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Briefing note June 2014

Protecting "out of scope" documents in dawn raids – a mixed bag

On 25 June 2014 the Court of Justice of the European Union (ECJ) dismissed an appeal seeking to limit the European Commission's (EC's) powers to seize documents in dawn raids.

French cable manufacturer Nexans brought the appeal following raids on its premises in 2009. It argued that the EC should not have been able to seize documents relating to activities outside the EU. The ECJ essentially ruled that this was acceptable if the EC believed the offending conduct had a global reach.

Nexans (and an Italian firm, Prysmian) had previously appealed to the General Court of the European Union (GC), scoring a partial victory limiting the product scope of the EC's inspection powers.

Whilst the case helps to clarify when companies might challenge the scope of an EC dawn raid, overall it presents a mixed picture: the EC requires "reasonable grounds" to inspect different product areas, but appears to retain a broad discretion on geographic reach.

Key points

- The EC may seize documents relating to activities taking place wholly outside the EU
- The EC can only examine product areas in which it has "reasonable grounds" to suspect an infringement
- Companies have clear opportunities to resist a "fishing expedition" in relation to products that appear to be out of scope of the EC's raid
- But the EC retains a wide discretion, particularly on geographic scope

Background

The EC has wide powers of investigation in the context of a cartel investigation, including the power to conduct unannounced inspections of business premises. These raids are carried out pursuant to an "inspection decision" by the EC.

In 2009, the EC raided electric cable businesses Nexans and Prysmian in relation to potentially anti-competitive agreements on the supply of certain electric cables.

Nexans (and Prysmian) brought an action before the GC to challenge the legality of the EC's inspection decision. The appeal was partially successful but partly refused in November 2012, and Nexans made a further appeal to the ECJ. The ECJ issued its judgment on 25 June 2014 (Case C-37/13 P – *Nexans SA and Nexans France SAS v European Commission*).

The EC issued a decision in relation to the cartel itself in April 2014, fining 11 producers EUR 302 million (Nexans received a fine of EUR 71 million). Several of these producers (including Nexans) are understood to be appealing.

The EC can seize documents relating to activity outside the EU…

The EC's decision stated that the potentially anti-competitive agreements "probably have a global reach". Nexans argued that this was insufficiently precise and overly broad– claims that fell on deaf ears at the EC and GC, but which Nexans hoped would be accepted by the ECJ.

- The EC only has powers in relation to behaviour that can affect competition within the internal market. The EC would therefore be unable to examine a suspected anti-competitive agreement that affects competition exclusively outside the EU.
- Nexans claimed that the EC's inspection decision extended to local geographical markets that were outside the EU, without specifying whether or how conduct on those markets could affect competition in the EU. Nexans argued that the EC appeared to give itself carte blanche to collect documents with no regard for jurisdiction.
- However, the ECJ upheld the GC's view that the EC is not required to limit its investigations to documents relating to the projects which had an effect on the internal market. The EC is well within its rights to examine documents relating to conduct outside the EU *in order to detect* conduct that could affect competition within the EU (particularly given the EC's suspicions that the cartel probably had a "global reach", which the ECJ also held to be a sufficiently detailed description).

… but the EC requires "reasonable grounds" to inspect different product areas

The GC had previously ruled that the EC only had reasonable grounds to suspect an infringement in relation to high-voltage underwater and underground electric cables.

- The EC's inspection decision referred to "the supply of electric cables and material associated with such supply, *including, amongst others*, high voltage underwater electric cables, and, *in certain cases,* high voltage underground electric cables" (*emphasis* added). It therefore presented high-voltage underwater and underground electric cables as mere *examples* of the types of product covered by the decision.
- Tthe parties argued that the language in the decision was too broad, pointing out that the EC's press release only referred to high voltage cables, and showing that during the raid the EC officials were only interested in employees working in that product area.
- The GC found that the parties had amassed sufficient evidence to cast doubt on the EC's grounds for its broad decision, and that the EC had not demonstrated that it had reasonable grounds to order an inspection covering *all* electric cables.

Accordingly, the GC annulled the EC's inspection decision insofar as it related to other types of electric cables. This part of the GC's judgment was not appealed to the ECJ by either side and so still stands.

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Comment

No-one expects the EC to be able to identify in advance the particular documents it wishes to inspect. The EC may end up examining documents without knowing at the time whether they will ultimately be within the scope of its inspection decision. However, this must be weighed against the right of private businesses to protect themselves from a "fishing expedition".

The GC's judgment in November 2012 marked a partial victory for businesses, as it meant the EC needed to demonstrate "reasonable grounds" to suspect an infringement in relation to specific product areas, and could not conduct an inspection beyond that particular area in the hope of finding evidence of a broader infringement. That said, had the EC written a broader press release and talked to a wider range of employees at the time, might the GC have found in its favour? These could be easy "problems" for the EC to remedy, meaning pushing back on the product scope of an inspection might become harder in the future.

The ECJ's judgment in June 2014 is less encouraging for companies, and serves as a further reminder that the

EC has broad discretion over the scope of documents it seizes. We think two further points can be drawn from this judgment.

- If the EC can seize non-EU documents on the basis that they could inform the EC's understanding of global behaviour affecting the EU, might the EC in future argue that documents on neighbouring product areas are relevant to helping it understand behaviour in the "main" product area, particularly where the scope of products potentially involved is uncertain?
- On the other hand, the ECJ ruled inadmissible the parties' claim that the EC did not have "reasonable grounds" for suspecting ex-EU activity could affect competition in the EU, because the parties did not bring that argument before the GC. Accordingly, in our view, there may yet be a way for companies to push back on the apparently broader discretion afforded to the EC on geographic scope: by running the "reasonable grounds" challenge in relation to the relevance of non-EU activity.

Finally, the ECJ judgment also ruefully noted that objections to geographic scope were not "the focal point" of Nexans' original submissions, highlighting the need for companies, together with their advisors, to adopt a clear-minded approach on these issues from the outset

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