

on hidden reserves can be understood as the counterpart of the *Sanierungsklausel* for undertakings in difficulty, since otherwise, undertakings in need of restructuring would be disadvantaged in structural terms.

- Contrary to the Commission's complaint, the *Sanierungsklausel*, which treats economically sound undertakings and those in need of restructuring unequally, is not a selective measure, but the concretisation of the principle that taxable persons should contribute to State financing in accordance with their means, which is a constitutional principle which has always been recognised by the German Basic Law (Grundgesetz). In the applicant's view, it thus forms part of the internal logic of the system of reference. The *Sanierungsklausel* is thus in conformity with the basic or guiding principles of the German tax system.
- In any case, on the basis of those guiding principles, the introduction of the *Sanierungsklausel* in Paragraph 8c KStG is a measure which is 'justified by the nature and the logic of the [German tax] system' and which, to an extent, revalidates that internal structure.

Action brought on 7 June 2011 — Deutsche Bahn a.o. v Commission

(Case T-289/11)

(2011/C 238/40)

Language of the case: German

Parties

Applicants: Deutsche Bahn AG (Berlin, Germany), DB Mobility Logistics AG (DB ML AG) (Berlin, Germany), DB Energie GmbH (Frankfurt-am-Main, Germany), DB Schenker Rail GmbH (Mainz, Germany) (represented by: W. Deselaers, J.S. Brückner and O. Mross, lawyers)

Defendant: European Commission

Forms of order sought

The applicants claim that the Court should:

- annul the Commission's inspection decision of 14 March 2011 notified on 29 March 2011;
- annul all measures taken on the basis of the inspections, which took place on the basis of that unlawful decision;
- in particular order the Commission to return all the copies of documents made during the inspections, on pain of the annulment of the future Commission decision by the General Court; and
- order the Commission to pay the costs.

Pleas in law and main arguments

The applicants seek the annulment of Commission Decision C(2011) 1774 of 14 March 2011 (Cases COMP/39.678 and

COMP/39.731), ordering, in accordance with Article 20(4) of Council Regulation (EC) No 1/2003⁽¹⁾, inspections of Deutsche Bahn AG and all legal persons directly or indirectly controlled by the latter by reason of a possible preference of subsidiary undertakings by means of a rebate system in the supply of electromotive power.

In support of their action, the applicants make five pleas in law.

1. First plea: infringement of the fundamental right to inviolability of one's premises by reason of lack of prior judicial authorisation.
2. Second plea: infringement of the fundamental right to an effective legal remedy by reason of the lack of possibility of prior judicial review of the inspection decision, both from the factual and the legal point of view.
3. Third plea: infringement of defence rights by reason of a disproportionately wide and non-specific subject-matter of the inspection ('fishing expedition').
4. Fourth plea: infringement of the principle of proportionality. The inspection decision is disproportionate, since the rebate system for electromotive power has been practised by the applicants for years and has been monitored by the authorities and the German courts many times and found compatible with competition law, and since the answer to the question whether the rebate system is 'objectively justified', which the Commission regards as the decisive question, could have been answered by a less invasive measure, namely a request for information.

⁽¹⁾ Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (OJ 2003 L 1, p. 1).

Action brought on 7 June 2011 — Deutsche Bahn and Others v Commission

(Case T-290/11)

(2011/C 238/41)

Language of the case: German

Parties

Applicants: Deutsche Bahn AG (Berlin, Germany), DB Mobility Logistics AG (DB ML AG) (Berlin, Germany), DB Netz AG (Frankfurt am Main, Germany), Deutsche Umschlaggesellschaft Schiene-Strasse mbH (DUSS) (Bodenheim, Germany) DB Schenker Rail GmbH (Mainz, Germany), DB Schenker Rail Deutschland AG (Mainz, Germany) (represented by: W. Deselaers, J.S. Brückner and O. Mross, lawyers)

Defendant: European Commission

Forms of order sought

The applicants claim that the Court should:

- annul the Commission's inspection decision of 30 March 2011 notified on 31 March 2011;
- annul all measures taken on the basis of the inspections, which took place on the basis of that unlawful decision;
- in particular order the Commission to return all the copies of documents made during the inspections, on pain of the annulment of the future Commission decision by the General Court, and
- order the Commission to pay the costs.

Pleas in law and main arguments

The applicants seek the annulment of Commission Decision C(2011) 2365 of 30 March 2011 (Cases COMP/39.678 and COMP/39.731), ordering, in accordance with Article 20(4) of Council Regulation (EC) No 1/2003⁽¹⁾, inspections of Deutsche Bahn AG and all legal persons directly or indirectly controlled by the latter by reason of a potentially anti-competitive model of a strategic use of the infrastructure administered by companies of the DB group and of the provision of rail-linked services.

In support of their action, the applicants make five pleas in law.

1. First plea: infringement of the fundamental right to inviolability of one's premises by reason of lack of prior judicial authorisation.
2. Second plea: infringement of the fundamental right to an effective legal remedy by reason of the lack of possibility of prior judicial review of the inspection decision, both from the factual and the legal point of view.
3. Third plea: Unlawfulness of the inspection decision, as it is based on information obtained by the Commission in the course of implementing the inspection decision on the system of rebates for electric traction energy, in the context of a very broad inquiry ('fishing expedition'), and thus in breach of the applicants' defence rights.
4. Fourth plea: infringement of defence rights by reason of a disproportionately wide and non-specific subject-matter of the inspection.
5. Fifth plea: infringement of the proportionality principle, as the Commission does not have jurisdiction over the subject-matter of the inspection and could in any event have obtained the relevant information through the competent Bundesnetzagentur [federal network agency] or by means of a simple request for information from the applicants.

⁽¹⁾ Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (OJ 2003 L 1, p. 1).

Action brought on 9 June 2011 — Cemex and Others v Commission

(Case T-292/11)

(2011/C 238/42)

Language of the case: Spanish

Parties

Applicants: Cemex S.A.B. de C.V. (Monterrey, Mexico), New Sunward Holding BV (Amsterdam, The Netherlands), Cemex España, SA (Madrid, Spain), CEMEX Deutschland AG (Düsseldorf, Germany), Cemex UK (Egham, United Kingdom), CEMEX Czech Operations s.r.o. (Prague, Czech Republic), Cemex France Gestion (Rungis, France), CEMEX Austria AG (Langenzerndorf, Austria) (represented by: J. Folguera Crespo, lawyer)

Defendant: European Commission

Form of order sought

The applicants claim that the Court should:

- annul Article 1 of the Commission's decision of 30 March 2011; in the alternative, partially annul that article so as to exonerate the applicants from the requirement to provide information in response to the questions in Annex I to the decision with respect to all aspects which go beyond the limits of the rules and principles applicable to the Commission under European Union law;
- order the Commission to pay the costs.

Pleas in law and main arguments

The action has been brought against the Commission's decision of 30 March 2011 in proceedings pursuant to Article 18(3) of Council Regulation (EC) No 1/2003, adopted in relation to Case COMP/39.520 — Cement and related products.

In support of their action, the applicants rely on six pleas in law.

1. First plea in law, alleging an infringement of Article 18 of Regulation (EC) No 1/2003.
 - The applicants submit in this regard that the Commission went beyond the limits of its powers laid down in that provision and the case-law of the Court of Justice, even going as far as requesting information which it knew that the applicants did not hold. Moreover, that request required the applicants not only to produce, but also to process, millions of items of data of an economic nature, thereby transferring to them the investigatory role incumbent upon the Commission.
2. Second plea in law, alleging an infringement of Article 18 of Regulation (EC) No 1/2003.
 - According to the applicants, the Commission required information to be provided which was not necessary for the investigation of the alleged restrictive practices identified in the contested decision. That information bears no relation to the purpose of the investigation, is public information, or is information which has already been provided in response to earlier requirements, or amounts to data processing.