



Reports of Cases

Joined Cases T-289/11, T-290/11 and T-521/11

Deutsche Bahn AG and Others

v

European Commission

(Competition — Administrative proceedings — Decision ordering an inspection — Powers of inspection of the Commission — Rights of defence — Proportionality — Obligation to state reasons)

Summary — Judgment of the General Court (Fourth Chamber), 6 September 2013

1. *Judicial proceedings — Pleas raised — Admissibility and relevance of a plea or claim — Distinctive character — Concepts of inadmissible plea and irrelevant plea*
2. *Judicial proceedings — Admissibility of actions — Assessment of the legality of a measure by reference to the situation existing at the time it was adopted*
3. *Plea of illegality — Scope — Measures the illegality of which may be pleaded — General measure providing the basis of the contested decision — Need for a legal connection between the contested measure and the contested general act*

(Art. 277 TFEU; Council Regulation No 1/2003, Art. 20(4))

4. *Competition — Administrative procedure — Commission's power of inspection — Damage to privacy — Lawfulness — Whether lack of prior judicial warrant capable of rendering administrative intervention unlawful — Lawfulness — Conditions — Appropriate and sufficient safeguards established by the system of Regulation No 1/2003*

(Charter of Fundamental Rights of the European Union, Art. 7; Council Regulation No 1/2003, Art. 20(4))

5. *Competition — Administrative procedure — Commission's power of inspection — Decision ordering an inspection — Obligation to state reasons — Scope*

(Council Regulation No 1/2003, Art. 20(4))

6. *Competition — Administrative procedure — Commission's powers of investigation — Power to demand production of a communication between lawyer and client — Limits — Protection of the confidentiality of such a communication — Scope — Exclusion of communications with the undertaking's in-house lawyers*

(Council Regulation No 1/2003, Art. 20(4))

7. *Competition — Administrative procedure — Commission's power of inspection — Decision requesting information addressed to an undertaking — Right to refuse to provide an answer implying recognition of the existence of an infringement*
(Council Regulation No 1/2003, Art. 20(4))
8. *Competition — Administrative procedure — Commission's power of inspection — Scope and limits*
(Council Regulation No 1/2003, Art. 20(4))
9. *Competition — Administrative procedure — Commission's power of inspection — Decision ordering an inspection — Judicial review — Scope*
(Art. 263 TFEU; Council Regulation No 1/2003, Art. 20(4))
10. *Competition — Administrative procedure — Commission's powers of investigation — Use of information gathered during a check — Limits*
(Council Regulation No 1/2003)
11. *Competition — Administrative procedure — Commission's power of inspection — Obligations of undertakings making complaints as to the conduct of the inspection*
(Council Regulation No 1/2003, Art. 20)
12. *Competition — Division of powers between the Commission and the national competition authorities — Right of the Commission to decide to carry out an inspection in a case under examination by a national competition authority and to order additional checks*
(Arts 101 TFEU and 102 TFEU; Council Regulation No 1/2003)
13. *Actions for annulment — Jurisdiction of the EU judicature — Claim seeking that directions be issued to an institution — Claim for a declaratory judgment — Inadmissibility*
(Art. 263 TFEU)

1. Classifying a plea in law or claim as irrelevant is to consider it incapable of influencing the outcome of the proceedings, without it being necessary to examine whether such plea in law or claim is well founded. On the contrary, an inadmissible plea in law or claim, even if capable of influencing the outcome of the proceedings, was not raised in circumstances allowing the court to determine whether it was well founded. Consequently, the nature of an argument as irrelevant is not, on any view, capable of rendering it inadmissible.

(see paras 47, 107)

2. See the text of the decision.

(see para. 49)

3. Since the purpose of Article 277 TFEU is not to enable a party to contest the applicability of any measure of general application in support of any action whatsoever, the scope of a plea of illegality must be limited to what is necessary for the outcome of the proceedings. It follows that the general

measure claimed to be illegal must be applicable, directly or indirectly, to the issue with which the action is concerned and there must be a direct legal connection between the contested individual decision and the general measure in question.

(see paras 56-58)

4. The exercise of the powers of inspection conferred on the Commission by Article 20(4) of Regulation No 1/2003 vis-à-vis an undertaking constitutes a clear interference with the latter's right to respect for its privacy, private premises and correspondence. Even if the lack of a prior judicial warrant is not capable, in itself, of rendering an interference illegal, the system established by Regulation No 1/2003, particularly Article 20(4) thereof, and the way in which it is implemented offers appropriate and sufficient safeguards so as to restrict sufficiently the powers of the Commission by means of five categories of safeguards. These relate to, first, the statement of reasons on which inspection decisions are based, second, the limits imposed on the Commission during the conduct of inspections, third, the impossibility for the Commission to carry out an inspection by force, fourth, the intervention of national authorities and, fifth, the existence of *ex post facto* remedies. The existence of an *ex post facto* comprehensive judicial review is particularly important, as it is capable of counterbalancing the absence of a prior judicial warrant.

(see paras 65, 73, 74, 97)

5. Article 20(4) of Regulation No 1/2003 defines the essential material that must be included in a decision ordering an inspection, requiring the Commission to specify the subject-matter and purpose of the inspection, the date on which it is to begin, the penalties provided for in Articles 23 and 24 of that regulation and the right to have the decision reviewed by the EU judicature. The requirement for the Commission to specify the subject-matter and purpose of the investigation therefore amounts to a basic guarantee of the rights of defence of the undertakings concerned and consequently the scope of the duty to give reasons in decisions ordering inspections cannot be limited on the basis of considerations relating to the effectiveness of the investigation. In that connection, whilst it is indeed the case that the Commission is not required to communicate to the addressee of such a decision all the information at its disposal concerning the presumed infringements, to delimit precisely the relevant market, to set out the exact legal nature of the infringements, or to indicate the period during which those infringements were committed, it is obliged to state, as precisely as possible, the presumptions that it wishes to investigate, namely what it is looking for and the matters to which the inspection must relate.

The Commission is also required to state in a decision ordering an inspection the essential features of the suspected infringement by indicating the market thought to be affected, the nature of the suspected restrictions of competition and the supposed degree of involvement in the infringement of the undertaking concerned, as well as the powers conferred on the European Union investigators.

In order to establish that the inspection is justified, the Commission is required to show, in a properly substantiated manner, in the decision ordering the inspection that it is in possession of information and evidence providing reasonable grounds for suspecting the infringement of which the undertaking subject to the inspection is suspected.

(see paras 75-78, 87, 168-172, 174)

6. See the text of the decision.

(see para. 81)

7. See the text of the decision.

(see para. 82)

8. On an inspection, the Commission is able to conduct exhaustive searches of certain offices or filing cabinets even if it is not clear that information concerning the subject-matter of the investigation is present therein, provided that there are reasons to suggest it. Were it to confine itself to entering premises or examining filing cabinets with a clear link to the subject-matter of the investigation, there is a risk that it would not be able to locate important items of evidence. Those items of evidence might be hidden or incorrectly filed. Furthermore, the link to the subject-matter of the investigation is not necessarily easy to identify at the outset and it may be the case that such identification is only possible after a thorough examination.

(see paras 86-90, 92-94, 139, 140)

9. Article 20(4) of Regulation No 1/2003 provides for such a review by the European Union Courts and requires it to be mentioned in the decision ordering the inspection at the undertaking's premises. The EU judiciary, ruling on an action for annulment brought under Article 263 TFEU against an inspection decision, conducts both a legal and factual review and has the power to evaluate the evidence and annul the contested decision. When carrying out its review of inspection decisions, the EU judiciary may find it necessary to satisfy itself that there exist reasonable grounds for suspecting an infringement of the competition rules by the undertakings concerned.

(see paras 111, 112)

10. See the text of the decision.

(see paras 124-128)

11. It is for the undertakings' representatives to make a formal record of all of their complaints at the time the alleged abuses took place and to use all means at their disposal to preserve tangible evidence. The absence of such formal evidence inevitably makes it more difficult to prove that a targeted search took place which fell outside the subject-matter of the inspection decision.

(see para. 136)

12. In order to fulfil the role assigned to it by the Treaty, the Commission cannot be bound by a decision given by a national court in application of Articles 101(1) and 102 TFEU. The Commission is therefore entitled to adopt at any time individual decisions under Articles 101 TFEU and 102 TFEU, even where an agreement or practice has already been the subject of a decision by a national court and the decision contemplated by the Commission conflicts with that national court's decision. The existence of sectoral rules is irrelevant when deciding whether a Commission decision on a competition matter is proportionate. That principle holds true for both final decisions and inspection decisions, whereas prior meetings between the Commission and the applicants, or the fact that a national authority may be dealing with a matter, does not affect the powers of investigation conferred on the Commission under Regulation No 1/2003.

(see paras 200-202, 216)

13. See the text of the decision.

(see para. 227)