



ANTITRUST CLIENT BRIEFING

Dawn Raid Update

Review of the EU General Court's dawn raid appeal judgments in the distribution sector

T-249/17, Casino, Guichard-Perrachon and Achats Marchandises Casino SAS (AMC) v Commission

T-254/17, Intermarché Casino Achats v Commission

T-255/17, Les Mousquetaires and ITM Entreprises v Commission

6 October 2020

The Development

- On 5 October 2020, the General Court of the European Union (GC) partially annulled decisions of the European Commission (EC) to order on-the-spot inspections (dawn raids) of a number of French retailers.
- The GC held that the EC did not have sufficiently strong evidence to launch dawn raids in respect of some of the suspected behaviour, namely in relation to the exchange of information concerning future commercial strategies.

Key Points

- Even though the EC has wide powers to order dawn raids and seize documents during them, the GC is prepared to closely scrutinise these powers, and annul inspection decisions when it considers that the EC has defined the scope of its investigation too broadly.
- The EC must have sufficiently strong evidence to launch an inspection, and must avoid “mission creep”.
- This judgment follows two other recent partial annulments on similar grounds:
 - *Czech Railway* (T-325/16): The EC had insufficient evidence to form the basis for launching an inspection with respect to (i) routes other than the Prague-Ostrava route, or (ii) other forms of Article 102 infringement (other than predatory pricing).
 - *Nexans* (T-135/09): The EC should have limited its dawn raid to the high-voltage cable sector, as this was the only sector for which the Commission had “reasonable grounds” for suspecting an infringement.
- This judgment provides a timely reminder that the EC is not entitled to go on “fishing expeditions”, and reinforces the importance for companies to have in place effective dawn raid defence procedures.

What Happened?

- In February 2017, after receiving information concerning exchanges of information, the EC conducted dawn raids at the premises of a number of companies active in the food and non-food distribution sector in France. The information uncovered in the raids fed into a formal EC investigation into alleged potential collusion between retailers through purchasing alliances.
- Three companies brought actions before the GC seeking annulment of the inspection decisions.

The Judgment

The GC ruled as follows.

Duty to state reasons

- Inspection decisions must state the alleged facts that the EC intends to investigate, including:
 - A description of the suspected infringement
 - The market thought to be affected
 - The nature of the suspected restrictions of competition
 - The sectors covered by the alleged infringement
- However, the EC is not required to communicate:
 - All the information at its disposal concerning the alleged infringements
 - A precise legal qualification of the alleged infringements
 - The precise delimitation of the market in question
 - The period during which the presumed infringements took place

Sufficiently strong evidence

- In order to be able to ascertain whether the EC had sufficiently strong evidence to launch a dawn raid in this case, the GC requested the EC to send to it (by the adopting of a measure of organizational procedure) the evidence justifying the inspections. The EC provided to the GC a number of documents (although an additional set of documents was rejected as inadmissible by the GC due to the lack of valid justification for its late lodgement).
- After a review of this evidence the GC found that:
 - The EC did have sufficiently strong evidence to suspect a concerted practice as regards the exchanges of information on discounts obtained on the supply markets of certain everyday consumer products and the prices on the market for the sale of services to manufacturers of branded products
 - The EC however failed to show that it had sufficiently strong evidence to suspect exchanges of information concerning the future commercial strategies of the companies
- The threshold at which it is recognised that the EC has sufficiently strong evidence must be placed below that allowing a finding of a concerted practice.

Type of evidence – requirement to record interviews

- The rules on the requirement to record interviews do not apply before the EC opens an investigation. Therefore, interviews with suppliers (which were a source triggering the dawn raids) constitute evidence available to the EC from the date on which they took place and not from the point at which they are reported.

Compliance with human rights

- The GC rejected the plea of illegality based on a disregard of the right to an effective remedy laid down in Article 47 of the EU Charter of Fundamental Rights of the European Union (the Charter) and Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR).
- In accordance with ECHR case law, the existence of a right to an effective remedy requires four conditions be satisfied:
 - The existence of an effective judicial review of the facts and of points of law (requirement of effectiveness)
 - The possibility for an individual to obtain an appropriate remedy when an unlawful act has taken place (requirement of efficiency)
 - The certainty of access to proceedings (requirement of certainty)
 - Judicial review within a reasonable time (requirement of a reasonable time)
- The GC considered that the system for monitoring the manner in which the inspection operations are carried out, comprising all the legal remedies made available to inspected undertakings (including actions for annulment, proceedings for interim relief, and actions to establish non-contractual liability), satisfies those four requirements.

Privacy

- A company can call upon the EC not to seize certain data that harms the private lives of its employees or managers or to seek the return of those data from the EC.
- However, when a company claims protections on grounds of privacy, it must make a clear and precise request on this basis. In the absence of such a request from the company, any seizure cannot give rise to the adoption of a decision open to challenge before the General Court.

Source

- A copy of the judgments are available online.

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