CPI's Europe Column Presents:

Cracks in the Finish: Affirming Fundamental Rights in the Cement Cartel Case

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Intro by Juan Delgado (Global Economics Group)

How much disclosure can the European Commission request from the investigated parties? A recent decision by the Court of Justice of the European Union puts this question on the table but, according to Kyle Le Croy, it does not provide a satisfactory answer to it. The HeidelbergCement judgment rightly identifies the need to put limits on the discretionary power of competition authorities to request information but "falls short in missing what should have been an overwhelming vindication of the limits of the discretionary power of institutions in the EU".

In quashing a European Commission (**"Commission"**) decision that had required a party under investigation to make excessive disclosures, the Court of Justice of the European Union ("**CJEU"**) affirmed in a recent judgment that certain fundamental protections which apply in the context of Commission dawn raids also apply in the context of Commission requests for information.

This affirmation is welcome, of course. Yet the judgment itself falls short of affording the clarity and judicial scrutiny appropriate to cases alleging interference with the same fundamental rights which the judgment purports to protect. Moreover, whereas the Advocate General had advised that the Commission decision should be quashed on no fewer than five of the seven grounds pleaded by the appellants, the CJEU – as is so often the case – limited its judgment only to the issues that it thought were absolutely necessary to cover.

In consequence, while the judgment is obviously an important marker for companies subject to overly broad Commission requests for information, the judgment fails to address several important points of law, some of which might now fall to be addressed, piecemeal and with little or no advanced guidance, in the decisional practice of the Commission.

An investigation begins – background to a dispute

In November 2008 and September 2009 the Commission carried out unannounced inspections, pursuant to Article 20 of Council Regulation 1/2003 (**"Reg 1/2003"**), at the premises of certain companies active in the cement industry, including those of HeidelbergCement. Acting under Article 18(2) of Reg 1/2003, the Commission subsequently sent HeidelbergCement requests for information in September 2009, February 2010, and April 2010.

In November 2010, the Commission notified HeidelbergCement by letter of its intention to issue a decision, under Article 18(3) of Reg 1/2003, ordering HeidelbergCement to reply to a further questionnaire (**"Contested Decision"**), a draft of which the Commission provided with the letter. In December 2010 the Commission gave notice of its intention to open a formal investigation, pursuant to Article 11(6) of Reg 1/2003, and in March 2011 the Commission

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adopted the Contested Decision, to which it annexed the final questionnaire. The questionnaire included 11 groups of questions and ran to some 94 pages.

The Contested Decision and the questionnaire annexed thereto became the subject of an appeal by HeidelbergCement, first to the General Court and then to the CJEU. Before the EU courts HeidelbergCement argued, *inter alia*, that the Contested Decision infringed Article 18(3) of Reg 1/2003 by failing to state the purpose of the request for information and by failing to contain an adequate description of the alleged infringement, the geographic market(s), and product market(s) at issue.

CJEU's approach in *HeidelbergCement*

The CJEU first recalled that, under the general rule in Article 296 TFEU, measures taken by the EU institutions must contain a statement which enables each person concerned to ascertain the reasons for such measures and to enable competent review of their lawfulness by the EU courts. In respect of a request for information specifically, the CJEU held that the duty to state the purpose of the request, expressly contained in Article 18(3) of Reg 1/2003, 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 and to safeguard their rights of defence.

Turning to the facts before the court, the CJEU held that the Contested Decision's recitals contained only an 'excessively brief statement of reasons' which was 'vague and generic', particularly by comparison to the 'extremely numerous' matters covering 'very different types of information' contained in the questionnaire. (Nor, alternatively, was such necessary and sufficiently precise information available to HeidelbergCement in the statement of reasons within the Commission's earlier decision to initiate proceedings.)

The Contested Decision required disclosure by HeidelbergCement 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 contrast between the scope of the reasons provided and scope of the information requested was even starker, as the CJEU observed, because the Commission had issued the Contested Decision more than two years after it had already instigated a series of investigative measures which would have permitted the Commission to present more precisely its suspicions of infringement.

Upholding HiedelbergCement's appeal, the CJEU set aside the General Court's judgment and, exercising its discretion under Article 61 of the Statute of the Court of Justice, annulled the Contested Decision.

On the face of it – implications of the judgment

The CJEU's judgment in *HeidelbergCement* affirms that certain limitations on the Commission's investigatory powers sought in *Nexans* (Case C-37/13P) and successfully

obtained in *Deutsche Bahn* (Case C-583/13P), both in the context of dawn raids, also apply to the Commission's requests for information. Although the Commission is not required to communicate to the addressee of a decision requesting information all the information at its disposal, or to make a precise legal analysis of those infringements, the Commission must nonetheless clearly indicate the suspicions which it intends to investigate.[3]

Inclusion in a decision of an 'excessively succinct, vague, and generic – and in some respects, ambiguous – statement of reasons' is no longer acceptable practice.[4] In more condemning language, Advocate General Wahl described such a practice as 'inexcusable',[5] observing that the purpose of a request for information under Article 18 of Reg 1/2003 was 'not to bring to light *any* possible infringement of EU competition rules in a given sector or by a given undertaking' but 'certain *specific* infringements'. And the absence of at least some indications of what those specific infringements might be has the result that 'the adoption of a decision to request information under Article 18(3) may be considered to be an arbitrary measure of investigation'.[6]

A wider reading – more questions, *then* answers?

Reading the Opinion of Advocate General Wahl in *HeidelbergCement* reveals that there were a number of additional grounds of appeal which the CJEU did not examine in its judgment (since the CJEU allowed the appeal on the first ground, so declined to consider the other six grounds).

Even the CJEU's discussion of that first ground, however, omits answers to certain important questions raised by Advocate General Wahl. For example, must every decision adopted pursuant to Article 18(3) of Reg 1/2003 have its own statement of reasons, or in exceptional circumstances might the statement of reasons in one decision refer to the statement of reasons in another? Advocate General Wahl advised the CJEU to adopt the latter approach, but in its judgment the CJEU examined the statements of reasons in the Contested Decision and the earlier decision to initiate proceedings without expressly articulating any necessary relationship between them.

Moreover, the lack of detailed discussion of the relationship between, on the one hand, the contents of the statement of reasons and, on the other hand, factors such as the stage of the investigation, the breadth of the questions posed, and the sophistication of the undertaking concerned may afford a wide discretion to the Commission to develop the principle through its own decisional practice in requests for information, to the detriment of the legal certainty of their addressees.

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[2] *HeidelbergCement v Commission* Case C-247/14P ("***HeidelbergCement***"), para 21.

[4] *HeidelbergCement*, para 38.

[5] Opinion of Advocate General Wahl in *HeidelbergCement*, point 51.

[6] Opinion of Advocate General Wahl in *HeidelbergCement*, point 73.

Some of the issues most important to businesses in practice and raised as grounds of appeal were not addressed by the CJEU at all, however. To what extent, for example, may the Commission require the addressee of a decision to undertake extensive, complex, and time-consuming clerical and administrative tasks, such as formatting or consolidation of data?[7] Further, in respect of the arguments around the seventh ground of appeal – regarding a breach of HeidelbergCement's rights of defence – Advocate General Wahl expressly acknowledged that the 'Court has, so far, not taken a position as to whether an undertaking which replies to a compulsory self-incriminatory question is, in doing so, waiving its rights and, consequently, the Commission is entitled to use that reply as evidence'.[8] The author of this column considers the CJEU's failure to address this key argument a rather regrettable outcome.

Call it 'conferral', or the phrase you're looking for is 'limited government'

Protection of privacy rights is an ever-growing challenge, as new technologies expose methods of greater retention and re-organisation of increasingly greater amounts of data. The fundamental right to a private life, however, is well established in the constitutional traditions of the Member States. As early as 1763, for example, courts in the United Kingdom held that a 'general warrant' affording a public authority 'a discretionary power… to search wherever their suspicions chance to fall… certainly may affect the person and property of every man in this kingdom, and is totally subversive of the liberty of the subject'.[9]

Today the right to respect for one's private life is a general principle of EU law which extends to both domestic and commercial premises[10] and is engaged not only where an antitrust authority may seek to enter private premises[11] but also when such authority demands that an undertaking provide information, including information held electronically, for inspection at the authority's own premises.[12] Where a public body such as the Commission enjoys a wide margin of discretion to exercise investigatory powers which interfere with fundamental rights with no or little *ex ante* judicial control,[13] *ex post* judicial control – including a clear articulation of the principles on which the Commission and addressees alike may rely – is indispensible.

Other jurisdictions have successfully addressed similar challenges. Articles commemorating the contributions and recent passing of US Supreme Court Justice Antonin Scalia, for example, have observed that through his opinions, the US has made 'significant adaptations of the

[7] Opinion of Advocate General Wahl in *HeidelbergCement*, points 107-112.

[8] Opinion of Advocate General Wahl in *HeidelbergCement*, point 164.

[9] Pratt LCJ, *Wood v Wilkes* (1763) 98 ER 489.

[10] *Deutsche Bahn v Commission*, Case C-583/13, paras 19-20.

[11] *Vinci Construction and GMT v France* nos. 63629/10 and 60567/10.

[12] *Bernh Larsen Holding AS and Others v Norway*, no. 24117/08.

[13] Opinion of Advocate General Wahl in *Deutsche Bahn v Commission*, Case C-583/13, point 61, referring to Article 13 of the Rules of Procedure of the Commission (C(2000) 3614) (OJ 2000 L 308, p.26), as amended.

Founders' concerns to modern privacy cases'.[14] The EU, too, needs a robust judicial response equal to the challenge of protecting fundamental rights in antitrust investigations. Indeed, the fact that HeidelbergCement did not withdraw its appeal to the CJEU, even after the Commission terminated the cement cartel investigation in July 2015, demonstrates the importance of this right to undertakings in the EU.

There is no insurmountable reason why the EU courts cannot work toward that goal, too. The judgment in *HeidelbergCement* is an example of such progress, but it also falls short in missing what should have been an overwhelming vindication of the limits of the discretionary power of institutions in the EU. The consequences of the CJEU's omission will continue to be felt most by the recipients of requests for information whose rights, at least on the narrow point examined by the court, the judgment purports to protect.

[14] Donald Alpin, 'Scalia's Fourth Amendment Voice Will Be Missed, *Bloomberg BNA* (22 February 2016), quoting from Edward R. McNicholas, Partner, Sidley Austin LLP, Washington, available at http://www.bna.com/scalias-fourth-amendment-n57982067562/ (accessed 23 March 2016).