AntitrustConnect Blog

European Commission Dawn Raids—Advocate General Recommends the Avoidance of "Fishing Expeditions"

Peter Citron (Hogan Lovells) · Tuesday, February 24th, 2015

Earlier this month, Advocate General Wahl delivered his opinion in the *Deutsche Bahn*[1] case. This case concerns important practical principles which govern the conduct of European Commission dawn raids (on-the-spot surprise inspections used to investigate possible infringements of the EU competition rules). In particular, the case focusses on what inspectors can do with documents that they have found during an inspection which do not relate to the subject matter of their inspection, but indicate separate unrelated anti-competitive behaviour.

Business needs to review closely this opinion (and final judgment in this case) to ensure that their dawn raid procedures and training reflect best practice.

The dawn raids in question

In March 2011, the European Commission conducted a dawn raid on the premises of Deutsche Bahn AG ("DB") and some of its subsidiaries on the grounds that DB might allegedly have abused its dominant position by giving preferential rebates to its subsidiaries when supplying operators with electric traction. During this dawn raid, the inspectors found documents which to the European Commission seemed to indicate the possibility of a further allegation of anti-competitive conduct, this time in relation to a different line of business involving the strategic use of DB infrastructure managed by one of its subsidiaries, DUSS. In order to gather evidence of the possible second allegation, the European Commission adopted a new inspection decision whilst the inspectors were still at DB's premises. In July 2011, the European Commission 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 by DUSS.

DB contested the legality of the three inspection decisions before the General Court. According to DB: (i) the European Commission should have obtained a judicial warrant in order to ensure that the inspection was subject to judicial control, and (ii) the second and third inspections were based on information obtained illegally during the first inspection. The General Court dismissed these arguments in their entirety. It held that there is no need for the European Commission to obtain judicial authorisation prior to a dawn raid, and that documents discovered by accident which indicate a separate infringement may be used as evidence of that infringement as long as the proper procedural requirements are followed.

DB lodged an appeal with the Court of Justice of the European Union seeking that the General

Court's judgment be set aside and the European Commission's inspection decisions be annulled.

Requirement of prior judicial authorisation

DB argued that various articles of the ECHR and the EU Charter (the right to the inviolability of private premises and the right to fundamental judicial protection) had been infringed as the three inspection decisions had been taken without prior judicial authorisation.

Advocate General Wahl dismissed these arguments and agreed with the General Court. He stated that the ex post judicial review that can be carried out by the Court of Justice of the European Union offers an adequate level of protection of fundamental rights.

Documents relating to separate anti-competitive conduct

However, Advocate General Wahl agreed with DB's argument that the use of documents (which indicated separate anti-competitive conduct) found during the first inspection as a basis for launching the second and third inspections constituted an irregularity which affected their rights of defence.

Advocate General Wahl concluded as follows:

- The European Commission is prevented from going on 'fishing expeditions'. *"The Commission cannot search for evidence relating to potential breaches of the EU competition rules other than those relating to the subject-matter of the investigation"*.
- The Dow Benelux case law contains a derogation from this principle. The European Commission *"cannot be required to turn a blind eye in the event that it should find, purely by coincidence, documentary evidence which appears to point to another possible infringement of the EU competition rules"*.
- In this case, it seems that, immediately before the inspection took place, all the European Commission inspectors had been specifically informed about the contents of another complaint against DB which had been received by the Commission. Dismissing the European Commission's argument that the inspectors had been told about this for "background information", Advocate General Wahl suspected that: *"There must have been another reason behind the briefing of the Commission staff. The only possible explanation […] is that information on the DUSS suspected infringement was given to the Commission staff so that they could 'keep their eyes peeled' for evidence related to the second complaint"*. For this reason, Advocate General Wahl concluded that the European Commission, deliberately or through negligence, circumvented the rules laid down in Regulation 1/2003, using an inspection to look for documents which concerned another, unrelated, matter. This circumvention gave rise not only to a breach of DB's rights of defence, but also to a manifest breach of the right to the inviolability of private premises.

Impact

It is to be hoped that the Court will follow the Advocate General's opinion, and take a line which supports company rights of defence. It is clearly important that the European Commission should not use dawn raids to conduct broad "fishing expeditions". This is particularly important in the current context where, as Advocate General Wahl put it, the European Commission's dawn raids powers are *"so extensive, the discretion so ample, and the decision-making subject to so few (judicial or administrative) prior controls"*.

Companies need to ensure that they have adequately trained staff and lawyers available to deal with issues of relevance and scope which arise during a dawn raid. Investigation decisions tend to be broadly written and will generally cover multiple product markets and types of conduct. Where a company is active in multiple closely related businesses, it will be difficult to draw a line between the scope of one investigation and another. However, correct determinations need to be made, and failure to do so can potentially trigger additional investigations.

This post originally appeared on the Kluwer Competition Law blog.

1. Case C-583/13P – Deutsche Bahn and others v European Commission I(ECLI:EU:C:2014:2365), Opinion of Advocate General Wahl, 12 February 2015..

This entry was posted on Tuesday, February 24th, 2015 at 7:18 pm and is filed under International Competition Law
You can follow any responses to this entry through the Comments (RSS) feed. You can skip to the end and leave a response. Pinging is currently not allowed.