AXINN Gleiss Lutz

Date: **28 April 2020**

Title: **Do You Have to Put Up With That? Legal Protections in the Context of Antitrust Law Investigations in the U.S. and E.U.**

Authors: **Nicholas Gaglio, Lindsey Strang, Susan Zhu, Dr. Lukas Aberle and Dr. Christian Steinle**

AXINN Gleiss Lutz

Protection against antitrust authorities' overreach in compulsory process

Abstract

In recent years, antitrust enforcers have conducted cartel investigations involving a variety of industries and large swaths of companies across the globe. For in-house and outside counsel, it can be an overwhelming experience when your employer or client is being investigated for cartel activity, especially when there is an unannounced search or "dawn raid." This article provides a streamlined and comparative guide to the different types of investigative measures (inquiries, searches, and interviews) available to United States and European Union enforcers during cartel investigations and practical tips on how companies may defend themselves against overly broad or burdensome measures.

While U.S. and E.U. antitrust enforcers utilize largely the same three types of investigative measures, the legal standards for each method can vary significantly between the jurisdictions, because E.U. cartel investigations are subject to a specific set of guidelines for antitrust investigations, whereas U.S. cartel investigations are treated as criminal investigations subject to general rules of criminal procedure. For example, in the United States, the Department of Justice generally has a broader authority for subpoenas, whereas in the European Union, the European Commission has broader authority for searches.

With regard to legal remedies to push back against overly broad or unlawful investigative measures, there are fewer cases in the United States in which measures were challenged in antitrust investigations specifically, and companies are generally best advised to follow a consent approach to narrow the scope of an overly broad subpoena. In contrast, there is more case law in the European Union where measures were challenged in antitrust investigations allowing companies to more seriously assess whether to formally challenge an overly broad or burdensome measure.

I. Introduction

It is six o'clock in the morning. You are in-house counsel for a multinational undertaking and you just received a frantic phone call that government officers have suddenly descended on several of your corporate offices around the world demanding to search the premises and confiscate documents. You have never been in this situation before and you ask yourself "What now?"

Both in-house and outside counsel for large, multinational undertakings are often quite familiar with antitrust risk. They may be used to providing advice on a variety of issues ranging from contemplated mergers with competitors to publicly filed complaints alleging that the undertaking has violated the competition laws. But there are few scenarios where it is more crucial to provide fast and competent advice than in the context of an unannounced search of a company's offices by antitrust authorities, often referred to as a "dawn raid."

Just the thought of that dreaded early-morning phone call from a frantic client reporting unannounced drop-ins by dozens of investigators demanding access to computers and file cabinets can alarm even the most experienced practitioners, especially if the investigators have simultaneously descended on several offices in different cities across the globe. Competent legal advice is absolutely essential in these situations. Undoubtedly, a bad situation can get a whole lot worse when handled poorly by unprepared employees and advisors. Conversely, both in-house and outside counsel often have an array of opportunities to improve the undertaking's position and optimize outcomes in the event of a dawn raid and the often long-running investigation likely to follow from it.

This article will discuss those opportunities. In particular, it will explore the answers to the many: "what can be done?" questions that arise in the context of various scenarios frequently seen in antitrust investigations. Because the available options may differ markedly depending on the jurisdiction, we will examine undertakings' options in the face of antitrust investigations both by the United States Department of Justice (DOJ) and the European Union's European Commission (EC).

As a general matter, the legal framework for investigative measures of the DOJ and EC is different with regard to cartel investigations, which are the primary type of antitrust investigation where searches and "dawn raids" are relevant. In the European Union, there is a specific set of provisions for all antitrust proceedings, including searches of parties' premises. Regulation No. 1/2003[1] provides the EC with a final catalogue of investigative measures. In contrast, any investigative measures taken by the DOJ with regard to cartel investigations must be taken within the context of the general U.S. rules of criminal procedure, which do not have any competition-specific provisions. This is partly due to the different legal categorization of antitrust sanctions in the respective jurisdictions. In the European Union, antitrust fines are administrative sanctions (cf. Art. 23 para. 5 Reg. No. 1/2003)[2] whereas in the United States, antitrust violations may carry criminal penalties, including imprisonment.

---

1 Council Regulation No. 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (Reg. No. 1/2003).

2 The EC is only entitled to sanction undertakings and not individuals.

II. When an Undertaking is Faced with a Written Request for Documents and Information

A widely used tool of both the DOJ and EC is to request undertakings to answer a set of questions aimed at revealing antitrust violations.

1. Grand jury subpoenas issued by the DOJ

In the United States, most cartel investigations begin with the issuance of a grand jury subpoena, which is not only applicable to criminal antitrust violations, but is the same mechanism utilized in all criminal investigative contexts. As a first step, the DOJ typically gathers basic evidence to support its suspicion, such as publicly available documents (*e.g.*, public evidence of parallel pricing or "signalling" in earnings calls). This is generally sufficient to get a grand jury to issue a subpoena to facilitate further investigation of the suspected violation, because a grand jury is empowered to "*investigate merely on suspicion that the law is being violated, or even just because it wants assurance that it is not.*"[3] The grand jury subpoena requires an undertaking to submit enumerated categories of documents related to the suspected antitrust violation.

1.1 Framework and limitations

Grand jury subpoenas are constitutional so long as they are "reasonable" and need not be supported by probable cause.[4] This is because U.S. law distinguishes between a search warrant (which allows law enforcement to search and seize property immediately and without warning), and a subpoena (which "commences an adversary process during which the person served with the subpoena may challenge it in court before complying with its demands").[5]

Because of this distinction, there are few limitations on the DOJ's authority to issue broad subpoenas to investigate antitrust violations with minimal basis for suspicion. Subpoenas are presumed to be reasonable, and an undertaking can carry its burden to quash or modify a subpoena only by demonstrating in court that compliance would be unreasonable or oppressive.[6] One way to establish the unreasonableness of a subpoena is to demonstrate that the materials sought are not relevant to the suspected antitrust violation. In practice, such a challenge is unlikely to be successful, because subpoenas are upheld unless "*there is no reasonable possibility that the category of materials the Government seeks will produce*

---

3 *United States v. Morton Salt Co.*, 338 U.S. 632, 642-43 (1950).

4 *United States v. R. Enterprises, Inc.*, 498 U.S. 292, 297 (1991) ("*In short, the Government cannot be required to justify the issuance of a grand jury subpoena by presenting evidence sufficient to establish probable cause because the very purpose of requesting the information is to ascertain whether probable cause exists.*").

5 *United States v. Bailey* (*In re Subpoena Duces Tecum*), 228 F.3d 341, 348 (4th Cir. 2000). *See also Oklahoma Press Pub. Co. v. Walling*, 327 U.S. 186 (1946) (rejecting Fourth Amendment challenge to an administrative subpoena issued by the Administrator of the Fair Labor Standards Act because subpoena was not a search or seizure, and recipient had "*adequate opportunity to present objections*" prior to any search of private papers).

6 Fed. R. Crim. P. 17(c); *see R. Enterprises, Inc.*, 498 U.S. at 299.

information relevant to the general subject of the grand jury's investigation."[7] Thus, mounting a successful legal challenge to a grand jury subpoena is an uphill battle.

1.2 What can be done: negotiating subpoena compliance

DOJ subpoenas typically include only a very high-level description of the violations being investigated (*e.g.*, antitrust violations related to the sale of a particular class of products or services over a ten-year period) and demand that an undertaking submit a broad array of documentary materials about the relevant product and competitors. The subpoenas usually also set an aggressive deadline for compliance (such as 30 days). The purpose of starting broad is to guard against the risk that the DOJ will have to issue additional subpoenas to expand the scope of its investigation in the future.

While the framework governing the legality of subpoenas is very pro-government, companies in receipt of DOJ subpoenas can—and frequently do—engage constructively and cooperatively with the DOJ to narrow the agency's requests and obtain deadline extensions. In other words, while the scope of the DOJ's demands may appear unconscionable in the first instance, the answer is rarely to rush into court to challenge the subpoena's "reasonableness" under the Fourth Amendment. Instead, undertakings are better served by initiating a dialogue with the DOJ to negotiate reasonable modifications to the agency's demands. Such a dialogue will generally be productive provided the undertaking demonstrates that it takes the DOJ's suspicions seriously and is committed to facilitating a thorough investigation without undue delay.

2. Requests for information issued by the European Commission

Art. 18 Reg. No. 1/2003 entitles the EC to issue two types of written requests for information (RFI), simple requests (Art. 18 para. 2) and formal request decisions (Art. 18 para. 3).

2.1 Framework and limitations

The EC may only issue an RFI if there is an initial suspicion for an antitrust violation according to Art. 101 or 102 TFEU[8]. The authority is not allowed to investigate arbitrarily ("out of the clear blue").[9] The EC must not go on a "fishing expedition". However, as the EC is regularly only at the beginning of its investigations, the standard for an initial suspicion is not high. There must be sufficient indication that certain facts are relevant from an antitrust perspective. It is not required that the EC already opened a formal proceeding.

Both, a simple request and a formal RFI decision, "*shall state the legal basis and the purpose of the request, specify what information is required and fix the time-limit within which the information is to be*

---

7 *United States v. R. Enterprises, Inc.*, 498 U.S. 292, 301 (1991).

8 Treaty on the Functioning of the European Union.

9 See Hennig, in: Immenga/Mestmäcker, 6. Edition 2019, Art. 18 VO Nr. 1/2003, para. 9. A sector inquiry, however, does not require initial suspicion.

provided" (cf. Art. 18 paras. 2 and 3 Reg. No. 1/2003). Thus, the EC is obliged to indicate the subject of its investigation in its request, and must therefore identify the alleged infringement of competition rules. It must clearly indicate the suspicions which it intends to investigate.[10]

To determine the necessity of certain information for the investigation, the EC's investigative purpose for requesting the information must be considered. The EC must reasonably suppose that the document would help it to determine whether the alleged infringement has taken place. The EC is entitled only to information which may enable it to investigate the alleged infringements set out in the RFI.[11] In principle, it is in the EC's discretion to decide whether particular items of information which it requests from the undertakings concerned are necessary for its investigation.[12]

Undertakings are only legally obligated to cooperate and provide requested information in response to formal RFIs based on Art. 18 para. 3 Reg. 1/2003.[13] However, if the undertaking voluntarily decides to respond to a simple request (Art. 18 para. 2 Reg. 1/2003), the answer must not be false or misleading. A confession made in a reply to a simple RFI may be used against the undertaking. Furthermore, an answer to a simple RFI does not qualify for a fine reduction.[14] If an addressee provides incorrect or misleading – or in the event of a formal RFI additionally also incomplete or not timely – information, he may face a fine of up to 1% of the turnover of the preceding business year.[15]

There is no general right to remain silent. Undertakings may only refuse to provide information when the questions aim at a confession.[16] Nevertheless, they are obliged to produce information that may enable the EC to prove the infringement. It is criticized that this might only depend on how the EC phrases its questions.[17]

2.2 What can be done: challenging unlawful requests

The addressee of an RFI may appeal the RFI decision before the European courts. With its judgment of 10 March 2016 (*HeidelbergCement*) the European Court of Justice (ECJ) overturned a judgment of the

---

10 Cf. ECJ, judgment dated 10 March 2016 (C-247/14P), para. 20 et seq. – *HeidelbergCement vs Commission*, with further reference; ECJ, judgment dated 25 June 2014 (C-37/13 P), para. 35 – *Nexans and Nexans France vs Commission.*

11 Cf. General Court, judgment dated 22 March 2012, Case T-458/09 and T-171/10, para. 42 et seq. – *Slovak Telekom vs Commission*, with further reference.

12 Cf. General Court, judgment dated 22 March 2012, Case T-458/09 and T-171/10, para. 43 – *Slovak Telekom vs Commission*, with further reference.

13 The EC may impose periodic penalty payments not exceeding 5 % of the average daily turnover, cf. Art. 24 para. 1 lit. d. Reg. No. 1/2003.

14 Cf. ECJ, judgment of 24 June 2015 (Case C-293/13 P and C-294/13 P), para. 186 – *Fresh Del Monte Produce Inc. vs Commission*.

15 See possible sanctions stipulated in Art. 23 para. 1 Reg. No. 1/2003.

16 Cf. ECJ, judgment of 18 October 1989 (Case C-374/87), para. 35 – *Orkem vs Commission*.

17 Cf. *Sura* in: Langen/Bunte, 13 Edition, Art. 18 Reg. No. 1/2003, para. 16.

General Court[18] and annulled an RFI decision of the EC that did not disclose, clearly and unequivocally, the suspicions of infringement that justified the adoption of that decision and did not make it possible to determine whether the requested information was necessary for the purposes of the investigation. The matters referred to in the questionnaire were extremely numerous and covered a broad array of information. In particular, the RFI asked for extensive information relating to a considerable number of transactions, both domestic and international, over a period of ten years.[19] According to the Court, the statement of reasons for that decision did not offset the brevity or the vague and generic nature of the statement of reasons of the decision at issue.[20] Given the advanced status of the proceedings – inspections were carried out over two years prior and several RFIs were issued before – the EC would have been able to be more precise. It was seen as insufficient that the products concerned by the investigation were only mentioned by way of example. In addition, the geographical scope of the alleged infringement was ambiguous.[21] Before, *HeidelbergCement* had applied for a suspension of the RFI decision. However, the President of the General Court dismissed the application.[22]

In a similar case, *Qualcomm* also filed an action to annul an RFI decision. The applicant saw a violation of the principle of necessity as well as of the principle of proportionality. Inter alia, it was claimed that the contested decision exceeded the narrow scope of the Commission's investigation and that the far-reaching questions contained in the contested decision could not be characterized as follow-up questions but as entirely new, unwarranted requests. Like in the *HeidelbergCement* case, the EC had already been investigating for quite some time. Moreover, *Qualcomm* argued that the information the contested decision sought to obtain from them was unwarranted, far-reaching and extremely burdensome to collect or to compile. The EC – according to *Qualcomm* –provided "*unconvincing, unclear, vague and inadequate reasons*" for its requests or no reasoning at all.[23] The General Court dismissed the action in its judgment dated 9 April 2019. It found that the RFI "*may legitimately be regarded as having a connection with the presumed infringement, in the sense that the Commission may reasonably suppose that the information may help it to determine whether the alleged infringement has taken place*".[24] According to the General Court, the fact that a RFI involves a significant workload does not make it disproportionate *per se* referring to the complexity of the alleged predatory pricing case.[25] Moreover, the Court found that the contested decision was sufficiently reasoned because the statement of reasons enabled the applicants to

---

18 General Court, judgment of 14 March 2014 (Case T-302/11).

19 Cf. ECJ, judgment of 10 March 2016 (Case C-247/14 P), para. 27 – *HeidelbergCement vs Commission.*

20 ECJ, judgment of 10 March 2016 (Case C-247/14 P), paras. 33 et seq. – *HeidelbergCement vs Commission*

21 Cf. ECJ, judgment of 10 March 2016 (Case C-247/14 P), paras. 35 et seqq. – *HeidelbergCement vs Commission.*

22 Order of 29 July 2011 (T-302/11 R).

23 Cf. Action of 13 June 2017 (Case T-371/17); General Court, judgment of 9 April 2019 (Case T-371/17) – *Qualcomm vs Commission*.

24 General Court, judgment of 9 April 2019 (Case T-371/17) para. 62 – *Qualcomm vs Commission.*

25 General Court, judgment of 9 April 2019 (Case T-371/17), paras. 121 et seqq. – *Qualcomm vs Commission*.

ascertain whether the requested information was necessary for the purposes of the investigation.[26] It follows from this case law that the General Court is rather generous when assessing in particular the necessity of the requested information.

Qualcomm had also applied for a suspension of an RFI decision arguing inter alia that *"it would suffer 'further serious and irreparable damage due to the enormous disruption for the main business responsibilities of a number of key employees, as well as external advisors currently advising [the applicant] on various ongoing matters.'"* The undertaking further argued that the required workload was *"enormous and entail[ed] significant financial costs."* If Qualcomm failed to answer the RFI correctly, it would face a daily penalty until it complied and a fine.[27] The President of the General Court rejected this application for interim measures. He stated that damage of a pecuniary nature in principle cannot be invoked in a suspension application.[28] According to the President of the General Court, the Applicant was not able to show the condition relating to urgency: serious and irreparable harm without such interim measure.[29]

III. When an Undertaking is Faced with a Search of its Premises for Evidence or "Dawn Raids"

In order to gather the information to build their case against companies for alleged antitrust violations, the DOJ as well as the EC may search the undertakings' corporate premises or other premises affiliated with the undertaking.

1. U.S. perspective: search or seizure

In the United States, unannounced raids of an undertaking's premises to search for and seize evidence of antitrust violations are relatively infrequent. Such raids are typically carried out by agents of the DOJ and the FBI, and are only permitted where there is a substantial basis to justify such an invasive method, such as concern that documents will be destroyed or concealed if the undertaking is given advance warning. Instead, documents are typically requested through grand jury subpoenas, as described above.

1.1 Framework and limitations

Government raids in the U.S. require a search warrant, which grants federal law enforcement agents the authority to enter private property and search for evidence of a specific suspected criminal antitrust

---

26 Cf. General Court, judgment of 9 April 2019 (Case T-371/17), paras. 51 – *Qualcomm vs Commission*.

27 Order of 12 July 2017 (Case T-371/17 R), paras. 25, 33 and 37.

28 Cf. Order of 12 July 2017 (Case T-371/17 R), para. 28.

29 Order of 12 July 2017 (Case T-371/17 R), para. 42.

violation without the company's consent. Search warrants must be supported by "probable cause," pursuant to the Fourth Amendment.[30] This means that to obtain a warrant, U.S. law enforcement officers need to swear an affidavit setting out enough facts to convince a magistrate judge that there is a "fair probability" (more than mere suspicion) that the search is likely to turn up evidence of the suspected crime. The Fourth Amendment also has a "particularity" requirement, meaning the warrant must have a limited scope (i.e., the warrant authorizes the agents to search only particular places for particular things). The officer's affidavit describing the basis for a probable cause finding is filed under seal and generally not made available to the undertaking under investigation.

Government agents are required to make the search warrant available to the undertaking for inspection before carrying out the search. Thus, undertakings should designate a representative in each office that will take responsibility for requesting and examining the warrant and contacting outside antitrust counsel to relay the contents of the warrant in the event of a raid. While the representative should ask the agents to wait to conduct their search until counsel arrives, the law enforcement agents may refuse and have no legal obligation to wait. While the company's representative may attempt to direct the law enforcement agents to where they are likely to find the documents they are searching for, the representative must ultimately yield to the agents and allow seizure, even if the agents insist on taking documents that appear beyond the scope of the warrant. Any employee that interferes with the execution of the warrant could face criminal liability for obstruction of justice.

1.2 What can be done: challenging search warrants

Companies whose premises are searched can challenge the legality of the search by demonstrating some failure to comport with Fourth Amendment requirements. In most cases, this means demonstrating either 1) the warrant was not supported by probable cause (*e.g.*, the officer misrepresented or provided insufficient evidence in the affidavit); 2) the warrant was insufficiently particularized (*e.g.*, overbroad description of place to be searched and items to be seized); or 3) there was some failure in the execution of the warrant (*e.g.*, officer seized items beyond what was authorized by the warrant). There is extensive jurisprudence on the Fourth Amendment in non-antitrust contexts, all of which is precedential in the antitrust context given that antitrust raids are subject to the same set of rules as other criminal investigations in the United States.

Generally speaking, companies are most likely to have a legal basis to challenge a search warrant where it is insufficiently particularized—*i.e.*, because it fails to identify with specificity 1) the suspected antitrust violation; 2) the relevant product(s) at issue; 3) the relevant time frame; and/or 4) the documents to be seized. While there is a dearth of case law relating specifically to challenges to search warrants executed in the antitrust context, searches conducted in connection with other suspected "white collar" crimes are a close corollary. Unfortunately, in the white collar context, courts have usually upheld that a degree of breadth in describing records to be seized is necessary due to the nature of the crime—*i.e.*,

---

30 U.S. Const. amend. IV ("*no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.*")

that the "evidence" is typically electronically-stored documents, and not readily identifiable contraband like weapons or drugs.[31]

One recent case out of the U.S. District Court for the Southern District of New York may be instructive. In *United States v. Wey*, 256 F.Supp.3d 355 (S.D.N.Y. 2017), the court granted a defendant's motion to suppress evidence seized during searches of both his residence and the office of his consulting firm for suspected fraud, because the search warrants presented to the defendant at the time of the search were insufficiently particularized in several key respects: 1) the warrants failed to set forth the crimes under investigation;[32] 2) the warrant listed overly expansive and generic categories of items to be seized (*e.g.*, all financial records, notes, memoranda, etc. related to the undertaking being searched), such that the court struggled to see how *any* document located in the office would be outside its scope; and 3) the warrant failed to identify a relevant time frame.

Even a warrant that is valid on its face may be challenged if agents seize materials beyond what the warrant authorizes. For example, if a warrant specifies that the investigation relates to a particular division of the undertaking whose documents are segregated, the company representative should make the segregation known to investigators and implore them not to seize out of scope materials.[33] To the extent agents insist on seizing items beyond the scope of the warrant, a legal challenge to the execution of the warrant may be sustained at a later time.

One exception to the rule that agents may not seize materials beyond the scope of the warrant is the "plain view" doctrine, which allows agents to seize evidence of additional crimes that they essentially stumble upon during the execution of a valid warrant. The application of this doctrine to searches of digital information is not well-defined, with courts in different jurisdictions reaching different conclusions. Whether officers may seize (and use) digital evidence of a crime outside the scope of the search warrant that they come across while lawfully reviewing computer files depends on a variety of circumstances, and varies by jurisdiction. Recognizing that "over-seizing is an inherent part of the electronic search process," the Ninth Circuit took a restrictive approach in a 2009 holding, which was so objectionable to the DOJ that the Solicitor General for the United States requested (and was granted) an *en*

---

31 *See United States v. Wuagneux*, 683 F.2d 1343, 1349 (11th Cir. 1982)

32 While the underlying affidavits submitted to the magistrate judge described the crimes, they were not attached to the warrant made available to the suspect, so the court held that they did not count.

33 Company representatives may also implore agents not to collect the files of the company's in-house counsel, recognizing that many or most will be privileged. However, in most cases, agents will image computers to collect large volumes of files, recognizing that they will inevitably seize some privileged materials that cannot be readily identified at the time of collection. In most cases, the government will allow the company to conduct its own privilege review of seized materials after the seizure, and then "produce" the non-privileged subset of the previously seized documents along with a privilege log describing the materials withheld. In some cases, the government will instead establish a "taint team," which is a set of government attorneys not involved in investigating the case, to conduct the privilege review. This approach has fallen out of favor as it has been subject to criticism by courts. *See, e.g., United States v. SDI Future Health, Inc.*, 464 F. Supp. 2d 1027 (D. Nev. 2006) ("Federal courts have taken a skeptical view of the Government's use of 'taint teams' as an appropriate method for determining whether seized or subpoenaed records are protected by the attorney-client privilege.").

banc review.[34] On review, the court walked back its strict requirements for administering search warrants for ESI, demoting them to suggested guidance. Thus, agents continue to have considerable leeway when it comes to the ability to use digital information, even when the incriminating records identified are beyond the scope of the warrant.

As with other criminal violations, materials seized as a result of an illegal search in connection with an antitrust cartel investigation may be excluded, meaning the government cannot use them as evidence at trial. A court recently excluded improperly obtained evidence in the context of a white collar investigation (described above).[35]

2. EU perspective: inspection decisions

Special provisions for inspections are contained in Art. 20 and 21 Reg. No. 1/2003. Art. 20 concerns inspections in premises of undertakings whereas Art. 21 covers "other premises." Like for RFIs, there are two types of possible inspection measures: a "simple" written authorization based on Art. 20 para. 3 and a formal inspection decision based on Art. 20 para. 4 Reg. No. 1/2003.

2.1 Framework and limitations

Inspection measures of the EC require an initial suspicion. The EC must have reasonable grounds for suspecting an infringement of the competition rules.[36] In principle, this is the same standard as for RFIs (see above). Mostly, the EC receives detailed information with leniency applications. A simple written authorization according to Art. 20 para. 3 Reg. No. 1/2003 does not establish a duty to comply. The respective undertaking may refuse the inspection.[37] However, undertakings are required to comply with inspections based on a formal inspection decision according to Art. 20 para. 4 Reg. No. 1/2003, and can be fined for failing to properly comply. For example, the General Court confirmed a fine where a raided company negligently allowed its employee to continue to access a blocked e-mail account and to divert incoming e-mails, thereby breaching the company's obligation to cooperate with the Commission.[38]

For both types of inspection measures, the EC inter alia has to specify the subject matter and purpose of the inspection (cf. Art. 20 para. 3 and 4 Reg. No. 1/2003). That obligation to state specific reasons constitutes a fundamental requirement not only to show that the intervention envisaged within the undertakings concerned was proportional, but also to put those undertakings in a position to understand the scope of their duty to cooperate, while at the same time preserving their rights of defense.[39] The General

---

34 *United States v. Comprehensive Drug Testing*, 579 F.3d 989 (9th Cir. 2009) (en banc)

35 *United States v. Wey*, 256 F.Supp.3d 355 (S.D.N.Y. 2017)

36 Cf. General Court, judgment of 20 June 2018 (Case T-325/16), para. 36 – *České dráhy vs Commission*.

37 However, the EC will then most likely issue a formal decision according to Art. 20 para. 4 Reg. No. 1/2003.

38 Cf. General Court, judgment of 26 November 2014 (Case T-272/12) – *Energetický a průmyslový Holding and EP Investment Advisors vs Commission*.

39 ECJ, judgment of 25 June 2014 (Case C-37/13), para. 34 – *Nexans and Nexans France vs Commission.*

Court further specified that the EC also has to indicate "*the market thought to be affected, the nature of the suspected restrictions of competition and the supposed degree of involvement of the undertaking concerned, the evidence sought and the matters to which the investigation must relate as well as the powers conferred on the Community investigators […].*"[40]

Only if there is a reasonable suspicion that books or other records related to the business and to the subject matter of the inspection, which may be relevant to prove a *serious* antitrust violation, the EC is also entitled to carry out inspections in other premises including private homes (cf. Art. 21 para. 1 Reg. No. 1/2003). Searching such other premises requires a search warrant of a national Court (cf. Art. 21 para. 3 Reg. No. 1/2003).

The list of inspection powers of the EC in Art. 20 para. 2 Reg. No. 1/2003 is a definitive list.[41] The EC is not entitled to seize documents but to make copies only. Documents subject to the attorney-client privilege must not be copied or even looked at.[42] Only communication with outside lawyers is protected by the attorney-client privilege (not in-house lawyers). This is furthermore restricted to legal advice and defense communication with regard to the cartel proceeding. However, such documents found at third parties' premises are no longer protected.

Information obtained during investigations must not be used for purposes other than those indicated in the order or decision under which the investigation is carried out. The EC cannot rely on evidence against undertakings that was obtained during an investigation but was not related to the subject matter or purpose thereof. However, the EC is not barred from initiating an inquiry in order to verify or supplement information that it happened to obtain during a previous investigation if that information indicates the existence of conduct contrary to the competition rules (discovery by chance).[43]

The EC is not required to communicate to the addressee of a decision ordering an investigation all the information and evidence at its disposal concerning the presumed infringements, or to carry out a detailed legal analysis of those infringements, providing it clearly indicates the presumed facts that it intends to investigate.[44] However, when the courts are called to review, they must be in a position to assess if reasonable grounds for suspecting an infringement were given at the time of the inspection decision, in particular, if the undertaking states circumstances calling such reasonableness into question.

---

40 General Court, judgment of 8 March 2007 (Case T-339/04), para. 59 – *France Télécom vs Commission*, with further reference.

41 See also General Court, 8 March 2007 (Case T-339/04), para. 57 et seqq. – *France Télécom*.

42 Cf. General Court, judgment of 17 September 2007 (Case T-125/3), para. 86 – *Akzo Nobel Chemicals and Akcros Chemicals vs Commission*.

43 Cf. ECJ, judgment of 17 October 1989 (Case C-85/87), para. 19 – *Dow Benelux NV vs Commission.*

44 Cf. ECJ, judgment of 25 June 2014 (Case C-37/13), para. 35 – *Nexans and Nexans France vs Commission*; see also judgment of General Court of 6 September 2013 (Case T-289/11), para. 170 – *Deutsche Bahn*; judgment of 20 June 2018 (Case T-325/16), para. 38 – *České dráhy vs Commission*.

[45] However, to determine that a decision was not arbitrary, the General Court held it is sufficient that the presumed facts which the EC wishes to investigate and the matters to which the inspection relates are defined sufficiently precisely in the statement of reasons for the decision.[46]

2.2 What can be done: challenging inspection decisions

The way the inspection is carried out, *i.e.*, actions after the inspection decision was made, cannot lead to the conclusion that the inspection decision itself was unlawful.[47] If the addressee of an inspection decision is of the opinion that the agents acted improperly, he in principle has to await the final decision ending the proceeding.[48] Thus, in recent appeals, the applicants claim that Art. 20 Reg. No. 1/2003 violates fundamental rights because it lacks effective judicial remedies.[49]

The General Court held in the *Nexans* case that the Commission had not demonstrated reasonable grounds for ordering an inspection covering all electric cables and the material associated with those cables. Only certain cables were affected.[50] In a further decision concerning passenger rail transportation services, the General Court annulled the inspection decision "*in so far as it concerns routes other than the Prague-Ostrava route and conduct other than the alleged predatory pricing practices*".[51] There were no reasonable grounds for suspecting an infringement concerning these routes and suspecting other kinds of violations.

In the *Deutsche Bahn* case, the EC informed its agents that there was an additional complaint about the undertaking in question prior to the first inspection being carried out. The subject matter of that inspection as set out in that decision must also include the particulars of that additional complaint. That prior information, which pertained to the existence of a separate complaint, was unrelated to the subject matter of the first inspection decision. Accordingly, the lack of reference to that second complaint in the description of the subject matter of the inspection decision infringed the obligation to state reasons and the rights of defence of the undertaking concerned. The EC's agents, being previously in possession of

---

45 General Court, judgment of 20 June 2018 (Case T-325/16), para. 48 et seq. – *České dráhy vs Commission*. See also judgment of 14 November 2012 (Case T-135/09), para. 72 – *Nexans and Nexans France vs Commission.*

46 General Court, judgment of 20 June 2018 (Case T-325/16), para. 48 et seq. – *České dráhy vs Commission*. See also judgment of 25 November 2014 (Case T-402/13), para. 91 – *Orange vs Commission.*

47 Cf. ECJ, judgment of 17 October 1989 (Case C-85/87), para. 49 – *Dow Benelux NV vs Commission*; General Court, judgment of 17 September 2007 (Case T-125/3), para. 55 – *Akzo Nobel Chemicals and Akcros Chemicals vs Commission*.

48 Only if such action contains a separate decision of the EC, it can be appealed.

49 Actions brought on 28 April 2017 (Case T-249/17) – *Casino, Guichard-Perrachon and EMC Distribution vs Commission;* Case T-255/17 – *Les Mousquetaires and ITM Entreprises vs Commission;* Case T-254/17 – *Intermarché Casino Achats vs Commission.*

50 General Court, judgment of 14 November 2012 (Case T-135/09), para. 72 – *Nexans and Nexans France vs Commission*; see also appeal to ECJ, judgment dated 25 June 2014 (Case C-37/13).

51 General Court, judgment of 20 June 2018 (Case T-325/60) – *České dráhy vs Commission*, appeal pending before ECJ (Case C-538/18).

information unrelated to the subject matter of that inspection, proceeded to seize documents falling outside the scope of the inspection as circumscribed by the first contested decision. The ECJ annulled the two subsequent inspection decisions that were at least partially based on the new (and illegally) gained information.[52] Meanwhile, several further cases refer to this decision.[53]

In two judgments of 12 July 2018,[54] the General Court rejected pleas in law of *Prysmian* and *Nexans* arguing that the EC violated Art. 20 para. 2 Reg. No. 1/2003 by making copies of all the documents contained in hard drives without knowing whether they were of relevance in the case. The Applicants further argued that the EC breached the terms of the inspection decision by extending its geographic and temporal scope because the EC reviewed the copied files at its own premises later instead of reviewing it instantly at the companies' premises.[55] Both undertakings appealed the General Court's decision.[56]

In several actions pending before the General Court,[57] the applicants *inter alia* claim that the EC failed to state adequate reasons in the inspection decision and that the description of the subject matter of the inspection was unreasonably wide and non-specific (a "fishing expedition"). Moreover, it is criticized that the inspection decision contained neither an end date nor a maximum duration for the inspection. They further claim a lack of reasonable grounds to conduct an inspection.

IV. When an Undertaking is Faced with Authorities Demanding to Interview its Employees

The DOJ and the EC may also interview individuals to find out more about potential antitrust violations. Unlike in the United States, where the process is again covered by ordinary rules of criminal procedure, EU law contains a specific provision in Art. 19 Reg. No. 1/2003.

Both jurisdictions also consider the possibility of antitrust authorities interviewing individuals in the course of conducting a search. However, there is in principle no obligation of the individuals to answer questions. In the European Union, employees of the undertakings must only provide explanations of

---

52 ECJ, judgment of 18 June 2015 (Case C-583/13) – *Deutsche Bahn vs Commission.*

53 See judgment of the General Court of 20 June 2018 (Case T-621/16) – *České dráhy vs Commission*, appeal before ECJ pending dated 16 August 2018 (Case C-539/18, only available in French). See also General Court, judgment of 10 April 2018 (Case T-274/15) – *Alcogroup and Alcodis vs Commission* (only available in French): rejection of action as inadmissible.

54 General Court, judgment of 12 July 2018 (Case T-475/14) – *Prysmian vs Commission*; General Court, judgment of 12 July 2018 (Case T-449/14) – *Nexans and Nexans France vs Commission.*

55 Cf. General Court, judgment of 12 July 2018 (Case T-475/14), paras. 34 et seqq. – *Prysmian vs Commission*; General Court, judgment of 12 July 2018 (Case T-449/14) para. 34 et seqq. – *Nexans France and Nexans vs Commission.*

56 Appeal brought on 24 September 2018 (Case C-601/18 P) by *Prysmian SpA, Prysmian Cavi e Sistemi Srl*; Appeal brought on 24 September 2018 (Case C-606/18 P) by *Nexans and Nexans France.* Advocate General Kokott confirmed the General Courts view in her opinion dated 12 March 2020.

57 Cf. action of 4 July 2018 (Case T-415/18) – *Silgan Closures und Silgan Holdings vs Commission*; action brought on 28 April 2017 (Case T-249/17) – *Casino, Guichard-Perrachon and EMC Distribution vs Commission*; Action brought on 28 April 2017 (Case T-254/17) – *Intermarché Casino Achats vs Commission.*

facts or documents relating to the subject matter and purpose of the inspection (cf. Art. 20 para. 2 lit. e) Reg. No. 1/2003). In the United States, employees must cooperate with the search (*e.g.*, direct agents to materials requested), but are not obligated to answer questions without an attorney present.

1. Interviews conducted by the DOJ

During the course of an unannounced search of an undertaking's premises, federal agents (often DOJ attorneys) may seek to conduct interviews with certain employees on the premises. Agents are free to conduct such interviews, provided they are voluntary. It is up to the individual employee whether to consent to the interview on the spot or demand the presence of an attorney.

Individuals have the right to refuse to submit to an interview with federal agents without an attorney present. Further, even if an employee initially consents to an interview, the employee remains free to cut it short at any time and demand a lawyer. Once an individual invokes their right to counsel, federal agents are legally required to stop asking questions, provided the demand for an attorney is clear and unambiguous (*e.g.*, "maybe I need a lawyer" is not enough).[58]

Employees enjoy additional protections to the extent they are implicated in the criminal conduct under investigation. In that case, employees are protected against self-incrimination by the Fifth Amendment, which provides that "*No person shall … be compelled in any criminal case to be a witness against himself.*" Thus, to the extent an employee has participated in illegal conduct, they have a right to refuse to answer questions that would amount to self-incrimination, even once they have hired an attorney.

Employees can—and should—refuse to talk to agents without an attorney present. To encourage this course of action, undertakings can train their employees to prepare them for the possibility of a government raid, and such training may advise employees of their right to counsel, which they are free to waive. That said, company representatives or executives cannot obstruct voluntary employee interviews during the course of the raid, and should not intervene to advise employees of their right to demand counsel while the agents are on-site. It is important to avoid any appearance or suggestion that the undertaking is obstructing the investigation.

Undertakings may also request that company counsel be present for any employee interviews (conducted during the course of an unannounced search of its offices or scheduled subsequently during the broader investigation). However, federal agents can—and frequently do—refuse such requests.

2. Interviews conducted by the EC

In order to carry out the duties assigned to it by Regulation No. 1/2003, the EC may interview any natural or legal person who consents to be interviewed for the purpose of collecting information relating to the subject matter of an investigation (cf. Art. 19 Reg. No. 1/2003). Like the other investigative

---

58 *Davis v. United States*, 512 U.S. 453 (1994).

measures, the EC must already have information regarding an alleged infringement (no fishing expedition). In its *Intel* decision, the ECJ held that there is no basic difference between a formal interview and an informal discussion and that the EC must record such interview.[59] It is discussed whether the EC is obliged to conduct an interview if this is voluntarily offered by an undertaking.[60]

As an exception to the consent principle, the EC is empowered to ask employees of the undertakings for explanations on facts or documents relating to the subject matter and purpose of the inspection and to record the answers (cf. Art. 20 para. 2 lit. e) Reg. No. 1/2003). However, this is limited to mere explanations of facts and documents found during the investigation. Incorrect or misleading answers and – in case of a formal inspection decision also incomplete answers – may trigger a fine up to 1% of the turnover of the preceding business year.[61]

Employees can—and should—refuse to answer to questions of EC agents. If voluntary statements are made, this should at least happen in the presence of an antitrust lawyer. In the situation that employees must provide explanations on facts or documents relating to the subject matter and purpose of the inspection, the answers should be limited to this purpose and an antitrust lawyer should be present to intervene if necessary.

V. Main takeaways

When comparing the investigative powers, it becomes evident that there are differences with regard to the investigational tools of the respective authorities. In the United States, the DOJ seems to have a broader authority concerning inquiries whereas in the European Union, the EC has more opportunities with regard to searches of premises. The EU has the same legal standard for inquiries and searches – initial suspicion. The U.S. has a low standard for inquiries, but a comparatively high standard (probable cause) for searches. In the United States, the DOJ may issue grand jury subpoenas so long as they comport with the lower "reasonableness" standard of the Fourth Amendment, and are not required to demonstrate the stricter probable cause standard necessary to support a search warrant. The EC may only issue requests for information if it has an initial suspicion concerning an antitrust violation. The powers for searches also vary between jurisdictions. Unlike the DOJ, the EC is not entitled to seize documents but only to take copies and – for a limited time – to seal certain premises or documents.

With regard to legal remedies against overly broad or unlawful investigative measures, there are few, if any, cases in the United States in which measures were challenged specifically related to alleged antitrust infringements. In principle, the parties are well advised to follow a consent-based approach by trying to narrow down the scope of an overly broad subpoena in consultation with the DOJ.

---

59 ECJ, judgment of 6 September 2017 (Case C-413/14 P), paras. 88 et seqq. – *Intel vs Commission.*

60 Cf. *Sura* in: Langen/Bunte Art. 19 Reg. No. 1/2003, para. 10 et seqq.

61 Cf. possible sanctions stipulated in Art. 23 para. 1 lit. d Reg. No. 1/2003.

Unlike in the United States, there is various case law in the European Union. In some rare cases, the European courts annulled RFI and inspection decisions of the EC that were out of scope. Undertakings affected by investigational measures of the EC should therefore assess whether the EC actually acts within the given legal framework in the European Union.

***