Broken Seal in EC Dawn Raid: A Costly Housekeeping Lesson

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In one of its last judgments of 2010, the EU General Court affirmed the European Commission (EC) decision to impose a €38 million fine on the German energy provider, E.ON, or breaching an area sealed during an antitrust inspection or "dawn raid." This is the EC's first fine for such an action. The case against E.ON is one of several reflecting the EC's efforts to stop behavior that may jeopardize its investigations under EU competition rules.

Some practical lessons can be drawn from the E.ON case for companies subject to an on-site inspection, where seals are placed at the premises of these companies, including that all persons with access to the concerned areas should be informed of the existence of the seals and the consequences of breaching a seal.

Facts of the Case

The EC is empowered under EU procedural rules "to seal any business premises and books or records for the period and to the extent necessary for the inspection." (EU Regulation 1/2003, Article 20(2)(d)) Broken seals may be sanctioned under the Regulation: "The Commission may by decision impose on undertakings…fines not exceeding 1% of the total turnover in the preceding business year where, intentionally or negligently…, seals affixed…by officials or other accompanying persons authorized by the Commission have been broken." (Article 23(1)(e))

After descending on E.ON premises in May 2006, EC officials, at the end of the first day of the dawn raid, sealed the door frame to a room at E.ON's premises where the EC had stored all documents collected that day, to safeguard against any overnight tampering.

On the second day, EC officials noticed that the seal to the room appeared as "VOID" (the seal is designed to display "VOID" when the seal is broken), and traces of residual glue around the sticker suggested that the sticker had been slightly displaced.

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After some investigation and proceedings, in January 2008 the EC concluded that the seal had either been negligently (perhaps by cleaning personnel) or intentionally removed and then reaffixed. It thereby imposed a fine for breach of seal of €38 million, 0.14% of E.ON's turnover. In setting this first-time fine, the EC took into account:

The General Court ruled that the EC made a proper finding of an infringement, under the terms of the Regulation, by the mere fact that the seal had been broken, whether negligently or intentionally.

Seriousness of the Infringement

"The use of seals is intended to prevent…evidence being lost during the inspection, thus undermining the effectiveness of the inspection… It was of particular importance that the seal remained intact, since the documents stored in the room were not (completely) catalogued and copied and it was no longer possible to ascertain…whether some documents were missing."

Ensuring Deterrent Effect

"It cannot pay off for an undertaking involved in an inspection to break a seal… This implies taking into account…the size of the company as well as its previous practice in cases of breaches of procedural provisions."

First-time Application of Fine

The EC took into account the fact that the fining provision of the Regulation was being applied for the first time, but stated "this circumstance cannot result in a level of fine which would risk undermining the deterrent effect" and highlighted the fact that E.ON is "one of the largest energy producers in Europe which has at its disposal extensive legal expertise with regard to antitrust law ('inhouse' as well as external)."

Judgment of the EU General Court

E.ON sought judicial review of the decision before the EU General Court, which confirmed the EC's decision.

The General Court ruled that the EC made a proper

finding of an infringement, under the terms of the Regulation, by the mere fact that the seal had been broken, whether negligently or intentionally. The EC was not required to further establish that someone had actually entered the room or that documents had been removed.

The General Court also validated all elements taken into account by the EC in setting the level of the fine. It concluded that the fine was not disproportionate to the infringement, in particular given the infringement's serious nature, the company's size, and the need to ensure the fine was sufficiently dissuasive of any temptation for a company to break a seal affixed by the EC during its inspections.

E.ON has indicated it will challenge the General Court judgment before the EU Court of Justice. The Court of Justice (like the General Court) cannot revisit the facts of a dispute, but only reconsider issues of law raised by E.ON in its appeal.

Similar EC Enforcement

The E.ON case should be understood in the context of a line of cases in which the EC has pursued conduct that may jeopardize its investigations.

In June 2008, the EC opened proceedings to determine whether a French pharmaceutical company had obstructed an inspection of its premises. EC officials had identified certain documents during the inspection, allegedly relevant to the EC's competition sector inquiry on the pharmaceutical sector. The company had refused to allow the EC officials to examine and copy such documents unless the French authorities (accompanying the EC during the inspection) produced a national search warrant (subsequently produced).

In May 2010, the EC opened an investigation against Czech company J&T for suspected obstruction of the Commission's inspection of its premises. The EC is examining J&T's production of e-mail accounts and electronic records – more particularly (1) failure to block access to an e-mail account (during inspections, inspectors block access to certain e-mail accounts in order to prevent destruction), (2) failure to open encrypted e-mails (the EC's right to uninhibited access to companies' premises and business documents implies that passwords used to secure e-mails must be given to the inspectors), and (3) diversion of incoming e-mails (officials wish to review not only e-mails that pre-date the inspection, but also those exchanged during the inspection). In question is whether the company provided these in incomplete form and, if so, whether such behavior effectively constitutes a refusal to submit to an inspection, in violation of EU rules governing antitrust investigations. The EC announced in September 2010 that it had sent a Statement of Objections to the company.

If seals are placed at the premises of your company, all persons with access to the concerned areas must be explicitly informed of the existence of the seals and the consequences of a breached seal.

In June 2010, the EC opened an investigation of the French firm Suez Environnement for suspected breach of a seal during a dawn raid at the premises of Lyonnaise des Eaux, a fully owned subsidiary of Suez Environnement.

Practical Advice on Seals

At the General Court hearing in the E.ON case, an EC official reportedly stated that "[t]he company has special responsibility to keep the seal intact."

Clearly, the EC expects large companies, with security services and legal advisors at its disposal, to take the necessary measures to prevent the breaching of seals

If seals are placed at the premises of your company, all persons with access to the concerned areas must be explicitly informed of the existence of the seals and the consequences of a breached seal. The sealed doors and the seal itself should remain untouched.

Additional precautions, such as setting up "airport style" cordons, should be considered if needed to minimize the risk of breaching the seal. ❑