The Suez Environnement seal case – EUR 8 million fine for breaching a Commission seal during an inspection

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In April 2010 the Commission conducted an inspection at the premises of water management companies in France, including Lyonnaise des Eaux (LDE), a subsidiary of French group Suez Environnement, because of suspicions of anti-competitive behaviour in the water and waste water markets.

When they arrived at LDE’s headquarters in Paris on the second day of the inspection, the Commission officials conducted the inspection found that a seal had been breached. The Commission swiftly opened a standalone procedure against Suez Environnement for alleged breach of seal on LDE premises. LDE and Suez Environnement admitted that an LDE employee had breached the seal, arguing that it was an unintentional act. On 24 May 2011, the Commission adopted a decision under Article 23(1)(e) of Council Regulation (EC) No 1/2003 imposing a fine of EUR 8 million jointly and severally on Suez Environnement and LDE for this breach of the Commission’s procedural rules. This was the second time the Commission imposed a fine for breach of seal. This article sets out the main factual and legal elements on which the decision is based.

1. The Facts

Between 13 and 16 April 2010 the Commission carried out unannounced inspections at the premises of water management companies in France, on suspicion of anti-competitive behaviour in the water and waste water markets. LDE, a wholly-owned subsidiary of the French group Suez Environnement, was among the inspected companies. On the first day, the inspection team searched several offices at LDE’s headquarters in Paris and collected a large number of documents. In accordance with the Commission’s standard practice, the Commission officials affixed seals to the doors of offices that had not been or were only partially searched at the end of the first day, in order to prevent any unauthorised access overnight. The company’s representative was duly informed of the significance of the seals and of the consequences of any breach.

Commission seals are 20 cm long and 7 cm wide self-adhesive strips of plastic. Each seal bears a serial number. When the seal is affixed, the two sections on either side of the middle section featuring the 12 stars of the European Union are uniformly red in colour. The physical properties of the seal mean that, when it is removed, some of the glue used to affix it to the door and doorframe remains on its surface. As a result, the side sections of the seal become partially transparent, so that the wording ‘OPENVOID’ stands out in these areas. In addition, ‘OPENVOID’ letters in red remain visible across the entire surface covered by the seal on the door and doorframe.

When the inspection team returned to LDE’s headquarters on 14 April, the Commission officials noted that one of the seals affixed the night before displayed ‘OPENVOID’. In addition, red marks were visible on the door just above the section of the seal affixed to it. The state of the seal was documented in a report signed by representatives of the company, the national authority and the Commission. Photographs and a video recording of the seal were attached to the report.

At their own initiative, Suez Environnement and LDE immediately launched internal investigations. In less than 48 hours they were able to identify the person responsible for breaking the seal, and while the Commission inspectors were still present at the site, they provided the Commission representative with a detailed statement in which that person unequivocally admitted to having breached the seal. During two interviews with Commission officials in the following days, that person confirmed his responsibility for the seal breach. At their own
initiative, the parties also provided the Commission with video recordings and statements by two LDE employees confirming the version of events given by the person who admitted to having broken the seal.

2. Standalone procedure

As in the E.ON case(6), the Commission decided to pursue this procedural infringement with a standalone procedure. Separating these proceedings from those concerning potential breaches of Article 101 or Article 102 of the Treaty on the Functioning of the European Union (“TFEU”) allows the Commission to take a prompt decision sanctioning the infringement. Opening a standalone procedure swiftly after a breach of seal occurs confirms the seriousness of the infringement, whether it is committed intentionally or not. In fact, seals are a crucial instrument to protect the effectiveness of Commission inspections, which are one of the most important powers of investigation the Commission has to detect infringements of Articles 101 and 102 of the TFEU.

Inspections enable the Commission to identify infringements of competition rules in cases where evidence of these infringements is held in places and forms which make it easy to conceal or destroy in the event of an investigation. In this respect, the power to conduct inspections is essential to ensuring the effective protection of competition in the internal market. The European legislator recognised the importance of this power by substantially increasing the maximum fine that can be imposed under Regulation 1/2003, in comparison with the previous Regulation 17/62, for a procedural breach relating to a Commission inspection.

3. The infringement

The Decision’s finding of a breach of seal was based on several legal considerations concerning Article 23(1)(e).

First, for the purpose of establishing the infringement it is not necessary for the ‘OPENVOID’ wording to appear on the entire surfaces of the two side sections of the seal. A seal is considered to have been broken if the ‘OPENVOID’ wording appears, indicating that it has been removed from the surface to which it was affixed. In this case, the ‘OPENVOID’ letters were apparent on the right-hand section of the seal (affixed to the door) and on a small part of the left-hand section of the seal (affixed to the doorframe). This indicates that the seal was peeled off the door and part of the doorframe so that access to the sealed office was possible.

Secondly, the Commission does not have to prove any effect or consequences of a seal breach. Indeed, for the purposes of establishing the infringement it is irrelevant whether one or more people entered the office or whether documents stored there disappeared subsequent to the breach of the seal. The provision in Article 23(1)(e) relates to the breach of the seal per se and not to the potential consequences, including access to the sealed premises or tampering with documents. As the General Court ruled in the E.ON case: “the Commission must provide evidence that the seal was broken. However, it is not required to demonstrate that access was indeed gained to the sealed premises or that anybody tampered with the documents stored therein” (8).

Thirdly, in order to establish the infringement, it is not relevant whether the seal was broken intentionally or negligently. Article 23(1)(e) refers explicitly to both scenarios(9). Breaches of seal are therefore defined as objective infringements. This means that undertakings to which inspection decisions are addressed must take all necessary measures to prevent any tampering with the seals affixed by the Commission during the inspections. As ruled by the General Court in the E.ON case: “it should be noted that it is the responsibility of the applicant to take all the measures necessary to prevent any handling of the seal at issue, especially as the applicant had been clearly informed of the significance of the seal at issue and the consequences of its breach” (10). Accordingly, in the absence of any evidence demonstrating intention, and except in cases of force majeure, it must be considered that a broken seal is, at least, the result of negligence on the part of the undertaking in question’. In their reply to the statement of objections, Suez Environnement and LDE acknowledge ‘that the elements establishing an infringement arising from negligence [may] be described as such by the Commission’ (11).

4. Fine

Article 23(1)(e) provides that the Commission can impose a fine of up to 1% of a company’s total turnover for a seal broken either intentionally or negligently. The amount of the fine should be proportionate and determined in the light of the gravity of the infringement and the particular circumstances of the case. However, there are no guidelines(12) in

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(6) E.ON Energie AG v Commission, cited above, paragraph 256.
(7) E.ON Energie AG v Commission, cited above, paragraph 256.
(8) E.ON Energie AG v Commission, cited above, paragraph 260.
(9) E.ON Energie AG v Commission, cited above, paragraphs 254 to 262.
(10) Paragraph 75 of the Decision.
(11) The Fines Guidelines (Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003, OJ C 210, 1.9.2006, p.2) only apply to breaches of Article 23(2)(a) of Regulation 1/2003, i.e. breaches of Articles 101 or Article 102 of the TFEU.

See E.ON Energie AG v Commission, cited above.
place defining the specific criteria and methods to be applied in setting fines for procedural breaches. The Commission therefore enjoys a wide margin of discretion in determining the exact amount of the fine for this type of infringement.

When setting the fine in this case, the Commission took into account, first and foremost, that breaches of seals must as a matter of principle be regarded as serious infringements in that they hamper the effectiveness of Commission's inspections. Accordingly, the level of the fine has to ensure a sufficient deterrent effect, so that it is clearly not in an undertaking's interest to breach a seal and destroy incriminating evidence rather than face a penalty for a substantive infringement. As ruled by the General Court in the E.ON case: 'a fine of EUR 38 million cannot be considered disproportionate to the infringement given the particularly serious nature of a breach of seal, the size of the applicant and the need to ensure that the fine has a sufficiently deterrent effect, so that it cannot prove advantageous for an undertaking to break a seal affixed by the Commission in the course of an inspection' (12).

The Commission also took into account the fact that LDE and Suez Environnement form a large corporate group with legal expertise in competition law, and so were perfectly aware of the penalty they could face in the event of an infringement of this kind. In this respect, the Decision notes that LDE had been duly advised by the Commission representative that it was responsible for ensuring that the seals affixed during the inspection remained intact, and that the Commission had previously imposed a fine for a breach of seal. In 2008, the Commission fined E.ON Energie EUR 38 million for breaking a seal affixed during an unannounced inspection.

However, the Commission also took into consideration the immediate and constructive cooperation provided by Suez Environnement and LDE. They voluntarily and without delay passed on to the Commission a great deal of information shedding light on the facts and facilitating the Commission's investigation. Suez Environnement and LDE also provided a detailed statement by an LDE employee in which this person unequivocally admitted to having broken the seal. Additionally, in their reply to the statement of objections, Suez Environnement and LDE accepted the Commission's conclusions concerning the substance of the facts, their legal nature and the attribution of liability for the infringement to both of them.

5. Liability for the infringement

In this case, the infringement was committed in LDE's business premises and, according to the information provided by LDE, by one of its employees. As such, the liability for the infringement can be attributed to LDE.

As LDE is a wholly-owned subsidiary of Suez Environnement, the liability for the infringement can also be attributed to the parent company.

In this respect, the Decision clarifies that the rules governing liability for infringements of competition rules are the same for both infringements of the substantive rules in Articles 101 and 102 of the TFEU, and for infringements of the procedural rules relating to the Commission's powers of investigation. Since procedural infringements relating to the Commission's powers of investigation aim to prevent or hinder detection of infringements of substantive rules, the rules on liability for procedural infringements must be governed by the same principles as the rules on liability for substantive infringements.

This analysis is also confirmed by Article 23 of Regulation 1/2003, which refers in the same way to 'undertakings and associations of undertakings' in connection with both fines imposed for infringements of the procedural rules (paragraph 1) and fines imposed for infringements of substantive rules (paragraph 2).

For these reasons, there must be parallelism between the rules applied to parental liability for substantive and procedural infringements. This is consistent with the case-law of the European Court of Justice in the Akzo case (13) where no distinction is made between substantive and procedural infringements (14).

Additionally, in this case, a number of circumstances prior and subsequent to the discovery that the seal had been broken indicated that Suez Environnement was closely involved in the inspection conducted at LDE headquarters. For instance, lawyers employed by Suez Environnement were on LDE premises even before the breach of seal had been discovered.


(14) E.ON Energie AG v Commission, cited above, paragraph 294.
For these reasons, the Decision was addressed to LDE and to Suez Environnement, and both were held jointly and severally liable for the infringement.

6. Conclusion

The Decision in the Suez Environnement seal case illustrates a wider trend by the Commission to pursue procedural infringements relating to inspections using standalone procedures. As already mentioned, in January 2008, the Commission imposed a fine of EUR 38 million on German company E.ON Energie for the breach of a seal affixed in its premises during an inspection(15). In March 2012, the Commission imposed a fine of EUR 2.5 million on Czech companies EPH and J&T Investment Advisors for having obstructed an inspection(16).

It is also important to be aware of the context; the Commission is investigating an increasing number of *ex officio* cases, in which inspections are a key tool for gathering evidence of breaches of Articles 101 or Article 102 TFEU. In this context, standalone prosecution of procedural infringements leading to the swift imposition of appropriate sanctions is essential to safeguard efficient enforcement of the Treaty provisions.

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