



Press and Information

General Court of the European Union

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Judgments in the cases T-249/17 *Casino, Guichard-Perrachon and Achats Marchandises Casino SAS (AMC) v Commission*, T-254/17, *Intermarché Casino Achats v Commission* and T-255/17, *Les Mousquetaires and ITM Entreprises v Commission*

## **The General Court annuls in part the Commission's inspection decisions following suspicions of anticompetitive practices by a number of French undertakings in the distribution sector**

*The Commission has failed to show that it had sufficiently strong evidence to suspect exchanges of information concerning the future commercial strategies of the undertakings*

After receiving information concerning exchanges of information between a number of undertakings and associations of undertakings in the food and non-food distribution sector, the European Commission adopted, in February 2017, a series of decisions ordering several companies to submit to inspections<sup>1</sup> ('the inspection decisions'). Those decisions were adopted pursuant to Article 20(1) and (4) of Regulation No 1/2003 on the implementation of the rules on competition ('Regulation No 1/2003'),<sup>2</sup> which determines the powers of the Commission as regards inspections.

In those inspections, the Commission, inter alia, visited the premises of the relevant companies where copies of the content of computer equipment were taken. Having regard to their reservations as to the inspection decisions and the inspection procedures, a number of companies inspected<sup>3</sup> brought actions seeking annulment of those decisions. In support of their actions, the applicant companies raised, in particular, a plea of illegality against Article 20 of Regulation No 1/2003, an allegation of infringement of the obligation to state reasons for the inspection decisions and of infringement of their right to inviolability of the home. Some of the applicants disputed, in addition, the legality of the seizure and of the copying of the data relating to the private lives of their employees and managers and the refusal to return those data.<sup>4</sup>

With regard to the latter challenge, raised in Case T-255/17, the General Court of the European Union declared it inadmissible. In its reasoning, it points out that all undertakings have a duty to ensure the protection of the persons whom they employ and that of their private lives, particularly as regards the processing of personal data. Thus, an inspected undertaking may be called upon to ask the Commission not to seize certain data which harms the private lives of its employees or managers or to seek the return of those data from the Commission. Accordingly, where an undertaking claims protection on the basis of respect for the private lives of its employees or managers in order to oppose the seizure of computer equipment or communication equipment and the copying of the data held therein, the Commission's decision by which it refuses that request

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<sup>1</sup> Case T- 249/17 concerns the Commission decision of 9 February 2017 ordering *Casino, Guichard-Perrachon* and all the companies directly or indirectly controlled by them to submit to an inspection. Case T-254/17 concerns the Commission decision of 9 February 2017 ordering *Intermarché Casino Achats* and all the companies directly or indirectly controlled by it to submit to an inspection. Case T-255/17 concerns, principally, the Commission decision of 21 February 2017 ordering *Les Mousquetaires* and all the companies directly or indirectly controlled by it to submit to an inspection and the Commission decision of 21 February 2017 concerning the same companies and, in the alternative, the Commission decision of 9 February 2017 ordering *Intermarché* and all the companies directly or indirectly controlled by it to submit to an inspection and the Commission decision of 9 February 2017 concerning the same companies

<sup>2</sup> Council Regulation No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles [101 and [102 TFEU] (OJ 2003 L 1, p. 1).

<sup>3</sup> The applicant companies are *Casino, Guichard-Perrachon and Achats Marchandises Casino SAS (AMC)* (Case T-249/17); *Intermarché Casino Achats* (Case T-254/17) and *Les Mousquetaires and ITM Entreprises* (Case T-255/17).

<sup>4</sup> Those applicants are *Les Mousquetaires and ITM Entreprises* in Case T-255/17.

has legal effects on that undertaking. Nonetheless, in that case, in the absence of any prior request for protection made by the applicants, the seizure of the equipment at issue and the copying of the data contained in that equipment could not give rise to the adoption of a decision open to challenge by which the Commission refused, even impliedly, such a request for protection. Furthermore, in the view of the Court, the request for the return of the private data at issue was not couched in sufficiently precise terms to enable the Commission usefully to define its position in respect of it, such that the applicants had not, at the date on which the action was brought, received any response from the Commission capable of constituting an act open to challenge.

With regard to the merits of the actions, the Court, after having recalled and specified the rules and principles which govern Commission inspection decisions in competition law, annuls in part those against which the applicants brought their actions.

In the first place, the Court rejects the plea of illegality raised against Article 20(1) and (4) of Regulation No 1/2003, which paragraphs relate, respectively, to the general power of the Commission to carry out inspections and to the obligation on undertakings and associations of undertakings to submit to those inspections when ordered to do so by a decision. In support of that plea of illegality, in each case, the applicants relied on a disregard of the right to an effective remedy. In Cases T-249/17 and T-254/17, they also alleged infringement of the principle of equality of arms and the rights of defence.

As regards the complaint alleging infringement of the right to an effective remedy, the Court recalls that that right, guaranteed in Article 47 of the Charter of Fundamental Rights of the European Union ('the Charter'), corresponds to Article 6(1), and to article 13 of the European Convention on Human Rights and Fundamental Freedoms ('the ECHR'), so that the provisions of the latter and the case-law of the European Court of Human Rights ('the ECtHR') must be taken into account when interpreting and applying that provision of the Charter.<sup>5</sup> **In accordance with the case-law of the ECtHR, the existence of a right to an effective remedy requires four conditions to be satisfied: the existence of an effective judicial review of the facts and of points of law (requirement of effectiveness), the possibility for an individual to obtain an appropriate remedy where an unlawful act has taken place (requirement of efficiency), the certainty of access to proceedings (requirement of certainty) and judicial review within a reasonable time (requirement of a reasonable time). In that regard, it is clear from the Court's examination that the system for monitoring the manner in which the inspection operations are carried out, comprising all the legal remedies made available to inspected undertakings,<sup>6</sup> satisfies those four requirements.** The complaint alleging disregard of the right to an effective remedy is therefore rejected as unfounded.

The complaint alleging infringement of the principle of equality of arms and the rights of the defence is rejected on the basis of settled case-law in accordance with which, at the preliminary investigation stage, **the Commission cannot be required to specify the evidence which justifies the inspection of an undertaking suspected of anticompetitive practices.** Such an obligation would upset the balance struck by the case-law between preserving the effectiveness of the investigation and upholding the rights of defence of the undertaking concerned.

In the second place, in the examination of the plea alleging infringement of the obligation to state reasons, the Court recalls that inspection decisions must state the presumed facts which the Commission intends to investigate, namely what it is looking for and the matters to which the inspection must relate (description of the suspected infringement, that is to say the market thought to be affected, the nature of the suspected competition restrictions and the sectors covered by the alleged infringement). That obligation to state specific reasons seeks to make clear that the inspection is justified and to enable the undertakings concerned to understand the scope of their duty to cooperate while, at the same time, preserving the rights of defence. In each case, the Court finds, in particular, that **the inspection decisions state clearly and in detail that the**

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<sup>5</sup> Article 52 of the Charter and explanations relating to that provision.

<sup>6</sup> Action for annulment, proceedings for interim relief, action to establish non-contractual liability.

**Commission was of the view that it had sufficiently strong evidence which led it to suspect anticompetitive practices.**

In the third place, with regard to the plea alleging infringement of the right to the inviolability of the home, the Court recalls that, in order to ensure that an inspection decision is not arbitrary, the EU Court must ascertain that the Commission had sufficiently strong evidence for a suspicion of an infringement of the rules of competition by the undertaking concerned.

In order to be able to ascertain the above, the Court requested the Commission, by the adoption of measure of organisation of procedure, to communicate to it the documents containing the evidence justifying the inspections and the Commission complied with that request within the time limit prescribed. An 'additional response' from the Commission, containing other documents relating to such evidence, was, however, rejected as inadmissible due to the lack of valid justification for its late lodgment.

With regard to the form of the evidence which justified the inspection decisions, the Court points out that, although the evidence obtained before an inspection was subject to the same formalities as the gathering of evidence of an infringement in the context of an open investigation, the Commission must comply with the rules governing its investigatory powers where no investigation, within the meaning of Regulation No 1/2003,<sup>7</sup> has yet been formally opened and it has not used its investigatory powers, that is to say, when it has not adopted any measure alleging that an infringement has been committed, in particular an inspection decision. It is for that reason, contrary to the applicants' submissions, that the Court holds that the rules on the requirement to record interviews<sup>8</sup> does not apply before the an investigation is opened by the Commission. Thus, **interviews with suppliers carried out before an investigation is opened, are capable of being evidence even if they have not been recorded.** If that were not the case, the detection of anticompetitive practices would be seriously undermined as a result of the dissuasive effect which a formal questioning which must be recorded may have on the willingness of witnesses to provide information and report infringements. In addition, in the view of the Court, those **interviews with suppliers constitute evidence available to the Commission from the date on which they took place and not from the point at which they are reported, as the applicants argue.**

With regard to the tenor of the evidence which justified the inspection decisions, the Court notes that, having regard to the necessary distinction between proof of a concerted practice and evidence justifying inspections for the purpose of gathering such proof, the threshold at which it is recognised that the Commission has sufficiently strong evidence must of necessity be placed below that allowing a finding of a concerted practice. In the light of those considerations, it finds that **the Commission had sufficiently strong evidence to suspect a concerted practice as regards the exchanges of information on discounts obtained on the supply markets of certain everyday consumer products and the prices on the market for the sale of services to manufacturers of branded products. However, in the absence of such evidence as regards the exchanges of information concerning the future commercial strategies of the undertakings under suspicion, the Court upholds the plea alleging infringement of the right to the inviolability of the home as regards that second infringement and therefore annuls the inspection decisions in part.**

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**NOTE:** An appeal, limited to points of law only, may be brought before the Court of Justice against the decision of the General Court within two months and ten days of notification of the decision.

**NOTE:** An action for annulment seeks the annulment of acts of the institutions of the European Union that are contrary to European Union law. The Member States, the European institutions and individuals may, under certain conditions, bring an action for annulment before the Court of Justice or the General Court. If the action is well founded, the act is annulled. The institution concerned must fill any legal vacuum created by the annulment of the act.

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<sup>7</sup> Chapter V of Regulation (EC) No 1/2003.

<sup>8</sup> Article 19 of Regulation (EC) No 1/2003 and Article 3 Commission Regulation (EC) No 773/2004 of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles [101 and 102 TFEU] (OJ 2004 L 123, p. 18).

*Unofficial document for media use, not binding on the General Court.*

*The full text of the judgments ([T-249/17](#), [T-254/17](#) and [T-255/17](#)) is published on the CURIA website on the day of delivery*

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