ECJ judgment in E.ON breach of seal case

This week, the European Court of Justice (the "ECJ") upheld the imposition of a fine on E.ON Energie AG ("E.ON") of €38 million (around 0.14% of the company's turnover in the year preceding the infringement) for breaking a Commission seal used by inspectors during a dawn raid.\(^1\)

**BACKGROUND**

In 2006 the Commission carried out an inspection of E.ON’s premises in Munich. Due to the scale of the investigation, certain documents were stored in a locked room for closer examination the next day. An official Commission seal was affixed to the door of the room. If such seals are removed or tampered with, they are irreversibly marked "VOID" on the surface. Inspectors found these markings the following day on the seals used at E.ON’s offices and concluded that the seal had been breached.

**PROCEEDINGS**

The ECJ dismissed the appeal of E.ON against a General Court judgment which confirmed the original Commission decision to fine E.ON for breach of the seal. The fine was the first to be imposed on a company under Article 23(1)(e) of Regulation 1/2003, which gives the Commission the power to fine undertakings up to 1% of their turnover where, intentionally or negligently, seals affixed by officials or other accompanying persons authorised by the Commission have been broken.

In relation to the principal grounds for E.ON’s appeal (that the General Court had erred in setting out the burden of proof required to prove an infringement, and had disregarded the presumption of innocence), the ECJ confirmed that the Commission had relied on a sufficient basis of evidence in reaching its decision, and that it was therefore for E.ON to adduce its own evidence to challenge that finding. The ECJ further clarified that an undertaking could not call into question the probative value

\(^1\) Case C-89/11 P, E.ON Energie AG v Commission, judgment of 22.11.2012.
of the Commission’s evidence by merely invoking the possibility that the seal might have been defective. The ECJ reasoned that if such an argument were admissible, the Commission would be unable to use seals at all.

The ECJ also dismissed E.ON’s claims regarding the proportionality of the fine, affirming that in order to find that the General Court had erred in law, the fine would have to have been excessive to the point of being disproportionate, not merely inappropriate. In this context, it should be noted that the ECJ does not share the view reached by Advocate General Bot, who in his opinion of 21 June 2012 concluded that the General Court’s judgment should be set aside insofar as the court had failed to exercise properly its unlimited jurisdiction in considering the proportionality of the fine imposed by the Commission, and that the case should therefore be sent back to the General Court on this point (see our EU Newsletter issue 26/2012 of 22-28 June 2012). However, the ECJ reasserted the importance of establishing a credible deterrent, referring to the fact that fines for anti-competitive behaviour could reach up to 10% of an undertaking’s total turnover. Given that hindering an inspection might result in an undertaking avoiding the higher fines under Articles 101 and 102 TFEU, the ECJ stated that fines for breach of seal had to be sufficiently high so as to dissuade companies from engaging in such behaviour, and could not be considered as excessive in the light of the need to ensure the deterrent effect of the penalty. The ECJ also confirmed that questions of fact were within the exclusive jurisdiction of the General Court.

The General Court had, in its judgment of 15 December 2010, also dismissed all the arguments raised by the appellant in relation to the principle of proportionality applied in reaching the final amount for the fine. At that stage of the proceedings, E.ON claimed that (i) there were no aggravating factors since the company had cooperated at all times with the Commission, and (ii) the Commission should have admitted as an attenuating circumstance the fact that the seal was broken negligently, as opposed to intentionally. In response, the Commission confirmed that it had not found any aggravating factors, but had calculated the amount of the fine based on the need to establish a strong deterrent, particularly given the fact that this was the first case to deal specifically with the issue of breach of seal. Furthermore, the Commission stated that it did not consider that breaking the seal negligently should constitute an attenuating circumstance, emphasising that Article 23(1)(e) made no distinction as to whether the offence was committed intentionally or negligently. The General Court agreed.

Another point that was consistently argued by E.ON related to the Commission’s inquisitorial procedure. In this regard, E.ON maintained that the Commission had a duty to explore whether or not the door that had been sealed had actually been opened at the time the seal was breached, and further, whether any documents had been removed from the room. Both the General Court and the ECJ confirmed the Commission’s view that it did not have to prove that the door that had been sealed had actually been opened or that the documents stored in the sealed room had been tampered with. Moreover, in answer to the applicant’s assertion that if the seal had in fact been broken it was likely to have been broken by a cleaner, the General Court asserted that it was the applicant’s responsibility to inform the cleaning company about the significance and handling of the seal at issue and to make sure that the seal was not broken by any of its employees.

In short, the Commission adopted a narrow interpretation of Article 23(1)(e), focusing purely on the fact that the seal had been broken, and not the circumstances surrounding the breaking of the seal. This case shows that the Commission was right in taking a strict approach, and is therefore likely to take the same stance again going

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forward. As such, it is vital for undertakings that are the subject of dawn raids to take the utmost care when it comes to protecting Commission seals, as any evidence of tampering could lead to significant financial sanctions being levied against them.

**SOURCES**

Case C-89/11. E.ON Energie AG v Commission, judgment of 22.11.2012

ECJ press release No 148/12, 22 November 2012

Slaughter and May competition newsletter, Issue 26, 22 – 28 June 2012
Merger Control

NOTIFICATIONS

4. Simplified procedure cases
   – Clariant/Wilmar/JV (Case M.6760, 16.11.2012).
   – Bain Capital Investors/Apex Tool Group (Case M.6755, 19.11.2012).

PHASE I CLEARANCES

5. Clearance Subject to Conditions
   – Glencore/Xstrata – The European Commission has conditionally cleared the proposed acquisition of Xstrata, the world’s fifth largest metals and mining group, by Glencore, the world’s leading metals and thermal coal trader. The clearance is conditional on the termination of Glencore’s off-take arrangements for zinc metal in the European Economic Area with Nyrstar, the world’s largest zinc metal producer, and the divestiture of Glencore’s minority shareholding in Nyrstar (IP/12/1552, 22.11.2012).

6. Unconditional Clearances

7. Unconditional Clearances: Simplified Procedure
   – Mid Europa Partners/Walmark (MEX/12/1122, 22.11.2012).

Antitrust

8. European Court of Justice dismisses appeal against decision to fine E.ON Energie AG for breach of a seal – The Court of Justice dismissed on 21 November 2012 E.ON Energie AG’s appeal against a decision to fine it €38 million for breaching a Commission seal during a dawn raid in 2006 (C-89/11 P, E.ON Energie AG v. Commission, judgment of 22.011.2012; see this week’s article for more details).

9. European Competition Network (ECN) refines its Model Leniency Programme – The ECN, composed of the European Commission and the competition authorities of all EU Member States, has strengthened its Model Leniency Programme, around which ECN competition authorities align their own leniency procedures. The Programme was adopted in 2006 to make it easier for
companies to apply for leniency where it is not clear which competition authority will take the case forward. Based on the practical experience acquired, the ECN has now introduced a range of refinements particularly concerning the handling of multiple leniency applications in the ECN and a few further modifications and explanations to the Programme. In particular, the system of summary applications has been expanded to make it available for all leniency applicants (MEMO/12/887 and FAQs, 22.11.2012; The new Model Leniency Programme will covered in more detail in a forthcoming newsletter article).

State Aid

10. Commission clears UK umbrella support scheme for broadband investment 'BDUK' – The Commission has found that a UK umbrella support scheme for investments in next generation access (NGA) broadband networks, Broadband Delivery UK (BDUK), is in line with EU State aid rules. In particular, the scheme is aimed at supporting local projects in rural and remote areas, where such networks would unlikely be developed on commercial terms. The BDUK scheme aims to provide as many UK homes and businesses as possible with access to superfast broadband infrastructure in the so-called “final third” areas, i.e. typically low-density, rural areas, where commercial operators are unlikely to invest in high quality broadband networks. The total value of aid to be delivered by the scheme is estimated around £1.5 billion (€1.8 billion) (IP/12/1244, 20.11.2012).

11. Commission approves a new Spanish scheme for the early depreciation of assets acquired via finance leases – The Commission held on 21 November 2012 that the new Spanish system for the early depreciation of the cost of certain assets acquired through finance leasing does not constitute State aid, inter alia, because it is not selective. The scheme makes it possible to deduct for tax purposes the cost of certain assets acquired through leasing as soon as their production begins, without having to wait for them to enter into commercial use. It therefore adds to the possibility already available to Spanish taxpayers of accelerating the deduction of such costs by reference to the payments made under a leasing contract (IP/12/1241, 21.11.2012).

12. Commission endorses €1.56 billion compensation for Poste Italiane for public services delivered over 2009-2011 – The Commission approved two compensations received by Poste Italiane for delivering two public services in the period 2009-2011, namely a compensation of €1.1 billion for the universal postal service and a compensation of €458 million for reduced postal tariffs offered, over the same period, to publishers, not-for-profit organisations and electoral candidates. The measures were found to be in line with EU rules on public service compensation since, in particular, they did not over-compensate Poste Italiane for providing these services, and therefore did not lead to cross-subsidisation of commercial activities (IP/12/1250, 21.11.2012).