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Recent EU Court and ECHR Case Law on Dawn Raids

By Matthew Hall
McGuireWoods LLP

Dawn raids remain a cornerstone of the European Commission (EC)'s and national regulators' investigatory practices, particularly in relation to cartels. Companies faced with a raid have to make rapid decisions concerning their internal investigations, external response and possible leniency applications.

At the same time, the law and practice governing the conduct of raids continues to become more complex. There have been several recent EU court and European Court of Human Rights (ECHR) cases in the area, which demonstrate the issues which can arise and which in-house and external counsel need to be cognizant of.

European Court of Justice; "no fishing"

On 18 June 2015, the European Court of Justice (ECJ) provided a reminder to the EC that it cannot engage in "fishing expeditions" during a dawn raid.

The dawn raid in question in this case¹, at Deutsche Bahn (DB), concerned alleged breaches of a dominant position. During the raid, the officials found documents which seemed to indicate the possibility of further anti-competitive conduct, beyond the type originally suspected and identified in the inspection decision. The EC adopted a second inspection decision whilst the officials were still at DB's premises. Later, the EC 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.

DB appealed the validity of the three decisions before the EU's lower court (the General Court (GC)) but lost. However, the ECJ disagreed, stating "... a search may be made only for those documents coming within the scope of the subject matter of the inspection". In other words, the EC cannot "go fishing". Since the EC had exceeded its powers during the first inspection and documents illegally obtained during it had been used as the basis for the adoption of the second and third inspection decisions, those latter two decisions should be annulled.

¹ Case C 583/13 P, Deutsche Bahn AG and others v European Commission

The ECJ did recognise previous case law which has held that if the EC during a raid “[happens] to obtain” evidence which appears to point to another possible infringement then it is not required to turn a blind eye to it. However, that is not what happened in this case. Instead, immediately before the first inspection took place, the officials were specifically informed as to the contents of another potential antitrust issue concerning DB. Advocate General Wahl took the view that the only reason for this was so that the staff could “keep their eyes peeled” for evidence relating to that issue. The ECJ held that this breached DB’s rights of defense.

The EC will need to be careful in the future but presumably it could have forestalled any issue in this situation by adopting two separate decisions at the outset and then carrying out both inspections at the same time. The case emphasizes the need for compliance programs to train staff and lawyers on issues of relevance and scope of the EC’s inspection decisions. The EC must be kept within the bounds of the decision, although the borders of this can be difficult to determine and uphold during the heat of an inspection.

“No fishing” but EC still has wide powers

On 25 June 2014, the ECJ had handed down judgment on another case principally concerning “fishing”². The Nexans case confirms that, provided it is not “fishing”, the EC has wide powers and the inspection decision must be examined carefully to determine the extent of these powers. The *Deutsche Bahn* case, where Nexans was referred to with approval, concerned by contrast documents which fell outside the description in the inspection decision.

The ECJ confirmed that, when undertaking a dawn raid, the EC is obliged to indicate as precisely as possible the evidence sought and the matters to which the investigation relates. However, it is not required to define precisely the relevant market, to set out the exact legal nature of the presumed infringements or to indicate the period during which those infringements were committed.

Since dawn raids take place at the beginning of an investigation, the EC lacks precise information allowing it to make a specific legal assessment of the potential infringement. It must first verify its suspicions and the scope of the incidents which have taken place. The aim of the inspection is to gather evidence relating to a suspected infringement.

The issue before the ECJ was the seizure of documents relating to conduct which took place entirely outside the EU. The ECJ found this to be permissible in order to detect conduct that could have an effect on competition within the EU. The inspection decision referred to potentially anti-competitive agreements which “probably have a global reach”, which was held not to be insufficiently precise or overly broad. This shows the broad discretion that the EC has in raids and also the need to be careful when challenging the scope of an inspection decision, since this can put a company at risk of a fine for obstruction.

Previously, before the GC, Nexans (together with another company, Prysmian) had however won on the issue of limiting the EC’s right to “go fishing”³. Unlike the *DB* case, the issue was not documents illegally seized at the raid, but the more basic issue of when the EC is entitled to carry out a raid at all.

² Case C-37/13 P, *Nexans SA and Nexans France SAS v European Commission*

³ Case T-135/09, *Nexans France SAS and Nexans SA v European Commission* and Case T-140/09, *Prysmian SpA and Prysmian Cavi e Sistemi Energia Srl v European Commission*

The GC held that the EC must have reasonable grounds to justify a dawn raid (i.e. reasonable grounds for suspecting an infringement of the EU competition rules). The decision authorizing the inspection can therefore only validly refer to sectors of activity in relation to which the EC has such grounds.

This GC judgment is a good check on the EC's power. If it did not need reasonable grounds to justify a dawn raid in particular product areas, the EC would be able to carry out an inspection (on the basis of reasonable grounds for suspicion in any sector) which could in practice cover all of the activities of a company.

European Court of Justice; do not obstruct

Case law has also recently emphasized the dangers of obstruction. On 26 November 2014, the GC upheld a EUR2.5 million fine imposed by the EC for obstruction of a dawn raid⁴. The case again shows the importance of properly training staff, in particular IT staff, in advance so they know what to do if a dawn raid happens.

The case concerned Czech companies Energetický a průmyslový holding (EPH) and its subsidiary EP Investment Advisors (EPIA), which had been fined in 2012 for failing to block an email account and diverting incoming emails during a dawn raid in 2009. The GC confirmed that the EC was right to consider both of these incidents serious breaches of EPH and EPIA's obligation to cooperate with the EC during the raid. The GC held that the incidents constituted an obstruction in themselves; the EC did not need to show that any document was actually removed or manipulated. Further, the fact that the information might be available elsewhere in the company's IT system was not relevant.

The judgment sends a message to companies that any steps that undermine the integrity and effectiveness of EC dawn raids, including tampering with data stored electronically, are illegal and will be sanctioned. Also, companies must assist. The GC found that it is up to the company being raided to take the necessary measures to implement the inspectors' instructions and to ensure that the persons authorised to act on their behalf do not impede the implementation of those instructions.

The companies cannot say that they had not been warned since this is not the first time the EC has fined a company for obstructing a dawn raid. For example, in 2008, the EC fined German energy company E.ON EUR38 million for the breach of a seal during an inspection.

European Court of Human Rights (ECHR)

Human rights law has also been raised in the context of dawn raids and can be a key part of a defence strategy in suitable cases. In addition to the EU courts in Luxembourg applying this area of law to EC raids, the Strasbourg-based ECHR itself has considered cases involving national dawn raids.

On 2 April 2015, in the *Vinci Construction* case⁵, the ECHR held that there had been a violation of the right to a fair trial under the European Convention on Human Rights and a violation of the right to respect for private and family life, for the home and for correspondence. The case concerned inspections and seizures carried out by investigators from the French Department for Competition, Consumer Affairs and Fraud Prevention on the premises of two companies.

4 Case T-272/12, *Energetický a průmyslový holding a.s. and EP Investment Advisors s.r.o. v European Commission*

5 *Vinci Construction and GMT genie civil and services v. France* (applications no. 63629/10 and 60567/10)

A central question in the case was the weighing of interests relating, on the one hand, to the legitimate search for evidence of offences under competition law, and, on the other, respect for home, private life and correspondence, and particularly for the confidentiality of lawyer-client exchanges. The Court considered that the safeguards provided by domestic law had not been applied in a practical and effective manner, particularly since it was known that the documents seized contained lawyer-client correspondence, which was subject to increased protection.

The parties could contest seizure of this correspondence before a judge but he had not conducted a “tangible examination” of the documents. The judge should have examined in detail the documents in question, considered the proportionality of their seizure and ordered their return where appropriate.

The ECHR handed down a judgment in another dawn raid case on 2 October 2014⁶. The case concerned an inspection carried out at the premises of Czech Republic company Delta Pekárny. The company was fined for refusing to allow an in-depth examination of its data at the raid but challenged that decision, arguing that it was contrary to the ECHR (right to respect for private and family life, home and correspondence) for the Czech Competition Authority to carry out an inspection without having received prior authorisation from a court. The ECHR agreed, holding that if prior court control of dawn raids does not exist (which it does not in the Czech Republic) then an effective *ex post facto* control must exist. However, the *ex post* judicial review which was available did not offer the company sufficient guarantees against arbitrariness.

Comment

The basic advice in relation to a dawn raid is usually “cooperate”. This is generally sensible since the consequences of obstruction can be serious. However, what is meant by “cooperate” may not be clear to all staff at the raided company and it is crucial for suitable and comprehensive procedures, including training, to be in place. Even in non-extreme cases fines are likely to be imposed for obstruction and the courts will uphold these fines.

At the same time, case law provides defences on procedural and human rights grounds to dawn raids. Regulators read the cases too and are increasingly taking care not to make mistakes, but the scope for identifying problems with raid authorisations or the procedure itself remains great. These issues need to form part of a defence strategy and companies should make sure that these are taken advantage of as relevant.

6 DELTA PEKÁRNY a.s. v. the Czech Republic (application no. 97/11)