Kluwer Competition Law Blog

Limits on EU information requests in competition investigations: ECJ provides clarification

Bill Batchelor, Rachel Cuff (Baker & McKenzie) · Tuesday, March 29th, 2016

Summary

On 10 March 2016, the European Court of Justice (ECJ) handed down judgments[1] that provide useful clarification regarding limits on information requests issued by the European Commission in antitrust investigations – in particular as regards the statement of reasons to be provided.

Facts

Following dawn raids and the opening of an investigation into suspected infringements in the cement sector, the European Commission asked a number of companies to answer a questionnaire concerning suspected infringements. This request took the form of a Commission decision under Article 18 of Regulation 1/2003.[2] Four companies unsuccessfully challenged the Commission's decision in front of the General Court, and then appealed the judgments of the General Court to the ECJ. The ECJ overturned the General Court's judgments and annulled the Commission's original decision. The Commission has an obligation to state reasons justifying its request for information and, in this case, the ECJ considered that the statement of reasons was "*excessively succinct, vague and generic – and in some respects, ambiguous*".

What requirements must the Commission satisfy in an information request?

Under Article 18(3) of Regulation 1/2003, where the Commission requires the supply of information by decision, it must:

- state the legal basis and the purpose of the request;
- specify what information is required;
- fix the time-limit within which it is to be provided; and
- indicate the penalties for failure to provide the information and the right to judicial review.

In its judgment, the ECJ stressed that:

- 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*".
- Although the Commission is not required to communicate all the information at its disposal concerning the alleged infringements, or to make a precise legal analysis, it must clearly indicate the suspicions which it intends to investigate.

Did the Commission meet its obligations in this case?

The parties argued that the Commission's statement of reasons was inadequate, and the ECJ agreed. The questions asked were "extremely numerous" and broad-ranging – in particular, the parties were asked to disclose detailed information relating to transactions (both domestic and international) in relation to twelve Member States over a period of ten years. The ECJ considered that the statement of reasons lacked detail regarding the nature of the suspected infringements as well as the products and geographic markets concerned. It did "*not disclose, clearly and unequivocally, the suspicions of infringement which justify the adoption of that decision and {did} not make it possible to determine whether the requested information is necessary for the purposes of the investigation*".

The timing of the Commission's information requests was relevant as to whether the statement of reasons was adequate, as the requests came two years after the Commission's first inspections (or "dawn raids"). The ECJ therefore considered that the Commission "*already had information that would have allowed it to present more precisely the suspicions of infringement by the companies involved*." In contrast, an inspection may take place at a time when there is less precise information available to the competition authority, and consequently it is "*not essential*" to provide an exact market definition, duration period or legal nature of the presumed infringements in a decision authorising an inspection.

Guidance provided by the judgments

These cases provide a reminder to companies and their legal advisors to review very carefully any information request received, to ensure that the document meets the required standard. They also provide guidance as to what constitutes an acceptable statement of reasons in the EU. Arguably, where there is no leniency applicant, as in this case, the investigating authority may be more inclined to make a broader, less substantiated, request, as it will be reliant on inspections and responses to information requests in order to obtain its information. Interestingly, in this case the Commission closed its investigation without reaching a decision, as the evidence obtained was "not sufficiently conclusive".

Further discussion

The opinion of Advocate General Wahl in these cases (which the ECJ followed) provides a great deal more detail regarding the conditions for, and the limits to, the Commission's powers to require

information. The ECJ's judgments related to only one point of appeal (regarding the statement of reasons), whereas the AG Opinion looked at:

- choice of the legal instrument and the time-limits imposed;
- necessity of the information requested;
- format of the information requested;
- vagueness of the questions;
- self-incrimination; and
- time-limits (where the AG thought that the actual human, technical and financial capacity of a company to provide the information requested should be one of the factors taken into account).

As regards the statement of reasons, the AG thought that "*the fact that a statement of reasons may be too general or somewhat vague on certain aspects does not result in invalidity if the rest of the decision allows the recipient and the EU Courts to understand with sufficient precision what information the Commission seeks and the reasons for that*". He considered the subject-matter of the questions posed might "*shed additional light on a statement of reasons*". However, in the cases in question he did not think this was the case, and pointed to the range of questions asked in which it was "*extremely difficult to identify a connecting thread*".[3]

To make sure you do not miss out on regular updates from the Kluwer Competition Law Blog, please subscribe here.

References[+]

This entry was posted on Tuesday, March 29th, 2016 at 11:03 am and is filed under Source: OECD“>Antitrust, European Union
You can follow any responses to this entry through the Comments (RSS) feed. You can leave a response, or trackback from your own site.