

## Competition & Compliance Bulletin

July 2016



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### Contents:

1. Antitrust: Deletion of a file from a laptop is not an obstruction of a dawn raid
2. Antitrust: Slightly delaying the start of a dawn raid does not justify high fines
3. Compliance: New incentives for whistleblowers planned
4. Compliance: 4<sup>th</sup> VIADRINA Compliance Congress

#### **1. Antitrust: Deletion of a file from a laptop is not an obstruction of a dawn raid**

In November 2011 Inco-Veritas S.A. (“Inco”) was fined EUR 517,000 for **deleting** – during a dawn raid - of an electronic file on a laptop. The Polish Office for Competition and Consumer Protection (“OCCP”) argued that deletion of a file was a **violation** of entrepreneur’s duty to cooperate during the search. The fine was imposed despite the fact the file was not removed from the laptop and the inspectors were able restore it.

The Competition Protection Court and the Appellate Court (“the Courts”) which reviewed the case took a different view and **annulled** the OCCP’s decision. The Courts came to a conclusion – following the earlier judgments of the Supreme Court - that while verifying sanctions imposed on entrepreneurs by administrative bodies, the courts are obliged to adhere to standards, which are usually applied in criminal proceedings. Thus the relevant provisions which sanction lack of cooperation during a dawn raid must be **interpreted narrowly**.

Further the Courts stated that deletion of a file by moving it to the trash bin of the laptop is not synonymous with **destroying** the file. The relevant file was still on the same laptop (although in a different folder, ie. in the “Trash Bin”) and the laptop itself was handed over to the inspectors. Also the access to that file on the laptop was in no way hindered by Inco’s employees. The Courts pointed out that in the standard Windows environment (which was installed on the laptop) the command “delete” always - by default setting - transfers the file into the “Trash Bin” folder. Further, such transfer **causes no harm** to the file itself. In order to permanently remove the file it is necessary to delete the file from the “Trash Bin” by using the command “**empty Trash Bin**”. The Courts concluded that the name of the command (ie. “delete”) in Windows OS is of **no importance** for the assessment of the behavior of Inco’s employee because only the **result** of such behavior is what counts.

At the same time the Courts stated that moving the file to the “Trash Bin” folder may be regarded as an **intention** to permanently delete the file later. In view of the Courts this is however not relevant for the legal assessment of the behavior as such intention **does not fall within the scope** of the relevant statutory law provisions, which impose sanctions for obstruction of a dawn raid.

## 2. Antitrust: Slightly delaying the start of a dawn raid does not justify high fines

In 2010 the OCCP fined PTC Sp. z o.o. (“PTC”) EUR 30 million for obstruction of a dawn raid. PTC is a 100% subsidiary of Deutsche Telekom Europe B.V. In OCCP’s view PTC allegedly **delayed entrance** of inspectors onto company’s premises located in Warsaw.

The Competition Protection Court (“the Court”) **reduced** the imposed fine **hundredfold**, ie. to EUR 300 thousand. In the recently published reasons for the judgement the Court stated that although PTC **did violate** its obligation to cooperate with the OCCP during the dawn raid, this violation was neither significant, nor its duration so long-lasting as to justify the EUR 30 million fine. In Court’s view the fine was **inadequate** to the weight of committed infringement.

The Court pointed out that the OCCP could not have **validly served** the authorization to conduct the search to a receptionist at building entrance, since this person was **not even employed** by PTC. Thus the search started only when an employee of PTC – who was called by the receptionist - arrived downstairs at the reception hall and was properly served the relevant documents. By the same token any obstruction of the dawn raid could only occur as of that moment.

However the Court pointed out that following the proper service of the search documents, PTC did not let in the inspectors but instead forced them to wait **25 minutes** in the reception hall until PTC’s legal department employees arrived. The additional delay was caused by issuing of **ID-passes** to the inspectors. Thus it took the inspectors **over 30 minutes** until they could pass through the security gate. In Court’s view PTC should have verified the inspectors’ authorizations and allow them to enter the premises first. Formalities such as issuing of ID-passes were **excessive** and should have been dealt with only later.

While reducing the fine the Court stated that no obstruction occurred after the inspectors passed the security gate and further that it was not proven that PTC had destroyed any evidence. Thus given that the inspection lasted two days, PTC’s illegal behavior pertained only to a **small fraction** of the entire procedure and thus the imposed fine was inadequate. Nonetheless the Court pointed out that it is entrepreneur’s **duty** to make **appropriate arrangements** with its contractors (eg. those who employ the receptionists and security staff) in order to secure the undisturbed course of an inspection.

## 3. Compliance: New incentives for whistleblowers planned

Mr. Marek Niechciał, the newly appointed President of the OCCP, has announced in a recent press interview that the OCCP under his lead will want to develop *inter alia* incentives and protection tools for whistleblowers. According to Mr. Niechciał there are people, who could offer the OCCP useful information about violations of competition law. However such potential informants quite often **risk** losing their jobs, if they decide to cooperate with the OCCP. Thus in order to **utilize this potential source** of information, the informants need to be granted protection and incentives. It can only be speculated whether the OCCP will **extend leniency** for managers onto lower level employees or if completely **new tolls** for whistleblowers will be developed.

## 4. Compliance: 4<sup>th</sup> VIADRINA Compliance Congress

The 4<sup>th</sup> VIADRINA Compliance Congress will take place in Frankfurt/Oder Germany on **6-7 July**. More details are available at: <http://www.compliance-academia.org/4vcc>.

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