

A new dawn for seizure of data: revised EC guidance on conduct of dawn raids

The European Commission ("Commission") on 18 March 2013 issued revised guidance on the conduct of inspections at business premises of companies suspected of anticompetitive conduct. It is important that the principles from the revised guidance and certain recent cases are reflected in internal company policy/compliance programmes and that key messages on the importance of fully cooperating with dawn raid inspectors are received at all levels of the business.

Key issues

- European Commission has issued revised procedural guidance on the conduct of dawn raid inspections.
- Recent cases have influenced/ should be read in conjunction with the revised guidance.
- Internal compliance programmes/ training ought to be brought in line with changes to the guidance and case law developments.
- Sanctions in the form of heavy fines can be imposed for breach of procedure.

Background

The Commission's revised guidance details, amongst other things, the procedure for seizing and copying information held on computers and storage devices.

The revision of the guidance follows a number of recent cases relating to breach of dawn raid procedure. The Commission may have seen this as an opportunity to codify and update its guidance in light of the case law and in order to better reflect dawn raid procedures that have become the Commission norm in practice.

The Commission has wide powers of investigation in the context of a cartel investigation, including the power to conduct dawn raids of business premises. Obstructing the exercise of these powers during a dawn raid is not taken lightly: fines in the E.ON case, for example, reached EUR 38 million.

The revised guidance interprets the scope of the Commission's powers of inspection broadly, even in instances where the case law may not yet fully reflect its interpretation.

By way of example, the guidance states that the Commission will seal and take away any hard drives that it

has not had time to examine during the inspection, so that they can be later unsealed and inspected at the Commission's offices, in the presence of the company and its advisers. The relevant EU Regulation, however, only expressly allows the Commission to make and remove copies of documentation, and in principle that power is limited to documents that are within the scope of its inspection mandate and not legally privileged. The General Court ("GC") in the recent *Nexans/Prysmian* appeal refused to rule on this point at an interim procedural stage, so it may be some time before it is clear whether the Commission's interpretation of its powers in this area is supported by the EU Courts.

Key changes to guidance

The Commission uses advanced methods for identifying and capturing data in electronic form (such as the use of built-in keyword search tools and forensic IT tools). The changes to the guidance reflect these methods and in some instances arguably ease the burden on the companies concerned.

Much of the detail of the changes brought about by the revised guidance merely codifies what already happens in practice, for example, providing that:

- the company can receive a list of copies of documents taken during the inspection on request;
- that the inspectors can retain storage media until the end of the inspection at which point data will be deleted from the Commission's forensic IT tools; and
- any remaining data that is yet to be searched is secured and removed, allowing the process to continue at the Commission premises.

Notwithstanding the uncertainties regarding the legality of these practices described above, allowing removal of copies of hard drives in sealed envelopes for subsequent review by the Commission in the presence of company representatives and its lawyers back at the Commission's offices may be seen to make practical sense.

It gives, for example, the company respite after the dawn raid within which to conduct its own investigations and consider applying for leniency. The alternative would be for the Commission to remain at the company's premises until it had completed its review of the information which might take some time.

Case law developments

Three recent European cases should be read together with the revised guidance:

In the **EPH decision** of March 2012, the Commission imposed a fine of EUR 2.5 million for refusal to submit to an inspection (by failure to ensure

blockage of an e-mail account and diversion of e-mails).

The revised guidance sets out the company's obligation to cooperate fully and actively with the inspection which includes assisting inspectors in the temporary blocking of e-mail accounts and where this is done, the text notes that these measures must not be interfered with and that the responsibility of informing the affected employees lies with the company concerned.

In the **E.ON case** concerning obstruction of a Commission inspection, first the GC and in November 2012, the European Court of Justice rejected E.ON's arguments as to why a Commission seal had been broken, thereby upholding the company's EUR 38 million fine.

The revised guidance now expressly states that the company has to ensure that seals that have been affixed are not broken and that inspectors will record that state of the seals to ensure they have not been tampered with.

In the **KWS case** of September 2012, the Commission had been denied entry to its premises for 47 minutes, pending arrival of its external competition counsel. While the GC recognised the right to seek the presence of a legal adviser, it said that pending their arrival the Commission should have at least been able to enter the premises to serve the inspection decision and to ensure there was no destruction of evidence or communication with other dawn-raided companies. The amount of the fine on KWS was increased by 10% to reflect KWS's obstruction of the Commission's dawn raid.

Best practice would be to admit inspectors into the premises and, if

they request to do so, allow them to take charge of communications - even if they are asked to delay starting the investigation proper until external counsel arrive.

The guidance in its original and revised form states that a legal adviser may be consulted during an inspection but that the presence of a lawyer is not a legal condition for its validity and that the inspection may proceed without such a lawyer being present. Only a short delay (which must be kept to a minimum) pending consultation of the lawyer will be acceptable.

Comment

While the guidance mostly codifies current Commission practice, it is a useful reminder of the competition authority's wide powers of inspection and, in particular, its increasingly sophisticated use of forensic IT tools.

It is important for businesses to ensure full cooperation during the dawn raid itself and also to ensure that they have a compliance programme in place and that all relevant staff (including, for example, IT, cleaning, reception and security staff) have been trained appropriately.

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