

# Kluwer Competition Law Blog

## Poisoned Fruits of Investigation

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Once upon a time, but not so long ago, a certain company received a request for information (“RFI”) from the European Commission (in the form of a binding decision). This RFI was nothing like any company had ever seen. It was 90 pages long, contained 11 sets of numerous detailed questions, and demanded a rapid response. The RFI also asked for information which the company had already provided, but this time in a different, specified format, and threatened that if the format was not followed, the answers might be considered misleading or incorrect.

Luckily, this company had wise lawyers. They challenged the RFI in the EU Courts. In a judgment delivered last month, the ECJ annulled the RFI decision on the grounds that the RFI did not contain an adequate statement of reasons.

As you might have already guessed, the company in this tale is Heidelberg Cement. Not only did Heidelberg Cement win its legal battle with the Commission regarding the RFI (see case C-247/14 P, *Heidelberg Cement v. European Commission*), but it also walked away without a fine – after being investigated for its role in an alleged cement cartel for more than 6 years. As the Commission’s press release reluctantly admits, it did not have sufficient evidence to press charges against Heidelberg Cement or anyone else.

So what is the moral of the *Heidelberg Cement* story? The case is undoubtedly a fishing expedition by the Commission that failed. However, I also see an interesting procedural dilemma lurking in the background. After all, had the Commission decided not to drop the charges and, instead, had it imposed a fine on Heidelberg Cement, would the company have been able to get the infringement decision annulled by arguing that evidence had been collected by means of this defective RFI?

This question immediately brings to mind a legal doctrine established in the United States to describe evidence that is obtained illegally: the “fruit of the poisonous tree” doctrine. This doctrine holds that evidence gathered with the assistance of illegally obtained information must be excluded from trial. The logic of the doctrine is that if the source of the evidence (the “tree”) is poisoned, then anything gained from it (the “fruit”) is poisoned as well.

To my knowledge, the “fruit of the poisonous tree” doctrine has never been adopted in EU competition law. However, I can see tendencies towards this approach in the case law of the EU Courts. The case that seems to come closest is the *Deutsche Bahn* saga.

In March 2011, the Commission dawn raided the premises of Deutsche Bahn and some of its subsidiaries. The purpose of the investigation – as defined in the Commission’s first investigation

decision – was to gather evidence on whether Deutsche Bahn had abused its dominant position by granting preferential rebates for the supply of electric traction energy to its subsidiaries. Even before the raid, however, the Commission informed its agents about additional suspicions of a second possible abuse that was not covered by the investigation decision.

During the inspection, the Commission's agents indeed found evidence pointing to this second abuse. To collect further evidence, the Commission hurriedly issued a second investigation decision (with the new purpose), and carried out a second inspection in parallel with the first. Once this was over, the Commission issued a third inspection decision that allowed it to return to Deutsche Bahn's premises and collect still more evidence.

Deutsche Bahn challenged the Commission's course of action before the EU Courts. While it lost before the General Court, the ECJ subsequently annulled all three inspection decisions (see case C-583/13P, *Deutsche Bahn and others v. European Commission*). The winning argument focused on Deutsche Bahn's rights of defense.

Under Article 28(1) of Regulation 1/2003, the Commission cannot use information obtained during investigations for purposes other than those indicated in the inspection decision. The ECJ decided that this provision was infringed by the Commission's agents, who possessed information unrelated to the subject matter of the inspection and proceeded to seize documents falling outside the scope of that inspection. This failure, in turn, "poisoned" the second and third inspection decisions because the Commission relied on information it discovered during the first inspection.

Now we come back to *Heidelberg Cement* in light of *Deutsche Bahn*. Let us assume that the Commission had imposed a fine on the alleged cement cartel and later had its RFI annulled by the ECJ. Following the reasoning from *Deutsche Bahn*, one could argue that such an infringement decision, if based on evidence obtained as a result of an invalid RFI, should be considered "poisoned" and annulled as well. After all, the Commission should not be allowed to rely on evidence which results from a breach of procedural guarantees.

What if the Commission had instead awaited the EU Courts' rulings on the RFI and had only then adopted an infringement decision. In that situation, it might have based the decision on other evidence, without mentioning any of the poisoned evidence. To obtain annulment of the infringement decision, would it be sufficient to show that, in the course of investigation, the Commission jeopardized the company's rights of defense, thus casting doubt in that way on the legitimacy of the final decision? This argument was enough for Solvay in the "*Soda Ash*" case: the entire prohibition decision was annulled because the Commission had lost a part of the file and thereby prevented Solvay from exercising its right of defense (Case C 110/10 P, *Solvay SA v. European Commission*).

We still have to wait for the new case which will test this hypothetical scenario. For now, however, the lesson of both *Deutsche Bahn* and *Heidelberg Cement* is that challenges to defective RFIs and inspection decisions can be crucial: a "poisoned tree" can jeopardize the Commission's entire investigation.

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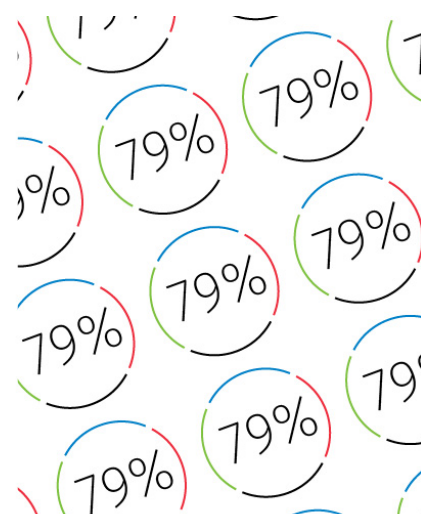
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