

# EC competition law requests for information after the CJEU's Cement judgments

The Court of Justice of the EU (CJEU) has in its recent *Cement* cartel judgments (Cases C-247/14 P [HeidelbergCement v Commission](#), C-248/14 P [Schwenk Zement v Commission](#), C-267/14 P [Buzzi Unicem v Commission](#), C-268/14 P [Italmobiliare v Commission](#)) limited the ability of the European Commission (EC) to require businesses to provide extensive and detailed information in response to so-called "formal" requests for information. The CJEU's judgments are also likely to curtail the EC's ability to ask for such information by way of the more common "informal" requests for information, issued by simple request letter.

## Legal context

**The means the EC uses most commonly to gather information for purposes of an antitrust investigation is the request for information addressed to companies under investigation or to third parties.**

Article 18(1) of Regulation 1/2003 empowers the EC to "require undertakings and associations of undertakings to provide **all necessary information**" (emphasis added). The EC often requests such information (a) informally, by "simple" and non-binding request (under Article 18(2) of Regulation 1/2003), but also has the power to request

such information (b) formally, by legally binding decision (under Article 18(3) of Regulation 1/2003). If the EC requires undertakings to supply information by decision, it is obligated 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.*"

## Background

In 2008 and 2009, the EC conducted dawn raids at the premises of several companies suspected of being members of a cartel in the cement industry. After initiating proceedings in relation to alleged infringements of Article 101 TFEU, the EC adopted a decision containing a (formal) request

## Key issues

- What are the limits on the EC's powers to issue extensive compulsory information requests in antitrust investigations?
- Will these judgments help companies to resist burdensome information requests?
- What are the implications of these judgments for merger investigations and other types of information request?

for information on 30 March 2011 to obtain further evidence. In this decision, the EC required the addressees to provide large quantities of economic data within a short period of time. The formal request for information, which included a questionnaire of 67 pages, created an extremely onerous workload for the undertakings concerned by requiring them, inter alia, to:

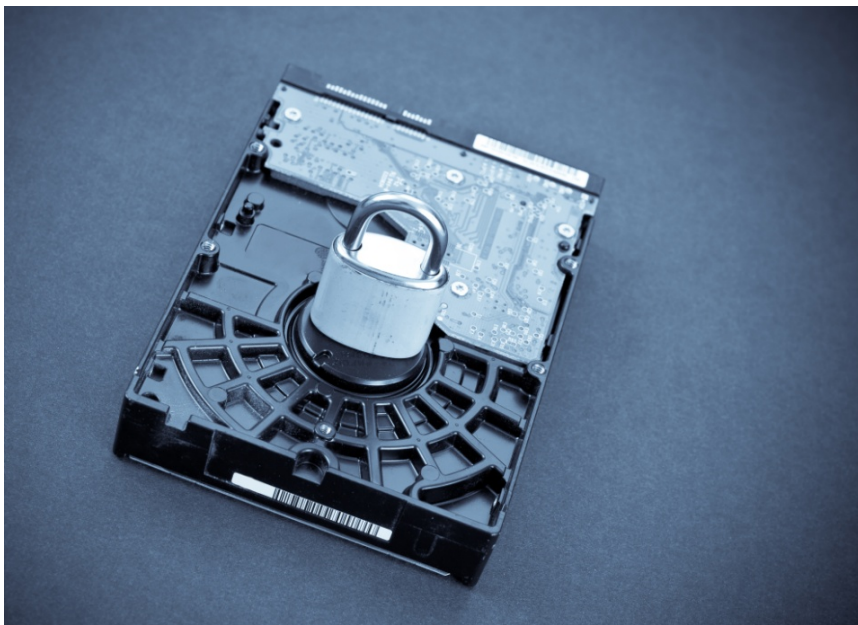
- submit an extraordinary volume of data, covering nearly all economic activities of the undertakings in twelve Member States during a period of more than a decade;

- verify, one by one, thousands of financial documents, as well as data on older transactions not included in the undertakings' databases;
- reformat information already covered by previous burdensome requests for information following a strict and complex format; and
- provide information that was in the public domain.

Seven addressees lodged an unsuccessful appeal against the EC's request for information by decision before the General Court. On 14 March 2014, the General Court upheld the EC's decision, noting that it is for the EC to determine what information it considers necessary to request from companies when investigating potentially anti-competitive practices, as long as it can reasonably expect that information to be of help in determining whether the alleged infringement took place.

Consequently, certain addressees brought actions before the CJEU. On 10 March 2016 (after the EC had already dropped its antitrust investigation due to inconclusive evidence), the CJEU set aside the General Court's judgments and annulled the EC's decision.

## The Judgments



In its judgments, the CJEU did not directly fault the EC for having issued a burdensome request for information. Instead, it held that the statement of reasons contained in the decision did not sufficiently explain why the burdensome request was necessary to further the EC's investigation. In effect, the CJEU applied a proportionality test pursuant to which it balanced the burden associated



with responding to a request against the level of detail and clarity of its statement of reasons: the more burdensome a request, the higher the burden on the EC to explain why a response to the request is necessary in the context of its investigation.

Applying this test, the CJEU found

that "an excessively succinct, vague and generic – and in some respect, ambiguous – statement of reasons does not fulfil the requirements of the obligation to state reasons laid down in Article 18(3)." In particular, the CJEU found that the brevity and the vague and generic nature of the contested request's statement of reasons as regards the description of the alleged infringement, the products

to which the investigation related, and the geographical scope of the alleged infringement, meant that it was impossible for the undertakings in question to verify whether the requested information was necessary for purposes of the investigation.

## Practical implications

In handing down its judgments, the CJEU has limited the EC's powers to require undertakings to provide extensive and detailed information without a statement of reasons that (i) clearly and unequivocally discloses the suspicions of infringement justifying the adoption of that decision, and (ii) makes it possible to determine whether the requested information is necessary for the purposes of the investigation.

Even though the Cement appeals concerned a formal request under Article 18(3) of Regulation 1/2003, the

judgments of the CJEU could also have important practical implications for the more common, so-called "informal" requests for information issued under Article 18(2) of that Regulation. In principle, the EC is not under a comparable duty to include a statement of reasons in an informal request for information. Nonetheless, Cement's limitations on EC's ability to require undertakings to produce information pursuant to a formal request may indirectly limit the EC's ability to request such information by way of an informal request, as the only lever for the EC to persuade undertakings to respond to an informal request is the its ability to issue a formal request in case of a failure to respond.

Cement was an antitrust case. It remains to be seen whether the judgments could also affect requests for information sent in merger proceedings pursuant to Article 11 of Regulation 139/2004, which mimics Article 18 of Regulation 1/2003 and similarly distinguishes between "simple" requests and "formal" requests by decision. While the EC is itself subject to tight deadlines in merger proceedings, this has not in all cases prevented the EC from sending

lengthy requests for information to the notifying parties or to third parties.

Overall, the Cement judgments could prove to have a significant impact on the EC's practice of sending requests for information in particular in antitrust investigations. Indeed, in recent years, the EC has increasingly requested relatively large datasets and large volumes of documents and electronic records in its investigations. A CJEU judgment upholding the EC's formal request for information in the Cement case would have confirmed the legality of extensive requests and could have contributed to a steadily increasing burden on recipients of such requests. The CJEU's dismissal of this practice has however signalled that there are limits, and that requests for information will be deemed unlawful if the regulator cannot explain why the request is necessary in the context of the investigation. The Cement judgments may put recipients of burdensome requests for information on firmer ground in pushing back – for example, by requesting a waiver or by negotiating an alternative, less burdensome means of responding to a particular question.



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