

ANTITRUST | 14 MARCH 2016

The EU Commission Should Provide Concrete Reasons for Requesting Information

The statement of reasons of a decision requesting information from a company must be appropriate and disclose the purpose of the request so that the company can provide the Commission with the information necessary to that purpose.

A Welcome Limitation on the Investigatory Powers of the Commission

Information request decisions shall require only information which may assist the Commission in investigating its suspicions of infringement. The Court of Justice ruled on 10 March 2016 that, as a result, when sending information request decisions to companies the Commission is obliged to substantiate its statement of reasons with a clear indication of the products or services under investigation and its suspicions of infringement. The decision's addressees must be in a position to clearly and unequivocally understand the reasoning followed by the Commission to assess the necessity of the information in relation to the purpose of the information request. The requirement to state "the purpose of the request" will prevent the Commission from relying on requests for information to get disproportionate—and likely irrelevant—amounts of information and guarantee—in that regard—the respect of the rights of defense of the addressees of the information request decisions.

Background to the Dispute and the Decision at Issue

In October and November 2008, the European Commission carried out dawn raids at the premises of a number of companies active in the cement industry for suspected cartel infringements. In March 2011, the Commission sent to these companies individual decisions requesting information under Article 18(3) of Regulation 1/2003.¹ The questionnaires attached to the decisions comprised between 78 and 94 pages of questions.

In June 2011 the addressees of these decisions brought actions before the General Court for the annulment of the decisions requesting information at issue. They alleged in particular that the Commission had failed to fulfill its duty to state reasons in the information request decisions. In March 2014, the General Court dismissed their actions.² On appeal to the Court of Justice, the appellants claimed that the Court of Justice should set aside the General Court's judgments and annul the decisions at issue.

The Court of Justice's Ruling

The applicants submitted, *inter alia*, that the General Court erred in law in holding that their pleas alleging a failure to state reasons in the decisions at issue were unfounded and had to be dismissed. The Court of Justice

¹ Commission decisions requesting information can either be addressed as a simple request under Article 18(2) of Regulation 1/2003 or by decision under Article 18(3) of Regulation 1/2003. The difference lies essentially in the fact that under Article 18(3) of Regulation 1/2003 the Commission can impose periodic penalties if a company does not disclose the requested information.

² *Buzzi Unicem v Commission*, Case T-297/11, EU:T:2014:122; *HeidelbergCement v Commission*, Case T-302/11, EU:T:2014:128; *Italmobiliare v Commission*, T-305/11, EU:T:2014:126; *Schwenk Zement v Kommission*, T-306/11, EU:T:2014:123.

sided with the appellants and concluded that the Commission's information request decisions did not contain an adequate statement of reasons.³

Principles

Article 18(3) of Regulation 1/2003 requires a decision requesting information to “state the legal basis and the purpose of the request, specify what information is required and fix the time-limit within which it is to be provided.” The obligation to state specific reasons is a fundamental requirement. It enables addressees to assess the scope of their cooperation duty whilst at the same time safeguarding their rights of defense.

The requirement to state “the purpose of the request” obliges the Commission to clearly indicate the subject of the investigation and therefore to identify the alleged infringement of competition law. According to the Court of Justice, this does not imply that the addressee of the information request decision gets all the information from the Commission's file with regard to the presumed infringement or a precise legal analysis of the alleged infringement. Nevertheless, these decisions must clearly indicate “the suspicions which [the Commission] intends to investigate.”⁴ This is because the Commission is entitled to require the disclosure only of information which may enable it to investigate further these suspicions. “Since the necessity of the information must be judged in relation to the purpose stated in the request for information, that purpose must be indicated with sufficient precision, otherwise it will be impossible to determine whether the information is necessary and the Court will be prevented from exercising judicial review.”⁵

The Information Request Decisions at Issue

The General Court had stated that the statements of reasons of the decisions at issue were “formulated in very general terms which would have benefited from greater detail and [warranted] criticism in that regard.”⁶ The Court of Justice went further and found that the matters listed in the questionnaire were “extremely numerous and [covered] very different types of information.”⁷ The Court of Justice noted in particular:

“[T]he questionnaire [...] requires 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. However, the decision at issue does not disclose, clearly and unequivocally, the

³ *HeidelbergCement v Commission*, Case C-247/14 P, EU:C:2016:149; *Schwenk Zement v Kommission*, C-248/14 P, EU:C:2016:150; *Buzzi Unicem v Commission*, Case C-267/14 P, EU:C:2016:151; *Italmobiliare v Commission*, C-268/14 P, EU:C:2016:152.

⁴ *HeidelbergCement v Commission*, Case C-247/14 P, para. 21; *Schwenk Zement v Kommission*, C-248/14 P, para. 25; *Buzzi Unicem v Commission*, Case C-267/14 P, para. 22; *Italmobiliare v Commission*, C-268/14 P, para. 23.

⁵ *HeidelbergCement v Commission*, Case C-247/14 P, para. 24; *Schwenk Zement v Kommission*, C-248/14 P, para. 28; *Buzzi Unicem v Commission*, Case C-267/14 P, para. 25; *Italmobiliare v Commission*, C-268/14 P, para. 26.

⁶ *HeidelbergCement v Commission*, Case T-302/11, EU:T:2014:128, para. 42. See also *Buzzi Unicem v Commission*, Case T-297/11, EU:T:2014:122, para. 36; *Italmobiliare v Commission*, T-305/11, EU:T:2014:126, para. 68; *Schwenk Zement v Kommission*, T-306/11, EU:T:2014:123, para. 37.

⁷ *HeidelbergCement v Commission*, Case C-247/14 P, para. 27. See also *Schwenk Zement v Kommission*, C-248/14 P, para. 31; *Buzzi Unicem v Commission*, Case C-267/14 P, para. 28; *Italmobiliare v Commission*, C-268/14 P, para. 29.

*suspensions of infringement which justify the adoption of that decision and does not make it possible to determine whether the requested information is necessary for the purposes of the investigation.*⁸

The information request decision mentioned only briefly that the Commission was investigating alleged ant-competitive conduct in the cement industry in the EEA and in particular restrictions on imports from countries outside the EEA, market-sharing and price-coordination practices. It also stated that additional information was required in order to assess the compatibility of the practices under investigation with EU competition law. That statement of reasons was held not to be sufficiently precise to determine “*either the products to which the investigation relates or the suspicions of infringement justifying the adoption of that decision.*”⁹ As a result, the addressees of the decision could not check whether the requested information was “necessary” for the purposes of the investigation.

Looking at the context surrounding the information request, the Court of Justice held that the succinct or vague nature of the statement of reasons could not be “offset” by the reasoning set out in the Commission’s decision to initiate proceedings. First, the infringement alleged in the decision to initiate proceedings was also expressed in a generic manner. Second, this decision referred to “cement and related products” and a non-exhaustive list of examples without providing more detail on the products concerned by the investigation. Finally, the two decisions were contradictory with respect to the geographical scope of the alleged infringement.¹⁰

Dawnraid Decisions vs Information Request Decisions

Statements of reasons for Commission decisions vary depending on the nature of the decision:

“[A]lthough the Court has held, with respect to inspection decisions, that, even though the Commission is obliged to indicate as precisely as possible what is being sought and the matters to which the investigation must relate, it is, on the other hand, not essential, in a decision ordering an inspection, to define precisely the relevant market, to set out the exact legal nature of the presumed infringements or to indicate the period during which those infringements were allegedly committed.”¹¹

This is essentially because at a preliminary stage of the investigation, as is the time of a dawn raid, precise information is not yet available to the Commission. However, for requests of information issued, as in the present case, two years after the first inspections, thresholds are much higher: “*an excessively succinct, vague and generic—and in some respects ambiguous—statement of reasons does not fulfil the requirements of the obligation to state reasons laid down in Article 18(3) of Regulation No 1/2003.*”¹² This is particularly the case as

⁸ *HeidelbergCement v Commission*, Case C-247/14 P, para. 27 (our emphasis). See also *Schwenk Zement v Kommission*, C-248/14 P, para. 31; *Buzzi Unicem v Commission*, Case C-267/14 P, para. 28; *Italmobiliare v Commission*, C-268/14 P, para. 29.

⁹ *HeidelbergCement v Commission*, Case C-247/14 P, para. 31. See also *Schwenk Zement v Kommission*, C-248/14 P, para. 35; *Buzzi Unicem v Commission*, Case C-267/14 P, para. 32; *Italmobiliare v Commission*, C-268/14 P, para. 33.

¹⁰ *HeidelbergCement v Commission*, Case C-247/14 P, paras 33-36. See also *Schwenk Zement v Kommission*, C-248/14 P, paras 37-40; *Buzzi Unicem v Commission*, Case C-267/14 P, paras 34-37; *Italmobiliare v Commission*, C-268/14 P, paras 35-38.

¹¹ *HeidelbergCement v Commission*, Case C-247/14 P, para. 38. See also *Schwenk Zement v Kommission*, C-248/14 P, para. 42; *Buzzi Unicem v Commission*, Case C-267/14 P, para. 39; *Italmobiliare v Commission*, C-268/14 P, para. 40.

¹² *HeidelbergCement v Commission*, Case C-247/14 P, para. 39. See also *Schwenk Zement v Kommission*, C-248/14 P, para. 43; *Buzzi Unicem v Commission*, Case C-267/14 P, para. 40; *Italmobiliare v Commission*, C-268/14 P, para. 41.

the Commission had already sent a number of requests for information to the companies under investigation and already issued a decision to initiate proceedings. At the time of issuing the information request decisions at issue, the Commission already had information that would have allowed it to draft in more precise terms its allegations of infringement.

As a result, the Court of Justice set aside the judgment of the General Court and annulled the Commission decisions requesting information. Anecdotally, in July 2015, while the appeals to the Court of Justice were pending, the Commission decided to close its investigation opened in December 2010; the evidence obtained by the Commission was held not to be “*sufficiently conclusive to confirm* [the Commission’s] *initial concerns*.”¹³ No infringement decision was addressed to—and no fine was imposed on—the cement manufacturers which complained about these information request decisions.

¹³ *Antitrust: Commission closes antitrust proceedings against a number of cement manufacturers*, European Commission – Daily News, 31 July 2015.

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