

**Summary of the Commission Decision**  
**of 30 January 2008**  
**relating to a proceeding under Article 23(1) of Council Regulation (EC) No 1/2003**  
**(Case COMP/B-1/39.326 — E.ON Energie AG)**  
**(Only the german text is authentic)**

(2008/C 240/06)

*On 30 January 2008, the Commission adopted a decision relating to a proceeding under Article 23(1) of Council Regulation (EC) 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<sup>(1)</sup>. A non-confidential version of the full text of the decision can be found in the authentic language of the case on the website of the Directorate-General for Competition, at the following address:*

*<http://ec.europa.eu/comm/competition/antitrust/cases>*

The decision concerns an EUR 38 million fine imposed on E.ON Energie AG (EE) under Article 23 of Regulation (EC) No 1/2003 for breaking a seal affixed by the Commission during an inspection in May 2006. EE is headquartered in Munich, Germany, and belongs to the E.ON group. This is the first case in which the Commission has fined a company under the said Article 23.

#### 1. SUMMARY OF THE FACTS

Having come across evidence of anticompetitive practices by the E.ON group, the Commission on 29 May 2006 carried out an unannounced inspection at the premises of EE and of other E.ON group companies. On the evening of the first day of the inspection, the inspection team placed a large number of documents, uncopied and only partly catalogued, in a room made available to the Commission by EE for that purpose. The leader of the inspection team locked the room with a key provided by EE and affixed an official Commission security seal to the door and door frame in order to secure the room against unauthorised access. EE was informed of the significance of the seal and of the possible consequences of breaking it.

When the inspection team returned at around 8.45 on 30 May 2006, it found in the presence of company representatives and lawyers representing EE that the 'VOID' message was clearly evident over the entire surface of the seal affixed the previous evening. Furthermore, the seal had been displaced by about 2 mm upwards and sideways, as was evident from the fact that traces of adhesive were to be seen on the door and door frame. After the seal was detached, traces of adhesive (remains of the 'VOID' message) were also evident on the rear of the seal, which was likewise evidence of a breach of seal.

Once the door to the room was opened, the inspection team was unable to ascertain whether the documents stored there were still complete.

#### 2. COURSE OF THE PROCEEDINGS

In order to clarify the facts, the Commission sent requests for information to 1. EE; 2. the manufacturer of the label stock material, 3M Europe SA/NV (3M); 3. the cleaning firm which cleans EE's premises; and 4. the security firm which looks after the security of EE's premises. As a possible explanation for the change in the seal, EE suggested that a 'partial loosening of the seal' might have occurred as a result of 'poor adhesion of the seal to the surface (e.g. because of the building materials used)'. EE also stated that a cleaner working for the cleaning firm had wiped the seal with a damp microfibre cloth and cleaning product and might possibly have displaced the seal slightly as a result. Lastly, EE asserted that, during the night in question, no unauthorised access to the building had been observed, although, besides the key that had been entrusted to the leader of the inspection team, other keys to the room in question were in circulation.

On 2 October 2006, the Commission sent EE a statement of objections. In it, the Commission came to the preliminary conclusion that the seal had been broken and that such breach had to be attributed to EE because of its organisational control of the relevant office building. The Commission remarked further that the proper functioning of the seal had not been affected by the fact that the official guarantee period ('shelf life') of the seal had expired. In particular, the possibility that a defective seal had led to the 'VOID' message appearing ('false positive') was excluded. If anything, a defective seal would have resulted in a false negative, that is to say, in the event of the seal being broken no 'VOID' message would have appeared.

The Commission granted EE access to the file. On 13 November 2006, EE replied to the statement of objections, arguing that the Commission's exposition was based on incorrect or unsound, i.e. scientifically and technically unsubstantiated, facts. At the oral hearing on 6 December 2006, EE used video evidence which it had produced itself to demonstrate how, in its view, external factors such as vibrations in the office wall (caused, for instance, by shaking of the locked door), possibly combined with other factors (such as a lack of prior cleaning of the substrate), could have resulted in the 'VOID' markings. It should be stressed, however, that the video did not show any extensive 'VOID' markings such as had been observed on 30 May 2006, but merely showed 'VOID' markings at the interface

<sup>(1)</sup> OJ L 1, 4.1.2003, p. 1.

between door and frame, where there was some play in the seal. EE proposed that further tests be carried out to determine the performance of the seal.

In March 2007, EE sent the Commission an expert opinion drawn up by a scientific institute on 'investigations into the reaction of sealing films to shearing and peeling forces'. Three months later EE sent a further expert opinion on 'investigations into the reaction of sealing films to pulling shearing stresses, compression shearing stresses and peeling stresses following the use of Synto'. Both expert opinions were based on tests of 3M's standard label stock 7866, as used for the Commission's seals and as available commercially. The experts came to the conclusion that vibrations in the wall, in combination with the cleaning product and other factors, could lead to a 'false positive' (some occurrence of 'VOID' markings and traces of adhesive on the edges of the seal). The Commission found, however, that the tests had been carried out under fundamentally different conditions from those obtaining on the spot during the inspection. It also found that there was no evidence whatsoever of an occurrence of 'VOID' markings over the entire surface of the seal. 3M confirmed, moreover, that the shelf life of the Commission's seals far exceeded their guaranteed shelf life and that the 'VOID' message was proof as it were that the seal had performed properly.

In its decision defending its viewpoint, the Commission also relied on expert opinions by its own expert. In April 2007, this expert carried out appropriate tests on a few seals in EE's office building in Munich in the presence of EE representatives and of two external experts acting on behalf of EE. The tests were carried out on the door to which the seal had been affixed on 29 May 2006. In addition, the expert carried out further tests in his laboratory. In his expert opinion of May 2007, the expert confirmed that the performance of the seal had been affected neither by the fact that the manufacturer's guarantee period had expired nor by the fact that the inspection team had omitted to test the seal beforehand or to clean the relevant door. He also confirmed that the hypothesis of the occurrence of a false positive result, with the 'VOID' markings becoming apparent under the influence of office cleaning products and vibrations in the walls even without any removal of the seal, was unrealistic. He concluded that the appearance of the 'VOID' markings could realistically be explained only by a breach of the seal and that the seal had therefore been removed and replaced.

In a letter of facts dated 6 June 2007, to which the expert opinion was attached, the Commission informed EE of these additional findings and of the conclusions drawn therefrom. EE replied by letter dated 6 July 2007, expressing continued doubts about the performance of the seal. It argued that the Commission could not entirely rule out other explanations for the tampered state of the seal. It maintained that the number of seals tested by the Commission's expert was too small. For the reasons set out above, the Commission was not swayed by these arguments.

In October 2007, EE submitted a further expert opinion, claiming that the condition of the seal could possibly be

explained by the influence of humidity or a combination of various factors (ageing of the seal, the effect of the cleaning product, etc.) on the seal. The Commission's expert demonstrated, however, in a further study carried out in November 2007 that humidity or a combination of humidity and other factors could not have caused any malfunctioning of the seal. He also highlighted numerous weaknesses in EE's expert opinion, the assumptions underlying which differed considerably from the realities on the ground. EE was informed of the expert's findings in a further letter of facts, after which it raised no more arguments questioning the Commission's conclusions. The sworn statements by key holders presented by EE in January 2008 to the effect that in any event they themselves had not opened the door added nothing of significance.

### 3. CONCLUSION

It is thus clear that the seal which was affixed on the first day of the inspection on the premises of EE was broken within the meaning of Article 23 of Regulation (EC) No 1/2003. That provision does not require proof that the door was actually opened or that documents placed in the sealed room were removed. Realistically, an intentional breach of seal took place. At the very least, a negligent breach of seal took place, it being the entire responsibility of EE to order its affairs in such a way that the injunction not to break the seal was obeyed. In this connection the Commission has established that EE did not inform every employee with access to the building — such as, for example, the cleaners — of the existence of the seal and its significance. Apart from the fact that this is the first case involving a breach of seal in which it has imposed a corresponding penalty, the Commission has been unable to find any mitigating circumstances. In particular, EE has not cooperated with the Commission to an extent beyond the legal obligation to cooperate.

### 4. LEGAL CONSEQUENCES

Where the conditions for a breach of seal within the meaning of Article 23(1)(e) of Regulation (EC) No 1/2003 are met, the Commission can impose a fine of up to 1 % of turnover. Quite apart from this specific case, breaches of seals are in principle a serious infringement. It must therefore be ensured that the fine has a deterrent effect. It must not be in the interests of an undertaking involved in an inspection to break a seal. On the other hand, in determining the amount of the fine, the Commission took account of the fact that this is the first case in which the new provision in Regulation (EC) No 1/2003 has been applied. The Commission therefore imposed a fine of EUR 38 million.

### 5. ADVISORY COMMITTEE

On 25 January 2008, the Advisory Committee on restrictive practices and dominant positions gave a favourable opinion on the draft decision.