The E.ON seals case — €38 million fine for tampering with Commission seals

Oliver KOCH and Dominik SCHNICHELS (1)

“The team will be aware that a broken seal is a breach of the rules in itself” (2)

In January 2008, the Commission — making use of its new powers under Article 23(1) of Council Regulation (EC) No 1/2003 (3) for the first time — imposed a fine of EUR 38 million on the German energy company, E.ON Energie AG (E.ON), for a breach of the Commission’s procedural rules. The Commission had found a seal broken on a door of E.ON’s premises during an inspection in May 2006. The article summarises the facts and the legal assessment of the decision (4).

1. The events of the night of 29 May 2006

On 29 May 2006 the Commission carried out an unannounced inspection at E.ON’s premises, based on information that the E.ON Group was involved in anti-competitive practices in the field of energy (5). The inspection team collected a large number of documents, which could not be copied and fully registered during the first day of the inspection. In line with the Commission’s usual practice in such a case (6), the inspection team stored the collected documents in a room made available to the Commission by E.ON. After the door was locked and a key handed over by E.ON, an official Commission security seal was affixed to the door in order to make any unauthorised access visible. E.ON was informed of the significance of the seal and the consequences of any breach of it.

The Commission’s seals are made of plastic film. If they are removed, they do not tear, but show ‘VOID’-signs which remain irreversibly visible on their surface (see picture 1).

Picture 1: Illustration of the functioning of a Commission security seal (simulation)

In January 2008, the Commission — making use of its new powers under Article 23(1) of Council Regulation (EC) No 1/2003 (7) for the first time — imposed a fine of EUR 38 million on the German energy company, E.ON Energie AG (E.ON), for a breach of the Commission’s procedural rules. The Commission had found a seal broken on a door of E.ON’s premises during an inspection in May 2006. The article summarises the facts and the legal assessment of the decision (8).

1. The events of the night of 29 May 2006

On 29 May 2006 the Commission carried out an unannounced inspection at E.ON’s premises, based on information that the E.ON Group was involved in anti-competitive practices in the field of energy (5). The inspection team collected a large number of documents, which could not be copied and fully registered during the first day of the inspection. In line with the Commission’s usual practice in such a case (6), the inspection team stored the collected documents in a room made available to the Commission by E.ON. After the door was locked and a key handed over by E.ON, an official Commission security seal was affixed to the door in order to make any unauthorised access visible. E.ON was informed of the significance of the seal and the consequences of any breach of it.

The Commission’s seals are made of plastic film. If they are removed, they do not tear, but show ‘VOID’-signs which remain irreversibly visible on their surface (see picture 1).

When the inspection team returned the next morning, accompanied by E.ON representatives and external lawyers in order to open the door, it found that the seal, although still sticking on the door where it had been affixed, was no longer intact. Instead, the seal showed the typical indications of a seal breach, namely ‘VOID’-signs visible on the entire surface of the seal. Moreover, the team found traces of the adhesive on the door and on the door frame, indicating that someone had removed the seal and displaced it about 2 mm...
upwards and sideways when re-affixing it (\textsuperscript{7}). The inspection team also found traces of glue on the back of the seal, indicating that the seal had been tampered with.

**Picture 2: Illustration of the state of the seal as found by the Commission (simulation)**

\begin{figure}[h]
\centering
\includegraphics[width=0.5\textwidth]{state_of_seal_simulation}
\caption{Illustration of the state of the seal as found by the Commission (simulation).}
\end{figure}

The state of the seal was documented in a protocol. When the door to the locked room was eventually opened to allow the team to continue their inspection, the team was unable to ascertain whether the documents stored in the room were still complete or whether any documents were missing.

2. **The course of the proceedings**

E.ON denied that it had broken the Commission seal. It argued that the Commission was in possession of the only key to the room, which would exclude any possibility of someone entering the room. However, it eventually emerged that around 20 keys were circulating among E.ON employees \textsuperscript{(4)}. Later in the proceedings, E.ON called into question the functional capability of the seal and suggested various possible explanations for the state of the seal. It claimed *inter alia* that (i) a cleaning lady might have wiped over the seal with a cleaning product, thereby displacing the seal; (ii) vibrations caused by people walking around, opening and closing doors in the vicinity of the seal might have made the seal move or (iii) the seal had not adhered properly to the door from the very beginning (e.g. because of moisture in the air, the age of the seal \textsuperscript{(5)} or the fact that the door had not been cleaned beforehand). According to E.ON, the state of the seal as it was found on the morning of 30 May 2006 (hereinafter referred to as ‘false positive’, i.e. void signs on the entire surface of the seal and glue traces around it, occurring without a seal breach) could have been due at least to a combination of all these factors.

The Commission undertook a thorough investigation in order to determine whether there was any possibility of a malfunction of the seal, including calling on an outside expert to test the seals. The Commission concluded that the arguments put forward by E.ON were not valid and that no explanation other than a breach of the seal can be found for the state of the seal. All the tests carried out by the Commission and the independent expert who had tested a large number of original Commission seals under all possible (even the most unlikely) hypothetical situations, confirmed that the only explanation for the state of the seal as found on the morning of 30 May 2006 was that there had been a breach of the seal.

As far as the ‘cleaning lady’ hypothesis is concerned, the Commission found that wiping over the seal with the cleaning product used by E.ON does not affect the functioning of the seal at all. It should be noted that the adhesive of the seal (which is 54 cm\textsuperscript{2} in area) is extremely powerful, and it takes a lot of force even to loosen it. Small traces of an aggressive cleaning product could only enter at the edges of the seal (which is in principle water-proof) and, as the tests proved, could under no circumstances result in a ‘false positive’.

Also the possible impact of ‘vibrations’ on the seal proved to be negligible. The Commission’s tests showed that a vibrating door would not result in a ‘false positive’. Even if strong vibrations might loosen the seal under certain circumstances within a very narrow area at the gap between door and doorframe, they would not be capable of moving the entire seal with its extremely powerful adhesive \textsuperscript{(10)}. It was also confirmed that even

\textsuperscript{(5)} Due to the large number of VOID-signs, it is indeed extremely difficult to re-affix the seal in exactly the same position as before. In any event, the VOID-signs remain visible in such a case.

\textsuperscript{(4)} One and a half years after the incident, E.ON submitted affidavits from the key holders in order to argue that none of them had (personally) opened the sealed door. However, these affidavits were couched in rather general terms; for example, they did not exclude the possibility that the keys had been passed on to third parties. It should also be noted that the very purpose of a seal is to avoid the need to demonstrate that a sealed door was actually opened. This is why a broken seal as such is sufficient to give rise to a fine pursuant to Article 23(1)(e) of Regulation 1/2003.

\textsuperscript{(7)} The manufacturer of the seal explicitly gives the seal a ‘guarantee period’ of only two years. This period had expired when the Commission seal was used. However, regardless of this legal guarantee, the seal remains functional for a much longer period. Indeed, some printers who sell security seals on the basis of the manufacturer’s promotional material give a guarantee of up to 10 years.

\textsuperscript{(10)} Even a film prepared by E.ON to demonstrate the effect of vibrations during the Hearing showed that the vibrations had only a minimal effect on the gap between door and frame, while the seal as such remained intact and no VOID-signs appeared.
strong vibrations would not result in a ‘creeping’ of the seal and would certainly not cause ‘VOID’ signs to appear over the entire surface of the seal.

Finally, the Commission also examined whether other factors, such as the age of the seal, the characteristics of the surface or moisture in the air, might have resulted in a malfunction of the seal, for example by preventing the seal from sticking to the door from the very beginning. Tests confirmed that the Commission seals worked properly, even many years after their manufacture, whether the surface had been previously cleaned or not (14) and whether the level of moisture in the air was high or low (15). It may be noted that if the seal had, hypothetically, failed to stick properly on the door, it would not have shown any VOID-signs (16), but would have peeled off without any change in its appearance (‘false negative’).

The Commission has also investigated whether any similar incident with material used for the security seals had occurred in the past. In fact, similar security seals have been in use world-wide since 1985, when the manufacturer of the seals started using the material for high security applications (transport of medical substances, sealing of ‘black boxes’ etc.). It turned out that not a single comparable malfunction (‘false positive’) has been reported to the seal manufacturer since 1985. The manufacturer also confirmed the Commission’s finding that none of the factors adduced by E.ON can have caused the state of the seals as found on E.ON building, e.g. the cleaning lady, about the existence of the seal and the need to respect it.

3. Legal consequences — determining the appropriate fine

Having discarded the hypothesis of a technical malfunction of the seal, the Commission concluded that E.ON or persons within E.ON’s sphere of influence had broken the seal, in breach of Article 23(1)(e) of Regulation 1/2003. Although the Commission was not in a position to prove an intentional breach of the seal and could not ascertain whether any documents were missing (17), the Commission assumed that the breach of the seal occurred, at the very least, as a result of negligence, since it was E.ON’s responsibility to organise its own business sphere in such a way as to ensure that the instruction not to break the seal was complied with (18).

As for the appropriate level of the fine, there are no guidelines in place setting out the specific criteria and mechanisms to be taken into account in cases of violations of procedure (19). The Commission therefore enjoyed wide discretion in determining the amount of the fine and was, in principle, free to set a fine of up to a maximum of 1% of annual turnover. This discretionary power was, however, limited by Article 23(3) of Regulation 1/2003, which provides that fines must in general take into account the gravity and the duration of the infringement (20) and by the general principles of Community law which the Courts have established for the setting of administrative fines, among them the principles of non-discrimination and proportionality (21).

(14) The Commission did not consider the fact that it could not prove an intentional breach of the seal as a mitigating factor. This is not only in line with the approach in the Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003 (OJ C 210 p. 2-5 of 1.09.2006, “Fines Guidelines”), according to which negligence should only be taken into account as a mitigating factor when the company has provided evidence that the infringement has been committed negligently (see Fines Guidelines, at paragraph 29). Fines Guidelines, at paragraph 29). Given that it will be practically impossible to prove an intentional breach of a seal and that breaches of seals will by nature occur secretly and normally require a deliberate act, it does not appear to be justified to grant a ‘rebate’ in cases where the Commission cannot prove intention.

(15) In this respect the Commission also noted that E.ON had not informed all personal authorised to enter the E.ON building, e.g. the cleaning lady, about the existence of the seal and the need to respect it.

(16) The Fines Guidelines only apply to breaches of Article 23(2) of Regulation 1/2003, i.e. breaches of substantive rules.

(17) It may be noted that, according to an opinion, Article 23(3) does not directly apply to procedural fines pursuant Article 23(1), cf. de Bronnet, Kommentar zum europäischen Kartellverfahrensrecht, Article 23, paragraph 21. Even in this case the Commission would, however, be bound in an equal manner by the principle of proportionality.

When setting the fine for E.ON, the Commission took into account, among others, that breaches of seals must, as a matter of principle, be regarded as a serious infringement (19). Accordingly, the level of the fine had to ensure that it had a sufficient deterrent effect for E.ON, which is a large subsidiary of a major European energy company with a turnover of around €28 billion, and all other potentially affected companies (20). As Competition Commissioner, Neelie Kroes, put it: ‘The Commission cannot and will not tolerate attempts by companies to undermine the Commission’s fight against cartels and other anti-competitive practices. Companies know very well that high fines are at stake in competition cases, and some may consider illegal measures to avoid a fine. This decision sends a clear message to all companies that it does not pay off to obstruct the Commission’s investigations.’

On the other hand, the Commission took into consideration the fact that the new provision in Regulation No 1/2003, which provides for a fine of up to 1% in the case of a procedural violation, was applied for the first time in this case (21); this means that, in subsequent cases, the Commission might even impose higher fines in absolute and relative terms.

In the light of these considerations, the Commission decided to impose a fine of €38 million on E.ON. The decision is currently the subject of an appeal by E.ON (22).

(19) In this context it may be noted that the International Competition Network (ICN) recently concluded that problems with obstruction have increased and that measures against obstruction in cartel investigations should be a priority for enforcers. See report of the ICN Working Group ‘Obstruction of Justice in Cartel Investigations’, available under: http://www.internationalcompetitionnetwork.org/media/library/conference_5th_capetown_2006/ObstructionPaper-with-cover.pdf.

(20) See, on the legitimacy of deterrence as an aim of fines in Community law, e.g. Joined Cases 100/80 to 103/80, Musique Diffusion française and others v Commission [1983] ECR 1825, at paragraph 106. In general, a fine can only have a deterrent effect if it ensures that it is not more profitable for a company to obstruct the investigation (e.g. by destroying incriminating documents) and to accept a ‘mild’ procedural sanction than to risk a very high fine for a substantive infringement. See in more details e.g. Calviño, Deterrent Effect and Proportionality of Fines, pages 2–6, in: Ehlermann/Atanasiu (ed.): European Competition Law Annual 2006, available under: http://www.iue.it/RSCAS/research/Competition/2006 (pdf)/200610-COMPed-Calvino.pdf.

(21) Given E.ON’s turnover of around €28 billion, the Commission could theoretically have imposed a fine of up to €280 million in this case.

(22) Registered as case T-141/08.