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Highest EU court strikes down vague and ambiguous information requests

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Statement of reasons was excessively vague in light of the extent of information requested and the advanced investigation stage.

Introduction

On 10 March 2016, the European Court of Justice issued a landmark ruling annulling European Commission decisions requesting information from cement manufacturers, on the ground that the decisions did not sufficiently explain why the information requested was necessary.[1] This judgment follows a recent judgment by the EU courts placing limits on the Commission's power of inspections (here).

Facts

Following inspections carried out in October 2008 at the premises of several cement manufacturers, the Commission opened formal proceedings in December 2010 against a number of cement manufacturers, suspecting possible import/export restrictions, market sharing and price coordination in the markets for cement and related products.[2]

In March 2011, the Commission issued a decision asking companies to answer a 79-page long formal request for information, giving them 12 weeks to respond.

Several recipients challenged this decision before the General Court, criticising the Commission for not having adequately explained the alleged infringements and for having imposed upon them a disproportionate burden.

In judgments on 14 March 2014, the General Court confirmed the lawfulness of the requests for information.[3] Although the General Court admitted that "*the statement of reasons for the contested decision is formulated in very general terms which would have benefited from greater detail and warrants criticism in that regard*", it came to the conclusion that "*the reference to restrictions on imports in the European Economic Area (EEA), to market-sharing and to price coordination in the cement market and related product markets, read in conjunction with the decision to initiate proceedings, have the minimum degree of clarity necessary to conclude that the requirements of Article 18(3) of Regulation No 1/2003 have been met*".

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1 Judgments in Case C 247/14 P, *HeidelbergCement v Commission*, Case C-267/14 P, *Buzzi Unicem v Commission*, Case C-286/14 P, *Italmobiliare v Commission* and Case C-248/14 P, *Schwenk Zement v Commission*

2 Case 39520 - *Cement and related products*

3 Cases T-292/11, *Cemex and Others v Commission*; T-293/11, *Holcim (Deutschland) and Holcim v Commission*; T-296/11, *Cementos Portland Valderrivas v Commission*; T-297/11, *Buzzi Unicem v Commission*; T-302/11, *HeidelbergCement v Commission*; T-305/11, *Italmobiliare v Commission* and T-306/11, *Schwenk Zement v Commission*

HeidelbergCement, Schwenk Zement, Buzzi Unicem and Italmobiliare appealed to the **Court of Justice** to set aside the judgments of the General Court and annul the Commission decisions.[4]

On 31 July 2015, the Commission decided to close its investigation. No decision was adopted against any of the targeted companies.

Judgment of the Court of Justice

On appeal, the Court of Justice first recalled its *Nexans* jurisprudence, according to which the obligation to state specific reasons is a "*fundamental requirement, designed not merely to show that the request for information is justified but also to enable the undertakings concerned to assess the scope of their duty to cooperate whilst at the same time safeguarding their rights of defence*".[5]

The Court of Justice then noted that, while the questionnaire in the cement investigation required the disclosure of "extremely extensive and detailed information relating to a considerable number of transactions, both domestic and international, in relation to twelve Member States over a period of ten years", the decision did not disclose sufficiently clearly and unequivocally the suspicions justifying such a substantial questionnaire. It was thus impossible for companies to determine whether the requested information was necessary for the purposes of the investigation.[6]

The Court rejected the Commission's argument that the lack of reasoning in the request for information could be compensated by information contained in the decision to initiate proceedings, which had been adopted a few months before. The Court considered that that decision was also expressed in "*a particularly succinct, vague and generic manner*", by referring only to "*restrictions of trade flows in the European Economic Area (EEA) including restrictions on imports into the EEA from countries outside the EEA, market allocations, price coordination and related anti-competitive practices*". In addition, the Court found that the decisions were vague and ambiguous as to which product and geographic markets were targeted.

The Commission invoked the *Nexans* jurisprudence, where the Court accepted that an inspection decision did not have to define precisely the relevant market, the legal nature of the presumed infringements, or the period investigated, since inspections take place at the beginning of an investigation, at a time when precise information is not yet available to the Commission. The Court rejected this argument in the present case, as the request for information occurred more than two years after the first inspections and several months after the decision to initiate proceedings. Further, the Commission had already sent several requests for information to suspected undertakings. As a result, the Court considered that the Commission already had sufficient information to present more precisely its suspicions of infringement.

Consequently, the Court of Justice came to the conclusion that the General Court judgment must be set aside, and annulled the Commission decisions requesting information from the appealing cement manufacturers.

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4 Holcim and Cementos Portland Valderrivas did not appeal the General Court judgement. Cemex filed an appeal but withdrew it in 2015, when the Commission closed its investigation.

5 Case C 37/13 P, *Nexans and Nexans France v Commission*, para. 34

6 Article 18(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, [2003] OJ L1/1, allows the Commission to require information from companies which is "*necessary*".

Take away

These judgments extend the list of recent cases where the EU courts have annulled inspection decisions in cartel proceedings before the European Commission, such as *Nexans* and *Deutsche Bahn*.[7] In these cases, Commission decisions were annulled essentially because the scope of the inspection went beyond what the Commission could legitimately investigate based on the information it had at its disposal at the time of the inspections. This series of judgments indicates an increased – and welcome – scrutiny from the EU courts on the respect of companies' due process rights in antitrust proceedings.

As a result, the Commission will have to provide more information on the suspected infringements in its decisions requesting information, to enable companies to better exercise their rights of defence, and in particular to assess whether the requested information does not go beyond what is necessary. Like the *Nexans* and *Deutsche Bahn* judgments, this should help limit the risk of so-called "fishing expeditions" by competition authorities in Europe.

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7 Case C-583/13 P, Deutsche Bahn and Others v Commission. In both Nexans and Deutsche Bahn, the Court annulled (either fully or partially) the Commission decisions.