

Summary of Commission Decision

of 28 March 2012

relating to a proceeding under Article 23 of Council Regulation (EC) No 1/2003 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty

(Case COMP/39.793 — EPH and others)

(notified under document C(2012) 1999 final)

(Only the English text is authentic)

(2012/C 316/05)

On 28 March 2012, the Commission adopted a decision relating to a proceeding under Article 23 of Council Regulation (EC) No 1/2003 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty⁽¹⁾. In accordance with the provisions of Article 30 of Council Regulation (EC) No 1/2003⁽²⁾, the Commission herewith publishes the names of the parties and the main content of the decision, including any penalties imposed, having regard to the legitimate interest of undertakings in the protection of their business secrets.

1. INTRODUCTION

(1) The Decision is addressed to Energetický a průmyslový holding ('EPH') and its 100 % subsidiary EP Investment Advisors ('EPIA'). It imposes a fine on them for refusal to submit to an inspection, an infringement within the meaning of Article 23(1)(c) of Council Regulation (EC) No 1/2003. The refusal took the form of a failure to block an e-mail account and of diversion of incoming e-mails which occurred during the inspection carried out at the premises shared by EPH and EPIA.

2. PROCEDURE

(2) On 17 May 2010, the Commission decided to initiate proceedings against J&T IA (now EPIA⁽³⁾) and EPH with a view to adopting a decision sanctioning an alleged infringement within the meaning of Article 23(1)(c) of Council Regulation (EC) No 1/2003.

(3) On 17 December 2010, the Commission adopted a statement of objections ('SO') against EPIA and EPH concerning an alleged infringement within the meaning of Article 23(1)(c) of Council Regulation (EC) No 1/2003. The SO was notified to the parties on 22 December 2010. The parties submitted their response on 17 February 2011. The oral hearing took place on 25 March 2011.

(4) On 15 July 2011, the Commission adopted a supplementary statement of objections ('SSO') setting out additional factual and legal elements with regard to one of the instances of an alleged infringement within the meaning of Article 23(1)(c) of Council Regulation (EC) No 1/2003. The SSO was notified to the parties on 19 July 2011. The parties submitted their response on 12 September 2011. The oral hearing took place on 13 October 2011.

(5) The Advisory Committee on restrictive practices and dominant positions was consulted on the existence of an infringement and on the proposed amount of the fine on 12 March 2011. The Advisory Committee delivered a unanimous positive opinion on the draft decision, including the proposed fine.

(6) The Hearing Officer issued his final report on 13 March 2012. The report concludes that the parties' right to be heard has been respected.

3. FACTS

(7) The Decision addresses two incidents relating to the handling of e-mails that occurred during the inspection of 24-26 November 2009: (i) failure to block an e-mail account and (ii) diversion of incoming e-mails.

Failure to block an e-mail account

(8) On 24 November 2009, after the notification of the inspection decision, the Commission inspectors requested to block e-mail accounts of key persons until further notice. This was done by setting a new password only known to the Commission inspectors. This is a standard measure taken at the beginning of inspections, to ensure that inspectors have exclusive access to the content of e-mail accounts and prevent modifications to those

⁽¹⁾ With effect from 1 December 2009, Articles 81 and 82 of the EC Treaty have become Articles 101 and 102 respectively of the TFEU. The provisions laid down in the respective articles are, in substance, identical in both cases. For the purposes of this Decision, references to Articles 101 and 102 of the TFEU should be understood as references to Articles 81 and 82 of the EC Treaty where appropriate.

⁽²⁾ OJ L 1, 4.1.2003, p. 1.

⁽³⁾ On 10 November 2010, J&T IA was renamed EPIA without changes in the corporate structure or the organisation of the company. The following text refers to EPIA also for the time when it was named J&T IA.

accounts while they are searched. On the second day of the inspection, the Commission inspectors discovered that the password for one account had been modified in the course of the first day in order to allow the account holder to access the account.

Diversion of incoming e-mails

- (9) On the third day of the inspection, the Commission inspectors discovered that one of the employees had requested the IT department on the second day of the inspection to divert all incoming e-mails to the accounts of several key persons away from these accounts to a computer server. The company admitted that it had implemented the instruction for at least one of the e-mail accounts. As a result, the incoming e-mails did not become visible in the inboxes concerned and could not be searched by the inspectors.

4. LEGAL ASSESSMENT

- (10) First, the Decision notes that the case law in *Orkem*⁽¹⁾ and *Société Générale*⁽²⁾ and the Commission's decision-making practice⁽³⁾ confirm that full submission to an inspection includes the obligation to actively cooperate with the Commission in all respects. This entails that e-mail accounts of the undertaking are blocked upon request of the inspectors by resetting the password and providing them with a new password exclusively known to the inspectors. The exclusive access to the account by the inspectors must be ensured until the inspectors explicitly allow for it to be unblocked so as to ensure the integrity of the content of the mailbox.
- (11) Second, the Decision notes that submission to an inspection requires that Commission inspectors must have access to all e-mails in the account, including e-mails entering the account during the entire inspection until such point as the inspection ends.
- (12) Third, the Decision determines that the unblocking of the e-mail account was committed by negligence and that the diversion of incoming e-mails was committed intentionally.
- (13) Fourth, the Decision determines that while each of the two incidents could constitute an infringement within the
- meaning of Article 23(1)(c) of Regulation (EC) No 1/2003 in itself, having regard to the common elements, it would not be appropriate to view each conduct in isolation. Therefore, it is concluded that EPIA and EPH engaged in a single overall infringement within the meaning of Article 23(1)(c) of Regulation (EC) No 1/2003.
- (14) Fifth, given that EPH controls EPIA as its 100 % owner in a common management structure as well as the fact that the incidents involved persons who represented both entities during the inspection and also related to e-mail accounts of persons working for each of them, the Decision determines that EPIA and EPH should be held jointly and severally liable for the infringement.

5. FINES

- (15) Since the infringement referred to in Article 23(1)(c) of Regulation (EC) No 1/2003 has been established, the Commission may impose on the undertakings fines not exceeding 1 % of their turnover.
- (16) For determining the amount of the fines, the Decision has regard both to the gravity and the duration of the infringement according to Article 23(3) of Regulation (EC) No 1/2003.
- (17) Concerning the gravity, the Decision notes that the infringement is of a serious nature. It is particularly noted that the power to conduct inspections is one of the most important of the Commission's investigative powers in the competition field permitting to detect infringements of Articles 101 and 102 of the TFEU. It is also noted that over the last decade paper-based evidence has become less important and most of the documents collected nowadays during inspections are extracted from e-mail accounts and electronic files and that data stored in electronic format are much easier and quicker to destroy than paper files. Finally, it is taken into account that there are two incidents in which EPIA and EPH obstructed the inspection: the failure to block an e-mail account and the diversion of e-mails.
- (18) In terms of duration, the Decision takes into account that the infringement continued for a significant period of time during the inspection at the premises of EPIA and EPH.
- (19) Finally, the Decision takes into account that the parties have cooperated in a way which helped the Commission to ascertain the circumstances of the refusal to submit to the inspection with regard to e-mails. It is nevertheless noted that while the parties did not contest certain facts, they have generally sought to put in doubt the existence of any procedural violation.

⁽¹⁾ Case 374/87 *Orkem v European Commission* [1989] ECR 3283, paragraph 27 which related to a request for information after an inspection had been carried out under Article 14 of Regulation No 17.

⁽²⁾ Case T-34/93 *Société Générale v Commission* [1995] ECR II-545, paragraph 72.

⁽³⁾ Commission Decision 94/735/EC of 14 October 1994 imposing a fine pursuant to Article 15(1) (c) of Council Regulation No 17 on Akzo Chemicals BV (OJ L 294, 15.11.1994, p. 31).

6. CONCLUSION

- (20) On the basis of the above, the Decision concludes that EPH and EPIA refused to submit to the inspection carried out at their premises on 24-26 November 2009 pursuant to Article 20(4) of Regulation (EC) No 1/2003 by negligently allowing access to a blocked e-mail account and intentionally diverting e-mails to a server, thereby committing an infringement within the meaning of Article 23(1)(c) of that Regulation. The Decision imposes a fine of EUR 2 500 000 jointly and severally on EPH and EPIA.
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