seal affixed during a dawn raid at its subsidiary Lyonnaise des Eaux.

The case is very similar to E.ON. A seal was placed on the door of an office and was "apparently breached". Suez has indicated that the cause was a Lyonnaise des Eaux employee accidentally moving the handle of the door. Whether this explanation is more readily accepted than those put forward by E.ON (which included the use of an aggressive cleaning product and vibrations caused by the preparation of a conference next door) remains to be seen.

Servier: Check Your Answers

A different type of procedural breach is being considered in yet another case. In July 2010, the Commission sent an SO to Servier, a French pharmaceutical company[9].

The allegation against Servier is that it provided misleading and incorrect information in reply to a request for information in the context of the pharmaceutical competition sector inquiry which was carried out by the Commission (and finished with the publication of the Commission's report in July 2009). No further information is available, but anybody who has replied to Commission questions will appreciate the various ways in which this apparent error by Servier may have been made. This is a reminder to be very careful when answering questions, whether this is in the context of a merger review, a cartel inquiry or a sectoral or any other investigation by the Commission.

Conclusion

These cases seem to reflect a new Commission focus on obstructions to its investigations under Articles 101 and 102 of the Treaty on the Functioning of the European Union. It is likely that this is not unconnected to the fines that can now be imposed for such obstructions, which are as noted above now capped at 1 percent of the company's group annual turnover. Under the rules in place before Regulation 1/2003, the cap was only EUR5,000 and fines for obstruction were therefore largely symbolic. Companies can expect to see further investigations for procedural breaches and further fines that are intended to act as a deterrent, mirroring to some extent the Commission's well-known fining policy for serious substantive breaches of the competition rules themselves.

[6] European Commission press release IP/10/627 of 28 May 2010.

[7] European Commission press release IP/10/1748 of 20 Dec. 2010.

[8] European Commission press release IP/10/691 of 4 June 2010.

[9] European Commission press release IP/10/1009 of 26 July 2010.