

European Commission Dawn Raids: the General Court's judgments in the French supermarket cases

General Court 5 October 2020 (T-249/17, T-254/17 and T-255/17)
Edmon Oude Elferink

Agenda



Introduction



Legal framework



Facts of the cases



Examination of the Applicants' main arguments



Conclusion





Introduction

Cases to be discussed

Overview

- T-249/17 *Casino, Guichard-Perrachon and Achats Marchandises Casino SAS (AMC) (Casino)*
- T-254/17 *Intermarché Casino Achats (INCA)*
- T-255/17 *Les Mousquetaires and ITM Entreprises (Intermarché)*

versus

European Commission

Buying alliance INCA

- Between 2014 and 2018, French retail giants Casino and Intermarché pooled their purchasing activities in a joint venture: the buying alliance INCA



Importance of the cases



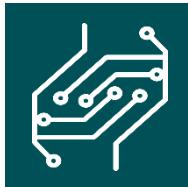
Buying alliances in food- and non-food sector are a hot topic



Legality of Regulation No. 1/2003 as such is being challenged



Refinement case law on reasonable grounds for suspecting an infringement and carrying out a dawn raid



Interplay between powers of investigation of the Commission and data protection



Legal framework

Article 20 Regulation No. 1/2003

- 1) The Commission may conduct all necessary inspections
- 2) The Commission officials are empowered to:
 - Enter premises
 - Examine books and other records
 - Take or obtain in any form copies of extracts from books and records
 - Seal any business premises
- 4) Undertakings and associations of undertakings are required to submit to inspections
- 6) If an undertaking opposes an inspection, the Member State shall request assistance of the police
- 7) If police assistance requires authorisation from a judicial authority, such authorisation shall be applied for

Relevant case law

- *Akzo Nobel and Akcros Chemicals/Commission* (T-125/03 and T-253/03) [2007]
- *Nexans/Commission* (T-135/09) [2012]
- *Deutsche Bahn/Commission* (T-289/1, T-290/11 and T-521/11) [2013]
- *Nexans/Commission* (C-37/13 P) [2014]
- *Deutsche Bahn/Commission* (C-583/13P) [2015]
- *České dráhy/Commission* (T-621/16) [2018]
- *České dráhy/Commission* (C-538/18 P) [2020]
- *Nexans/Commission* (C-606/18 P) [2020]



Facts of the case

Timeline

| Date | Events |
|---|---|
| <ul style="list-style-type: none">• February 2017• May 2019<ul style="list-style-type: none">• June 2019• 4 November 2019• 29 and 30 January 2020<ul style="list-style-type: none">• 1 and 5 October 2020• 5 October 2020 | <ul style="list-style-type: none">• Commission conducts dawn raids I• Commission conducts dawn raids II<ul style="list-style-type: none">• Casino and Intermarché bring actions for annulment in cases T-538/19 and T-539/19• Commission opens investigation• General Court hearings dawn raids I<ul style="list-style-type: none">• Casino and Intermarché bring actions for annulment in cases T-614/20 and T-625/20• General Court ruling dawn raids I |

Inspection decisions dawn raids I

| Date | Undertakings addressed |
|--------------------------|---|
| • 9 February 2017 | • Casino and all the companies directly or indirectly controlled by them |
| • 9 February 2017 | • INCA and all the companies directly or indirectly controlled by it |
| • 9 and 21 February 2017 | • Intermarché and all the companies directly or indirectly controlled by them |

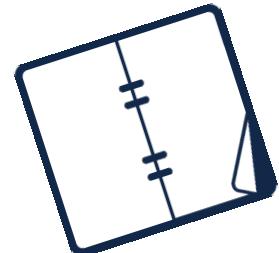
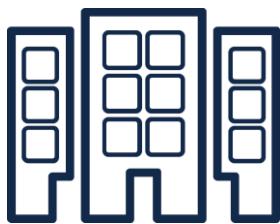
Inspection decisions dawn raids I

Undertakings are required to submit to an inspection concerning concerted practices consisting of:

- Exchange of information, since 2015, with respect to **discounts** obtained on the supply markets of certain everyday food- and non-food consumer products (**first infringement**)
- Exchange of information, since 2016, between Casino and Intermarché concerning their **future commercial strategies** on the food- and non food consumer products (**second infringement**)

Dawn raids I

- The inspections at Casino, INCA and Intermarché started on 20 February 2017 and continued at least until 21 February 2017
- The Commission obtained access to offices, collected material including laptops, mobile phones, interviewed staff and made copy of records
- Casino, INCA and Intermarché sent their objections with respect to the inspections on 24 February 2020 and 13 April 2020





Examination of the Applicants' main arguments

Applicants' main arguments

- Plea of illegality with respect to Article 20 Regulation No. 1/2003
- Inspection decisions violate the right of inviolability of the home as there were insufficient grounds to suspect a concerted practice
- The Commission refused to protect the private lives of employees and managers of Intermarché

Illegality of Regulation 1/2003

Plea of illegality

| Applicants | General Court |
|--|---|
| <ul style="list-style-type: none">Article 20 Regulation 1/2003 illegal because of a violation of the right to effective judicial protection (article 47 Charter / article 6 ECHR) | <ul style="list-style-type: none">Four requirements apply:<ul style="list-style-type: none">Effectiveness: effective judicial review of the facts and points of lawEfficiency: possibility for an individual to obtain an appropriate remedy when an unlawful act has taken placeCertainty: certainty of access to proceedingsReasonable time: timely judicial review |

Plea of illegality

General Court

- Five **remedies** available to challenge the way the European Commission carries out inspections:
 - Direct action against inspection decisions
 - Direct action against an act capable of being challenged in light of existing case law (legal professional privilege)
 - Direct action against a final infringement decision
 - Injunction proceedings
 - Action on the basis of non-contractual liability EU
- Each of these remedies, or the set of remedies combined, ensure that all the criteria set out above are **fulfilled**



Violation of the right to inviolability of the home

Insufficient grounds to suspect infringements

Applicants

- Inspection decisions violate the **right to the inviolability of the home** (article 7 Charter / article 8 ECHR) since the Commission had insufficient grounds to suspect both the **first** and the **second** infringement

General Court

- The Commission had **sufficient grounds** to suspect the **first infringement** (discounts obtained on the supply markets)
- The Commission had **insufficient grounds** to suspect the **second infringement** (future commercial strategies)

Insufficient grounds to suspect infringements

General Court

- The Commission had **sufficient grounds** to suspect the **first infringement**:
 - Thirteen interviews had been conducted with representatives of suppliers of food and non-food consumer products: ten interviewees had indicated that Casino and Intermarché had requested identical discounts and three suppliers had explicitly referred to a possible exchange of information
 - A number of suppliers and a director of a trade organisation referred to the many channels that existed for the exchange of information (alliances, personnel moving from Casino to Intermarché and vice versa)

Insufficient grounds to suspect infringements

General Court

- The Commission had **insufficient grounds** to suspect the **second infringement**:
 - The only element relied on was the “convention Intermarché” on 21 September 2016 during which Intermarché announced its commercial priorities and which was attended by a representative of Casino
 - The convention was a public event, where over 400 suppliers were present and member of the press reporting
 - The information shared by Intermarché was *genuinely public*

Refusal to protect the private lives of employees and managers

Request Intermarché

Applicants

- Intermarché requested the General Court to annul the alleged decision of the Commission to apprehend and copy the **personal data** of the users of the means of communication as well as the refusal to return the personal data

General Court

- This request, which boils down to a complaint that the Commission has refused to protect the confidentiality of personal data, is **inadmissible**
- It follows from the GDPR that each undertaking has a **duty to protect** the personal data and the privacy of the persons it employs and to **request** the Commission to ensure that the privacy of the employees or directors be respected
 - Such a request cannot only be made by the individuals themselves, but also by the undertaking
 - The undertaking has an interest to challenge a refusal to protect

Request Intermarché

General Court

- The **refusal** by the Commission is not necessarily a so-called preparatory act, but an act capable of being challenged. A tacit decision to refuse to protect the privacy of personnel can be assumed if actual collection and copying of data takes place in spite of a request to respect the privacy
- The principles adopted in the *Akzo Nobel* case with respect to legal privilege can also apply where it concerns personal data
- Intermarché has **not** made a request *during* the inspections to respect the privacy of employees and directors before the copying took place, it has done so only on 24 February 2020
- The request to return the data was **too vague**



Conclusion

Conclusion

Rulings of the General Court

- The inspection decisions dawn raid I are **annulled** to the extent that they concern the investigation into the **second infringement**
 - With respect to that infringement, the Commission is not allowed to use any evidence collected
- The direct actions for annulment are otherwise **dismissed**
- **Appeals** can be lodged against the judgments of the General Court

Conclusion

Investigation (AT.40466) is still on-going:

Buying alliances between retailers have become a key component of grocery supply chains. They can bring lower prices to consumers for food and personal care brands that they purchase on a daily basis. Such benefits can however disappear quickly if retailers use these alliances to collude on their sales activities. The Commission will therefore investigate if Casino and Intermarché have coordinated their activities in an anticompetitive way.



Thank you for your attention!

Contact details:



Edmon Oude Elferink
Partner – advocaat
+32 4 79 13 36 47
edmon.oudeelferink@cms-dsb.com



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