Update on fines imposed for obstructing Commission investigations

On 28 March 2012, the European Commission announced that it had imposed a fine of €2.5 million on Czech energy group Energetický a průmyslový holding ("EPH") - jointly with EP Investment Advisors (which previously owned the EPH business and remains a 40% shareholder) - for obstructing Commission officials during an unannounced inspection in November 2009 by tampering with email accounts. Prior to this announcement, the Commission had only issued fines for breaching a Commission seal on E.ON Energie A.G ("E.ON") and Suez Environnement and Lyonnaise des Eaux.

THE FACTS

In November 2009, the Commission opened an investigation into suspected breaches of Articles 101 and 102 TFEU in the Czech Republic’s energy and lignite sectors. This involved unannounced inspections (or "dawn raids") at various companies, including EPH and EP Investment. In May 2010, the Commission opened a formal investigation into the behaviour of EPH during the inspection, alleging that its actions amounted to an obstruction.

On the first day of the inspection, Commission officials sought to block access to email accounts for certain key personnel. This is standard Commission practice and was done by setting a new password on email accounts which only the Commission officials knew. However, on the second day of the inspection, it was discovered that the password to one account had been modified, allowing the account holder to access the inbox. Further, on the third day of the inspection, the Commission officials discovered that one employee’s emails had been diverted to a different computer server. This means that incoming emails during the investigation had not been seen by the Commission officials and there was the potential that emails had been deleted before Commission officials had been able review them, thus hindering the Commission’s investigation. The Commission therefore concluded that EPH had obstructed its investigation.
LEGAL BASIS

The Commission is empowered to carry out inspections pursuant to Article 20 of Regulation 1/2003, giving Commission officials the right to examine business records and company books (irrespective of the medium on which they are stored). This includes the right to access emails. Importantly, under Article 20(4), companies are required to submit to such investigations and failure to do so can result in significant fines being imposed.

Article 23(1)(c) provides that the Commission can fine an undertaking up to 1% of its total turnover in the previous business year if the company intentionally or negligently fails to produce the books or records requested by the Commission officials, or refuses to submit to an inspection ordered by decision.

FINE

The Commission concluded that allowing an employee to modify a supposedly secure password and allowing another employee to divert emails to a different server clearly hinders the ability of Commission officials to carry out their investigation. As EPH failed to properly submit to an inspection, the Commission issued a fine of €2.5 million. This is the first Commission fine imposed for obstructing a Commission investigation by modifying or deleting emails. The Competition Commissioner, Joaquin Almunia, commented that the decision "sends a clear message to all companies that the Commission will not tolerate actions which would undermine the integrity and effectiveness of our investigation by tampering with [company information stored in IT environments like email systems] during an inspection".

PREVIOUS DECISIONS FOR OBSTRUCTING INVESTIGATIONS

The Commission has on two previous occasions issued fines on companies for obstructing Commission investigations. In 2008, the Commission fined E.ON €38 million and in 2011 it fined Suez Environnement and Lyonnaise des Eaux €8 million for breaking Commission seals.

E.ON was the first company to be fined for breaking a seal. As part of an unannounced inspection, the Commission had secured un-reviewed documents in a room using a secure Commission seal. If the seal was tampered with, the words "void" would appear on the face of the seal. When Commission officials returned the next day, it was evident that the seal had been tampered with as the words void had appeared and there was glue on the seal. The Commission had no record of the documents in the room, so it was impossible to tell if the investigation had been compromised.

Although it was impossible for the Commission to prove that E.ON intentionally tampered with the seal and removed documents from the room, the legislation states that it is enough that the seal was negligently tampered with. Consequently, the Commission imposed a fine of €38 million on E.ON, as E.ON had the ability to remove documents from the room. The size of E.ON’s fine reflected the fact that E.ON did not cooperate with the Commission upon being made aware of the alleged breach. E.ON put forward various arguments explaining that the supposed tamper was potentially due to the cleaning products used to clean the door, the high levels of humidity that night, the vibrations caused by preparing for a meeting in the room next door and the age of the seal in question. While the seal had passed its best before date, extensive testing by independent experts and the seal’s manufacturer conclusively determined that there was no explanation for the seal displaying the word "void" apart from the seal being broken.
On appeal, the General Court upheld the Commission's findings and the level of the fine. E.ON has since appealed to the European Court of Justice.

In 2011, the Commission fined Suez Environnement and Lyonnaise des Eaux, French water and waste water companies, €8 million for tampering with an official Commission seal in an unannounced inspection. The companies involved did not deny that the seal had been broken and went on to cooperate extensively with the Commission. In light of this, the Commission fine was considerably lower than in the E.ON decision.

CONCLUSION

As the above cases show, it is important that businesses implement effective dawn raid policies and procedures, ensuring that key managers know what to do if such an inspection occurs. This includes making sure employees do not inadvertently obstruct an inspection as any obstructing act, however negligent, can lead to significant fines being imposed on the company. Further information is available in the Slaughter and May client publication on the EU Competition Rules on Cartels (available on the firm's website).

SOURCES

Commission’s decision to fine Energetický a průmyslový holding and EP Investment Advisors (IP/12/319, 28.03.2012).

Commission’s decision to fine E.ON Energie A.G. (IP/08/108, 30.01.2008).

Commission’s decision to fine Suez Environnement and Lyonnaise des Eaux (IP/11/632, 24.05.2011).

E.ON’s appeal to the General Court (MEMO/10/686, 15.12.2010).
Merger Control

NOTIFICATIONS

1. **SCA/Georgia-Pacific Europe** *(Case M.6455, 15.05.2012)*.

2. **La Poste/Swiss Post/JV** *(Case M.6503, 11.05.2012)*.

3. **Simplified procedure cases**
   - **KIB/BDMI/Bidmanagement** *(Case M.6583, 15.05.2012)*.
   - **Aegon/Liberbank/Liberbank Vida** *(Case M.6594, 15.05.2012)*.
   - **CPPIB/Atlantia/Grupo Costanera** *(Case M.6604, 10.05.2012)*.
   - **Posco/MC/MCHC/JV** *(Case M.6555, 10.05.2012)*.

PHASE I CLEARANCES

4. **Unconditional clearances**
   - **ABB/Thomas & Betts** *(IP/12/473, 11.05.2012)*.
   - **Groupe Lactalis/Skanemejerier** *(IP/12/472, 11.05.2012)*.
   - **Freudenberg & Co/Trelleborg/JV** *(IP/12/476, 14.05.2012)*.
   - **BP/Chevron/ENI/Sonangol/Total/JV** *(IP/12/487, 16.05.2012)*.

5. **Unconditional clearances: simplified procedure**
   - **EDF/Edison** *(MEX/12/0511, 11.05.2012)*.
   - **Royal Bank of Canada/RBC Dexia Investor Services** *(MEX/12/0514, 14.05.2012)*.

PHASE II CLEARANCE WITH UNDERTAKINGS

6. **Südzucker/ED&F MAN** – Following an in-depth investigation, the European Commission has cleared the proposed acquisition of control by Südzucker of Germany, Europe’s largest sugar producer, over ED&F MAN of the UK, the second largest sugar trader worldwide and a company also active in sugar production. The approval is conditional upon the divestiture of ED&F MAN’s interests in the Brindisi refinery, the biggest production facility in Italy *(IP/12/486, 16.05.2012)*.

Antitrust

7. **Commission rejects complaint alleging abuse of dominance by Numericable Luxembourg** – The Commission has published its decision in a complaint against Numericable Luxembourg, which it rejected on the grounds that the alleged conduct would only have a limited impact on the internal market. The complaint alleged that Numericable had abused its dominant position as the sole cable provider for a certain road in Luxembourg, by, inter alia, charging different prices in France and Luxembourg for essentially the same service, making arbitrary changes in the television channels it offered, and starting to charge a monthly subscription price without prior notice. However, the Commission noted that the complaint only concerned a limited geographical part of a small member state, and that only one third of cable television subscribers in Luxembourg were affected by the behaviour, which, in addition to the fact that the alleged infringements were likely to be very difficult to prove, led it to reject the complaint due to an insufficient degree of EU interest *(COMP/39892 (in French), 29.03.2012)*.
State Aid

8. Commission temporarily approves aid for the resolution of Greek T Bank – The Commission has approved circa. €680 million of State aid granted by the Hellenic Deposit and Investment Guarantee Fund for six months, to facilitate the acquisition of the economic activities of the Greek T Bank by Hellenic Postbank in the context of T Bank’s resolution. The Commission aims to preserve financial stability, before it takes a final decision on the restructuring of Hellenic Postbank (IP/12/485, 16.05.2012).