

## Court of Justice Finds Deutsche Bahn Dawn Raids Illegal

***Commission's dawn raids of Deutsche Bahn's premises were illegal because improperly discovered documents triggered the action.***

### Summary

On 18 June 2015, the Court of Justice of the EU (ECJ) partly allowed Deutsche Bahn's (DB's) challenge to the Commission's decisions to conduct inspections of DB's premises in 2011.<sup>1</sup> The ECJ confirmed the Commission's ability to conduct dawn raids without judicial authorization, but annulled two follow-up Commission inspections triggered by documents improperly discovered during the initial inspection: since the initial inspection decision failed to refer to an additional potential infringement known to Commission officials conducting the inspections, DB's rights of defence were infringed. Following this judgment, legal advisers should be able to insist on shadowing Commission officials during a dawn raid, so as to ensure that officials are acting within the scope of the inspection decision. Understanding what the officials are looking for and questioning search strategies that do not appear to be covered by the inspection decision, will be key to safeguarding raided companies' rights of defence.

### Background

In 2011, the Commission adopted a decision to search DB's premises in order to investigate potential intra-group preferential rebates for the supply of electric traction energy. Prior to the inspection, the Commission officials were informed of the existence of a complaint relating to another potential competition law violation regarding the strategic use of infrastructure by DB subsidiary DUSS. This complaint was not covered by the inspection decision. During the raid, the Commission officials identified documents concerning DUSS' use of infrastructure, and the next day, while the first raid was ongoing, the Commission issued a second inspection decision relating to practices DUSS had implemented. A few months later, the Commission issued a third inspection decision relating to DUSS' strategic use of infrastructure.

DB appealed the Commission's inspection decisions to the General Court (GC), which dismissed the action. DB appealed the GC's judgment to the ECJ. The ECJ upheld DB's appeal following the opinion of Advocate General Wahl (AG Wahl).

### Issues of Interest

#### Commission can conduct dawn raids without judicial authorization

DB had argued that the Commission's failure to obtain judicial authorization before the raids was in breach of its fundamental rights under Article 6 (right to effective judicial protection) and Article 8 (right to

inviolability of the home) ECHR.<sup>2</sup> The ECJ dismissed this argument and agreed with the GC's analysis: the lack of prior judicial authorization did not in itself render the inspection decision unlawful.

### **Commission's broad inspection powers will be subject to judicial review including to ensure the rights of defence are not infringed**

The ECJ pointed out that the absence of prior judicial authorization and the broad inspection powers that result from this principle can be counterbalanced by an effective post-inspection review covering both questions of fact and law (such as that conducted by EU courts). The ECJ also referred to EU law "safeguards" that ensure compliance with Article 6 ECHR — namely that the Commission cannot use any documents or evidence in infringement proceedings if these were obtained in the course of an irregular inspection.

In exercising its powers of review in this case, the ECJ ruled that the failure in the first inspection decision to refer to the DUSS complaint and the additional potential infringements in that complaint (of which the Commission informed its agents immediately before the first inspection) infringed DB's rights of defence and the Commission's obligation to provide reasons for its decisions. This omission and the consequent breach of the rights of defence led the ECJ to annul the second and third inspection decisions, since these were triggered by documents improperly discovered during the first inspection.

### **Fortuitous discoveries**

The ECJ, however, confirmed that the Commission *can* expand its investigation to cover information that *it happened to obtain* during an inspection (following the *Dow Benelux*<sup>3</sup> judgment). While the judgment is not as clear on this point as the AG Opinion, it does recognize that barring the Commission from further investigating such discoveries would constitute an "unjustified hindrance" to the Commission's enforcement task. In this case though, the documents in question were not a fortuitous discovery — given the inspectors' prior knowledge of the DUSS complaint.

### **Practical Implications**

While the ECJ has affirmed the Commission's right to conduct raids without prior judicial authorization, this ruling is unlikely to have a significant impact on the Commission's practice. In many cases the Commission will continue to obtain warrants from national courts as a precautionary measure (*i.e.*, in order to ensure that its officials can gain access to the premises if an undertaking refuses to allow entry).

Importantly, however, the ECJ's judgment shows a willingness on the part of the EU judiciary to limit the Commission's broad inspection powers if the rights of defence are adversely affected. If the Commission is aware of potential infringements before an inspection, then the ECJ ruling clarifies that the company targeted must be informed. If this does not occur, as was the case with DB, any documents the Commission discovers during the dawn raid related to the undisclosed potential infringement cannot be used as evidence in an infringement decision against the company that was inspected.

From a practical perspective, the ECJ's ruling provides a strong basis for legal advisers to insist on closely shadowing Commission officials during dawn raids, so as to ensure that officials are acting within the scope of the inspection decision. The Commission will not be able to evade such scrutiny by drafting overly broad inspection decisions as clarified in the 2012 GC judgment in *Nexans*, which specified that the Commission's inspection decision must relate to the products for which the Commission has *reasonable grounds* to suspect an infringement.<sup>4</sup> Understanding what the officials are looking for and questioning search strategies that do not appear to be covered by the inspection decision — particularly early in an inspection, when the Commission will not have had any real opportunity to "fortuitously" discover potential evidence of other infringements — will be key to safeguarding raided companies' rights

of defence. To the extent that the Commission seeks to expand the scope of its searches during an inspection, the ECJ's ruling will support legal representatives seeking explanations from the Commission officials as to their basis for going beyond the scope of the inspection decisions. As a final point, the GC's rigorous review of the Commission's conduct during the inspection should help ensure that rights of defence are upheld — for example in the DB case, the GC conducted a detailed review of the electronic keyword search terms which Commission officials used during the inspection. Even though the GC eventually dismissed DB's appeal, we can expect this type of scrutiny to continue, particularly in light of the ECJ ruling.<sup>5</sup>

## Conclusion

The ECJ's ruling in *Deutsche Bahn* thus affirms both the legitimacy and the importance of a company's legal representatives taking a proactive approach in ensuring that the Commission inspectors are conducting searches within the scope of an inspection decision or have a basis to go beyond the scope of the inspection decision.

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#### Endnotes

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- <sup>1</sup> Case C-583/13 P *Deutsche Bahn AG and Others v. European Commission*
- <sup>2</sup> Also Article 7 and Article 47 of the Charter of Fundamental Rights of the European Union
- <sup>3</sup> Case 85/87 *Dow Benelux v. European Commission*
- <sup>4</sup> *Nexans v. European Commission* T-315/09 and *Prysmian v. European Commission* T-140/09
- <sup>5</sup> T-289/11 - *Deutsche Bahn and Others v. European Commission*