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## Scope of search and seizure / cooperation duty

- Subject matter in the inspection decision is critical since it establishes the boundaries of (a) the duty of cooperation; and (b) the search and seizure
  - Cases T-135/09 *Nexans* and T-140/09 *Prysmian*. Broad subject matter in practice covering all electric cables. Dawn raids appealed as fishing expeditions before the General Court (GC)
  - The GC established that, in the inspection order, the Commission should :
    - a. state the essential characteristics of the suspected infringement, indicating inter alia the market thought to be affected (T-135/09 *Nexans* , Para 44; following Case T-340/04 *France Télécom*, Para 52), and
    - b. identify the sectors covered by the alleged infringement with a degree of precision sufficient to
      - i. enable the undertaking to limit its cooperation to its activities in the sectors in respect of which the Commission has reasonable grounds for suspecting an infringement of the competition rules, justifying interference in the undertaking's sphere of private activity, and
      - ii. to make it possible for the Court to determine whether or not those grounds are sufficiently reasonable for those purposes (T-135/09 *Nexans*, Para 45)
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## Scope of search and seizure / cooperation duty

- Thus, in order to assess if a fishing expedition took place, the GC found that it depended on whether the Commission ***“had reasonable grounds for the purposes of justifying interference in the sphere of the applicant’s private activity relating to all electric cables”*** (Nexans. Para 58)
  - After a thorough analysis of the information in hands of the Commission at the time when the inspection was ordered, the GC annulled the inspections in so far as it concerned cables other than high voltage underwater and underground cables (regarding which the leniency applicant provided evidence of infringement)
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## Scope of search and seizure – The fortuitous discovery doctrine - EU

- Under Regulation 1/2003, the Commission is banned from using information obtained during investigations for purposes other than those indicated in the inspection order
- However, the Commission may initiate an inquiry to “*verify or supplement information information which **it happened to obtain** during a previous investigation if that information indicates the existence of conduct contrary to the competition rules*” (Dow Benelux, 85/87)
- In the *Deutsche Bahn* case (C-583/13P) the Court of Justice ruled that the Commission had not found new information by chance during the first dawn raid (officials were informed of a separate complaint just before initiating the first inspection), infringing the rights of defense of the company: “...*it is manifestly clear that such provision of information does not fall within the subject-matter of the first inspection decision and therefore disregards the safeguards forming the framework for the Commission’s powers of inspection...*” (*Deutsche Bahn*. Para 67)

## Scope of search and seizure – The fortuitous discovery doctrine - Spain

- The Spanish Supreme Court has developed the fortuitous discovery doctrine in its judgment of 6 April 2016, in the *Montesa-Honda* case
  - E-mail between Honda and Suzuki exchanging sensitive information found during a dawn raid concerning possible vertical infringements by Honda and its distributors
  - The Authority opened a separate investigation
  - The High Court ruled that the Authority had incurred in a fishing expedition
  - However, on appeal (filed by the Competition Authority), the Supreme Court annulled the High Court's judgment, ruling that the Authority is not barred to open a separate investigation if it finds new information during lawful inspections

## Massive copy of electronic data – *off-site* inspections

### ➤ European Commission:

- Explanatory note on Commission inspections, 2015 (Para 14)
  - At the end of the on-site inspection the Commission may collect the data still to be searched and place in a sealed envelope
  - Search continues at Commission's premises, in presence of the representatives of the undertaking
  - Review by the GC (see *Nexans* case):
    - The massive copy is regarded by the GC as implementing measures, rather than reviewable acts having binding legal effects in their own right (save for LPP documents, see *Akzo* case)
    - Can only be challenged as part of a challenge against final cartel decision
    - Option hinted by the GC: refuse to allow the copy of the documents and challenge decision fining the company due to obstruction (rather dangerous and perhaps no decision concerning obstruction)
    - Some friction with the case law of the ECHR, which seems to call for possibility of immediate review as requirement (*Primagaz*)
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## Massive copy of electronic data – *off-site* inspections

### ➤ Spain:

- Reviewable action before the Courts
  - The Supreme has confirmed (*Stanpa* case) that the Authority has wide powers to copy all kinds of documents, including LPP documents
  - Search continues without the undertaking being present
  - Only if a non-related document or LPP document is used as evidence by the Authority there will be a breach of fundamental rights
  - However, in the Authority explanatory note (2016) it is stated that the Authority will ask undertakings to identify private and LPP documents at the beginning of the inspection in order to prevent the seizure
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## Spain - recent court cases

- Spanish Courts have annulled (at least, partially) several dawn raids:
    - Supreme Court judgment of 10 December 2014, *UNESA* (Spanish association of utilities). Overly broad subject and purpose, lack of definition of the conduct and the market
    - Supreme Court judgment of 27 February 2015, *Transmediterránea*. Overly broad subject and purpose, lack of definition of the conduct and the market
    - Supreme Court judgment of 15 June 2015, *Montibello*. Vitiating consent regarding submission to the inspection (failure to disclose that judicial warrant had been denied)
    - High Court judgment of 4 December 2012, *Montesa Honda*. Quashed by the Supreme Court judgment of 6 April 2016
    - High Court judgment of 29 September 2011, *Colgate Palmolive*, confirmed by the Supreme Court on 16 June 2015. Search and seizure exceeded the subject matter of the order
    - High Court judgment of 30 September 2009, *Stanpa*. Overturned by the Supreme Court on 27 April 2012
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