

## Dawn Raid Derailment – A Cautionary Tale

### IN SHORT

**The Development:** The European Commission ("Commission") issued a preliminary finding that ZSSK, Slovakia's state-owned railway, obstructed a dawn raid ("inspection") and infringed its obligation to comply with inspectors.

**Background:** The Commission alleges that during a 2016 inspection related to exclusionary conduct, ZSSK may have misled officials as to the location of a laptop and installed a new operating system, which overwrote relevant data.

**Looking Ahead:** ZSSK faces fines up to 1 percent of its annual revenue. The Commission's finding sends the message that it will not tolerate obstruction of inspections, which are one of the Commission's key investigative tools in uncovering anticompetitive conduct.

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### The Commission's Powers of Inspection

To enforce EU competition rules, the Commission has the authority to conduct unannounced inspections of company records or question personnel on company premises. Given the element of surprise, these inspections are a powerful tool in detecting anticompetitive behavior.

**Inspection Powers.** The Commission may enter any premises (whether business or private residence), land, or means of transport, and may examine and copy any books or records related to the business, whether in paper or electronic form.

**Duty to Comply.** Companies must cooperate with Commission inspections and provide all documents relevant to the investigation, including accurate explanations of documents or facts.

**Sanctions.** Failure to comply with inspection rules, whether intentionally or negligently, may result in a penalty of up to 1 percent of a company's total turnover in the preceding business year. Alternatively (but not cumulatively), the Commission may punish obstruction of an inspection as an aggravating circumstance in fining a company found to have violated EU competition rules.



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### A Painful Past

The Commission has pursued both above-mentioned sanctions for obstructing a dawn raid.

**Direct Approach—Fines for Violating EU Procedural Rules.** The ZSSK finding follows a series of Commission cases in which parties obstructed inspections, either carelessly or intentionally, that resulted in costly consequences for the inspection target:

- **2014: €2.5 million fine upheld.** The EU General Court upheld the Commission's €2.5 million fine on Czech energy company Energetický a průmyslový and its subsidiary for obstructing IT searches during a dawn raid in 2009.
- **2012: €38 million fine upheld.** The EU Court of Justice affirmed the Commission's €38 million fine imposed in 2008 on E.ON Energie for breaking, intentionally or negligently, the Commission's seal placed on a door to protect a locked room overnight, which contained documents that the Commission selected for examination.
- **2011: €8 million fine imposed.** In another case of a broken seal during an inspection, the Commission imposed lower fines because the implicated company demonstrated immediate and constructive cooperation, and provided information that went beyond its obligations.

### Indirect Approach—Aggravating Circumstance in Setting the Fine for EU Antitrust

**Infringement.** The Commission also has penalized obstruction of an inspection as an aggravating circumstance in setting fines for violating EU competition rules.

In the latest example, in 2012, the GCEU affirmed a 10 percent increase (or €1.7 million) in the fine on

Koninklijke Wegenbouw Stevin ("KWC"), which refused access to Commission officials until KWC's lawyers arrived approximately 47 minutes later. KWC also temporarily refused access to a company director's office.

### Precedents in EU Member States

EU Member States also have imposed fines against parties that obstructed inspectors, including, for example, Slovakia, €1.6 million in 2015; Poland, €33 million in 2011; and Spain, €2 million in 2011.

### A Reminder of Do's and Don'ts

Company management must ensure employee awareness of proper conduct during dawn raids. Some key elements to retain:

- *Do* request that officials wait until external counsel arrive but *do not* refuse access (officials are not required to wait).
- *Do* inform all employees that an investigation is taking place and instruct them to cooperate with the investigator, including that they *do not* delete any emails or destroy any documents.
- *Do* check if a document requested is within the scope of the investigation and is legally privileged, but *do not* refuse access to a document without obtaining legal advice first.

### THREE KEY TAKEAWAYS

1. A dawn raid is a stressful experience. In a surprise inspection, employees who lack proper training may conceal or destroy evidence, intentionally or not, which can lead to additional financial penalties for the company.
2. This case is a reminder that companies should prepare employees for how to handle a surprise inspection and consider holding "fire drill" exercises with outside counsel.
3. This case also illustrates a trend within the Commission to pursue procedural violations relating to inspections, and more broadly, to enforce its procedural rules.

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