BRUSSELS À JOUR

Buy one, get one free. But not a Commission dawn raid

Markus Roehrig and Laura Stoicescu report on the latest developments from the European capital of competition law.

While we were all looking forward to the first hints of spring, the European Court of Justice held a hearing in *Intermarché Casino v. Commission*[1] on 24 February. The case has French supermarket Intermarché (and others) challenging the lawfulness of an inspection decision that the Commission had adopted in 2017 when it raided the companies' premises pursuing allegations around anti-competitive purchasing arrangements. Similar to other recent cases such as *Prysmian*[2] and *Nexans*[3], *Intermarché Casino* raises the issue of just how much and what type of information ("indicia") must be in Commission's possession to justify the adoption of an inspection decision. Put more bluntly: When does the Commission cross the line of conducting an unlawful fishing expedition? The case affords the European Court of Justice another opportunity to weigh in on the evidentiary standard that the Commission's inspection decisions should be held to. Building on the so-called "sealed envelope procedure" that it had established in *Akzo*[4], the Court might also establish procedural safeguards that companies can draw on when they sense that the Commission might really be just fishing for information.

Gone fishing in muddy waters?

In *Prysmian* and *Nexans*, the Court reminded the Commission that it needed to be (more) precise in defining the scope of a dawn raid in the inspection decision. While the Commission is not necessarily required to delimit the relevant market, it must state "the essential characteristics of the suspected infringement, indicating *inter alia* the market thought to be affected". The ink had hardly dried on these judgments that the regulator found itself in hot water once again.

1 Case C-693/20 P – Intermarché Casino Achats v Commission; case C-690/20 P - Casino, Guichard-Perrachon and Achats Marchandises Casino v Commission.

2 Case T-140/09 - Prysmian v Commission.

3 Case T-135/09 - Nexans v Commission.

4 Case T-125/03, Akzo v Commission, case T-253/03, Akcros Chemicals v Commission.

In the *Intermarché Casino* case, the French supermarket Intermarché (together with Casino and Intermarché Casino Achat) was the subject of a dawn raid in 2017 by the Commission based on allegations of an unlawful coordination between their and other competitors' purchasing behaviour. Anti-competitive conduct, according to the Commission, had occurred in separate instances and forms: first, an exchange of information on discounts that the companies granted to their respective suppliers (since 2015) and, second, coordination between the companies on their respective future commercial strategies (since 2016). Information obtained during the 2017 dawn raids was used to conduct fresh inspections in 2019. The supermarkets appealed the 2017 dawn raid decision before the General Court arguing that the Commission had breached their right to the inviolability of the home, invoking Article 7 of the Charter of Fundamental Rights and Article 8 of the European Charter of Human Rights. Separately, the supermarkets challenged the Commission´s 2019 inspection decision, arguing that it was adopted solely on the basis of documents seized during an inspection carried out beforehand on the basis of a decision that was itself illegal. The latter appeal is currently pending before the General Court.[5]

The applicants went all out and challenged the Commission's views on evidentiary elements. Both before the General Court[6], as well as before the European Court of Justice, the supermarkets alleged that the Commission's handling of indicia was shoddy, which could potentially set a dangerous precedent. The General Court largely defended the Commission, in stating – among other points – that due to the secrecy shrouding cartels, the indicia are only rarely direct and individual; most of the times it is a body of indicia which must be read in block. However, out of the two alleged infringements, the Court could only justify the Commission's take on one – the 2015 incident. As far as the second infringement was concerned (i.e. the 2016 incident), the Court (even if reluctantly) concluded that the Commission did not have in its possession sufficient indicia to indicate the potential existence of an infringement and declared null the relevant provision in the inspection decision.

An (antitrust) hen v. egg dispute

In accordance with the *Nexans* case-law, in order to confirm that the inspection decision was not arbitrary, i.e. not adopted in the absence of any circumstance of fact and of law capable of justifying an inspection, the General Court in *Intermarché Casino* considered whether the Commission had sufficiently serious indicia to suspect an infringement of the competition rules by the undertaking concerned. To that end, the General Court determined, first, what indicia were in the Commission's possession at the time it adopted the inspection decision. On that basis, second, it assessed whether these indicia were sufficient to justify that decision.

Why the supermarkets were suspicious. The companies discovered that, prior to adopting the inspection decision, the Commission had held interviews with 13 suppliers. However, the interviews had taken place even as late as on the day before the said decision was adopted. Furthermore, the interview minutes were only drafted after the inspection decision had been adopted, and had not been formally acknowledged for accuracy by the

5 See case T-538/19 - Casino, Guichard-Perrachon v Commission. The supermarkets also challenged the legality of a 2020 information request which the Commission had issued as part of its ongoing EU antitrust probe. That appeal is also pending before the General Court. See case T-614/20 - Casino, Guichard-Perrachon v Commission.

6 Case T-254/17 - Intermarché Casino Achats v Commission, case T-249/17 - Casino, Guichard-Perrachon and Achats Marchandises Casino v Commission.

interviewees. For the supermarkets, all this chain of events pointed to one conclusion – the Commission had already decided to inspect them, even before collecting all the necessary indicia (in this case – the interviews).

The Commission's interviews. Even though the interviews were only transcribed as minutes after the date on which they had been conducted and also after the date on which the Commission had adopted the inspection decision, the Commission considered them relevant indicia on which it based its inspection decision. This raises the question: Whatever information the Commission learned in these interviews, was that information already in the Commission's possession at the time it adopted the inspection decision? Here, the General Court chose to take a fairly lenient approach, holding that the moment when the Commission obtained the relevant piece of information was the date of the interviews, not their recording in proper interview minutes. Slippery slope, the supermarkets said. Bottom line: The case surely offers sufficient reason for the Court of Justice to set out when and under which circumstances the Commission may rely on information from interviews to justify an inspection decision.

Assessing the weight of the Commission's indicia. The General Court assessed in detail the weight of the indicia in the Commission's possession when adopting the inspection decision. At the outset, the Court clearly stated that, at the preliminary investigation stage, the Commission cannot be required (before adopting an inspection decision) to be in possession of evidence. Such evidence, which refers to a stricter and more formalistic level of proof than "indicia", was required only at the phase of the statement of objections. Then, the Court looked into the form of the indicia, its authors, and its contents. The Court examined the indicia for the two alleged infringements separately, in light of these criteria taken together. In one instance, it considered the indicia sufficient, in the other it did not. While the General Court's intensely fact-based assessment offers some guidance, there is still room for the Court of Justice to chime in and set out, in clear and unequivocal terms, what evidentiary standard the Commission's indicia need to meet to justify an inspection.

What would Akzo do?

Interestingly, the Court seized the opportunity of the oral hearing to table the "sealed envelope" procedure that is had developed in *Akzo* as a procedural tool to safeguard the professional legal privilege during inspections. More precisely, the Court wondered whether it could be extended to include documents containing sensitive personal data, or to protect materials that fall outside the scope of the decision to launch inspections (i.e. different products or countries other than the ones listed in the inspection decision). As a reminder, the "sealed envelope" procedure allows companies to challenge Commission's efforts to seize documents protected by attorney-client privilege, documents which are put in a sealed envelope pending verdict.

As expected, the supermarkets deemed the proposed extended scope too limited, as it would not provide an efficient remedy to potential dawn raid abuses from the Commission's side. In the opposite corner, the Commission pleaded for an enforcement of an extended *Akzo* rule only as last resort and after its inspectors had already sifted through the documents, briefly contemplated them and discussed them with the company lawyers.

Maybe it's time for a facelift

Last, but not least, the parties discussed whether our beloved Regulation 1/2003 is still en vogue, or whether it is overdue for maintenance.

According to the supermarkets, Article 20 of the Regulation seems to lag behind in terms of human rights developments, because it breaches their right to an effective remedy. More precisely, the companies consider that in so far as the judicial review of the conduct during inspections (as opposed to the inspection decision as such) can be carried out only in the context of the action for annulment of the final decision adopted by the Commission in application of Articles 101 and 102 TFEU, the possibility of challenging the specific investigatory measures that the Commission takes during these inspections is not certain and is not available within a reasonable time. In light of this, the supermarkets argued that they were not given the opportunity to place themselves, in a timely manner, under the protection of an impartial and independent tribunal and were thus required to respond favourably to all requests made by the inspectors.

This, while EU Member States such as France, Germany, Sweden, Czechia, Belgium, Spain and Poland allow legal challenges to the conduct of inspections (following Strasbourg rulings).

Surprisingly, the allegation was met with resistance from the Commission's side, which stated that the intensity of the EU review takes precedence over its timeliness.

Although the 24 February hearing was hardly the time or the place for academic reflections on the future of judicial remedies in EU competition law, the issue does taste like food for thought. Would an "ECN++" initiative focused on safeguarding companies' rights of defence, as opposed to strengthening regulators' enforcement powers, be the silver bullet, as opposed to a facelift of Regulation 1/2003? Will the Strasbourg judges finally be heard up north, in the Schuman roundabout? Let's wait and see what the Court of Justice thinks about the case.

It will take a while before the Court hands down its judgment. If your measuring unit for time is the lockdown, count a solid couple of them. In the meantime, don't forget to follow us on LinkedIn for more on your favourite EU competition law topics!

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