

General Court Rejects Edeka's Appeal in Relation to the Disclosure of EURIBOR Documents from EC File

Kluwer Competition Law Blog

February 27, 2018

James Hain-Cole (Cuatrecasas)

Please refer to this post as: James Hain-Cole, 'General Court Rejects Edeka's Appeal in Relation to the Disclosure of EURIBOR Documents from EC File', Kluwer Competition Law Blog, February 27 2018, <http://competitionlawblog.kluwercompetitionlaw.com/2018/02/27/general-court-rejects-edekas-appeal-relation-disclosure-euribor-documents-ec-file/>

In a judgment dated 5 February 2018, the General Court of the EU (the "General Court") rejected the appeal by German retailer Edeka-Handelsgesellschaft Hessenring's ("Edeka") against a decision by the European Commission (the "Commission") refusing Edeka's application to obtain access to material classified by the Commission as confidential during its investigation into alleged manipulation of the EURIBOR benchmark rate.

On 4 December 2013, the Commission published a decision sanctioning four banks, Barclays, Deutsche Bank, RBS and Société Générale, for participating in anticompetitive conduct the aim of which was the manipulation of the setting of EURIBOR. Believing itself to have been affected by the conduct of the banks, **Edeka wrote to the Commission on 3 December 2014**, through its subsidiary Edeka Verband kaufmännischer Genossenschaften eV ("Edeka Verband"), **requesting access to the Commission's full EURIBOR file pursuant to EC Regulation 1049/2001 of 30 May 2001 (the "Transparency Regulation").**

After several rounds of correspondence, Edeka Verband's request was rejected by the Commission on 27 April 2015, with **the Commission citing Articles 4(2)**

and 4(3) of the Transparency Regulation as its basis for denial. In response, Edeka wrote to the Commission on 13 July 2015, this time on its own account, requesting **access to the Commission’s EURIBOR decision and the table of contents to the Commission’s file.** The Commission rejected this further approach on 29 July 2015 on the basis that the documents being requested by Edeka in its own name were of the same nature as those requested by Edeka Verband, and therefore Edeka’s application for disclosure of these materials should be rejected for the same reasons. This position was affirmed by the Secretary General of the Commission in a decision dated 3 September 2015 (the “Rejection Decision”).

Edeka appealed the Rejection Decision to the General Court on 2 November 2015, seeking: (i) annulment of the Rejection Decision; or (ii) in the alternative, a declaration that the Commission unlawfully failed to issue Edeka a non-confidential version of the decision of 4 December 2013 in the EURIBOR proceedings and/or also failed to provide to Edeka with a non-confidential version of the table of contents of the Commission’s file relating to those proceedings.

Edeka’s appeal was based, inter alia, on: (i) **alleged breaches by the Commission of its fundamental rights** (including good administration and the right to be notified about legal remedies); (ii) **alleged breaches of the Transparency Regulation and Article 101 TFEU.**

In rejecting the appeal, the General Court made the following key findings:

- Regarding the alleged breach of Edeka’s fundamental rights, although the Rejection Decision itself did not expressly contain information about the recourse options available to Edeka (as expressly required under Article 8 of the Transparency Regulation), this omission was not sufficient in law to merit its annulment, particularly in circumstances where Edeka had – both on its own account and through Edeka Verband – already been through two related processes before the Commission and should, thus, have had knowledge of its rights of recourse.
- Contrary to Edeka’s submissions that the general assumption of confidentiality underpinning the exceptions listed at Article 4(2) of the Transparency Regulation should not apply in the case of a request for a single document (in this case, the table of contents of the Commission’s file), **it is not apparent from the Transparency Regulation case-law**

that the general presumption of confidentiality applies only where the request for access concerns the entire Commission file.

- **Edeka had failed to show that there was an “overriding public interest”:** (i) sufficient to justify the abrogation of the exceptions to disclosure in Article 4(2) of the Transparency Regulation; and (ii) such that the non-disclosure by the Commission of the requested documents could be deemed an obstacle to Edeka’s rights derived from Article 101 TFEU to bring an action for damages. In relation to the latter point, the General Court noted that, in weighing up the case for disclosure under the Transparency Regulation, **it is incumbent on any person seeking compensation for damage suffered as a result of a breach of Article 101 TFEU to establish the need for access to the relevant document(s) in the Commission’s file**, so that the Commission may, on a case-by-case basis, weigh the interests justifying the disclosure of such documents against the need to protect them from disclosure. **Edeka failed to provide a convincing case on this point.**

The judgment is available here (note that an English language version is not currently available).

<http://curia.europa.eu/juris/documents.jsf?pro=&lgrec=en&nat=or&oqp=&lg=&dates=&language=en&jur=C%2CT%2CF&cit=none%252CC%252CCJ%252CR%252C2008E%252C%252C%252C%252C%252C%252C%252C%252C%252Ctrue%252Cfalse%252Cfalse&num=T-611%252F15&td=%3BALL&pcs=Oor&avg=&page=1&mat=or&jge=&for=&cid=270300>