Current Intelligence

General Court confirms the comprehensive effectiveness of the Commission's inspection powers vis-à-vis professional associations and their governing bodies

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Case T-23/09—*Conseil national de l'Ordre des pharmaciens (CNOP), Conseil central de la section G de l'Ordre national des pharmaciens (CCG) v European Commission* [2010] ECR 000

Legal context

The prohibition under Article 101(1) TFEU puts restrictive decisions of associations of undertakings on an equal footing with restrictive agreements or concerted practices between undertakings. The main reason for this is that by coordinating the competitive behaviour of the members of the association in a restrictive way, such decisions may be just as detrimental for competition as restrictive agreements or concerted practices between the members would be.

To ensure compliance with the various prohibitions laid down in Articles 101 and 102 TFEU, the Commission needs to have far-reaching and effective investigative powers extending to both undertakings and associations of undertakings. Therefore, Article 20 of Regulation (EC) 1/2003 enables the Commission to conduct all necessary inspections, not only of undertakings but also of associations of undertakings, and immaterial of the fact whether they themselves and/or third parties are suspected to have infringed Articles 101 or 102 TFEU.

The GC's judgment confirms the comprehensive effectiveness of the Commission's inspection powers when investigating a professional association and its governing bodies for possible breaches of Articles 101 or 102 TFEU committed by themselves or committed by others, such as their members.

Facts

In the course of an investigation into anticompetitive practices in the French market for clinical laboratory tests, the Commission ordered the *Ordre national des pharmaciens (ONP)* and its governing bodies (*Conseil national de l'Ordre des pharmaciens (CNOP)* and *Conseil central de la section G de l'Ordre national des pharmaciens (CCG)*) by decision of 29 October 2008, pursuant to Article 20(4) Reg.1/2003, to submit to an inspection, which took place on 12 November 2008, concerning the suspicion that they and/or their member pharmacists might have infringed Articles 81 and/or 82 EC (now Articles 101/102 TFEU) through restrictive conduct within the meaning of these provisions.[2] On 21 January 2009, CNOP and CCG brought an action for annulment of that inspection decision, putting forward three pleas in law alleging:

1. breach of the principle that decisions of EU institutions must be addressed to entities having legal personality, as the ONP is also an addressee of the contested decision although it has no legal personality;
2. breach of the duty to state reasons, as the Commission did not identify the entity which may constitute an undertaking or an association of undertakings, within the meaning of Article 20(4) Reg.1/2003, and as it did not state the reasons justifying such a categorisation;
3. infringement of Article 20(4) Reg.1/2003, inasmuch as neither the applicants, nor the ONP (i) are undertakings, since they do not carry out any economic activity, or (ii) could be categorised as associations of undertakings since they group together a body of members who do not all carry out an economic activity, and they do not satisfy the circumstantial requirements for identifying an association of

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2 In the meantime, the European Commission's antitrust decision in the main proceedings of this case was adopted on 8 December 2010, see European Commission's press release IP/10/1683 of 8.12.2010.

undertakings, set out by the Court, in the case of professional associations responsible for public tasks.

By judgment of 26 October 2010 (case T-23/09), the General Court (GC) rejected the action in its entirety.

Analysis

I. The GC rejected the first plea as inadmissible holding that even if it examined the substance of the plea and concluded that inspection decisions could not be addressed to entities without legal personality and ONP did not have such personality, this conclusion would have no significance for the validity of the decision inasmuch as it was addressed to the applicants. Nor would an annulment of the inspection decision as addressed to ONP impact on the scope and the results of the inspection with regard to the applicants since the inspection took place in the applicants' offices only, due to the fact that ONP had no external representation apart from its governing bodies.

II. The GC rejected the second plea on several grounds: First, it found that the text of the inspection decision was sufficiently clear about the identity of its three addressees and the fact that they were considered associations of undertakings and not undertakings. Second, while the GC acknowledged that the Commission in its decision had not put forward any specific argumentation why a professional association and its governing bodies should in this case be considered associations of undertakings within the meaning of Article 20(4) Reg.1/2003, it rejected the applicants' claim that the Commission was obliged to do so. Instead, the GC referred to several parts of the inspection decision describing the nature of the ONP as a professional association of pharmacists and the role of its governing bodies CNOP and CCG, which allowed an understanding of why the Commission had qualified them as associations of undertakings. Moreover, the GC recalled the European Courts' case law according to which the objective behind the duty to state reasons was to enable those concerned by the decision to ascertain the reasons for it so that they could defend their rights and ascertain whether or not the measure was well-founded, and to enable the Community judicature to exercise its power of review. While acknowledging that the applicants' claim that Article 8 of the European Convention on Human Rights protecting homes extended to commercial offices was supported by case law, the GC likewise pointed to the case law according to which it was important to safeguard the practical effectiveness ('*effet utile*') of Commission inspections. Consequently, the Commission needed to have the power to search for elements of information which were not yet known or fully identified. In essence, the GC found that in view of the early procedural stage at which inspection decisions intervened, it had to be acknowledged that the Commission at that moment did not yet have sufficiently precise information to analyse whether the behaviour investigated constituted agreements between undertakings or decisions of associations of undertakings. Imposing on the Commission a heavier obligation to state reasons would, according to the GC, not duly take account of the preliminary character of an inspection decision on the way to a possible later finding of a competition law infringement. Finally, the GC referred to the ECJ's *Wouters* judgment (case C-309/99, para 59) according to which a professional association representing the members of a liberal profession was not *a priori* excluded from the scope of application of Article 101 TFEU.

III. Concerning the first branch of the third plea, that is that neither the applicants nor the ONP were undertakings, the GC simply referred to its prior finding that the inspection decision clearly qualified all its three addressees as associations of undertakings.

To support the second branch of their plea, that neither ONP nor CNOP or CCG were associations of undertakings within the meaning of EU competition law, the applicants had referred to the *Wouters* judgment according to which, in their interpretation, a professional association could only be an association of undertakings if, first, all its members were undertakings, and second, the activities of this association did not escape the economic sphere. To demonstrate that these two conditions were not fulfilled, the applicants had first explained that not all of their and the ONP's members were undertakings since hospital pharmacists and university professors teaching pharmaceutical sciences were State officials and salaried pharmacists could not qualify as undertakings. Second, the applicants had argued that their and the ONP's activities took place outside the economic sphere. In this respect, they had referred to the fact that under the French *Code de la santé publique* they also exercised social missions based on the principle of solidarity (i.e. mutual help and professional solidarity, particularly in cases of accidents and retirements) and that they exercised prerogatives typical of a public authority, such as functions of an administrative court (e.g. in disciplinary matters), as well as administrative powers (e.g. in organising the training of pharmacists, in suspending pharmacists unfit to continue their work, and in maintaining surveillance of compliance with deontological rules).

The GC accepted none of these arguments. It first underlined general principles: The definitions of the terms 'undertaking' and 'association of undertakings' under Article 20 Reg.1/2003 in principle had to be identical with those valid under Article 101 TFEU, while, however, the specific nature of inspection decisions, and in particular the fact that they were typically adopted in the early phase of an investigation, had to be taken into account. Therefore, the goal of inspection decisions could not be to assess in definitive form whether the suspected behaviour of its addressees or of third parties amounted to agreements between undertakings or decisions of associations of undertakings, all the more as it was precisely the object of the inspection to collect evidence about that behaviour. The GC also stressed the fundamental importance of the Commission's investigative powers under Reg.1/2003 for its task of ensuring compliance with the competition rules in the internal market and the fact that inspections could have a very large scope in order to allow collection of all available evidence.

With regard to the members of the ONP, the GC then concluded that at least the independent pharmacists fulfilled the constituent criteria of undertakings since they offered the service of retail distribution of medicines for remuneration and assumed the financial risks of this activity. Moreover, certain members of the CCG, notably the directors and deputy directors of the bio-medical analysis laboratories, likewise had to be qualified as undertakings. On this basis, the GC rejected the applicants' argument that where part of the members of an association were not undertakings that association could not fall within the scope of Article 101 TFEU at all. The GC referred to earlier case law according to which the fact that an association of undertakings also comprised persons or entities which did not qualify as undertakings was not enough to exclude this association from the scope of Article 101 TFEU as long as some members of that association were undertakings. The GC therefore concluded that the Commission at the relevant time of adopting the decision under Article 20(4) Reg.1/2003 and subjecting the ONP and the applicants to inspections had been entitled to qualify these as associations of undertakings within the meaning of that provision.

Finally, turning to a central element of the applicants' submissions, the GC held that none of the arguments they had drawn from the *Wouters* judgment could modify the GC's conclusion. The question decided by the ECJ in *Wouters* had been whether a professional body like the Dutch Bar Association, when it adopted a certain regulation, had to be considered an association of undertakings or a public authority. The GC pointed out that, in contrast to this, in the case at hand it was manifestly premature to determine whether in the exercise of their concrete prerogatives the applicants escaped the application of Article 101 TFEU, or whether some of their conduct had to be considered decisions of associations of undertakings within the meaning of that provision. If relevant for the final Commission decision, this question had to be decided therein. Moreover, the GC once again stressed that the *Wouters* judgment had clearly confirmed that a professional association was not *a priori* excluded from the scope of application of EU competition law.

Practical significance

It is first of all important to bear in mind that the judgment exclusively concerns the legality of submitting a professional association and its governing bodies to an inspection under Article 20(4) Reg.1/2003, which is independent from the questions who (i.e. that association or its governing bodies themselves and/or third parties, such as its members) is suspected of infringements of Articles 101 and/or 102 TFEU and who will in the end be held liable for such infringements in a final Commission decision. In this context, the judgment is important for confirming the wide scope and practical effectiveness of the Commission's inspection powers as such and with particular regard to inspections carried out at professional associations and their governing bodies in their capacity as possible associations of undertakings within the meaning of Article 20(4) Reg.1/2003. The rule that even undertakings and associations of undertakings, which are not themselves suspected of competition law infringements, may be subjected to compulsory investigative measures under Reg.1/2003 is well established. Collateral to this, the judgment confirms that such investigative measures are lawful even where at the time of their adoption the qualification of the entities subjected to them as undertakings or associations of undertakings is not obvious though not manifestly excluded (see in particular the conclusions in paras 43, 76–78, 82 of the judgment). The GC's position stands on firm ground since it is based on previous case law about the Commission's inspection powers and its duty to reason inspection decisions, about the notions of undertakings and associations of undertakings and the composition of entities that can qualify as associations of undertakings, and about the fact that a professional association is not *a priori* excluded from the scope of application of EU competition law. The fact that the GC, following the wording of the inspection

decision at issue, throughout its judgment concentrates on the hypothesis that ONP, CNOP, and CCG may be associations of undertakings does not preclude extending the reasoning of the judgment to situations where the inspection decision assumes that its addressees are undertakings while at the time of adopting and implementing this decision it is not obvious that the addressees indeed qualify as undertakings.

While the GC's finding that the first plea was inadmissible cannot be criticised, it would have been possible and interesting to have the GC's position, *à tître subsidiaire*, about the alleged necessity that the addressee of an inspection decision must have legal personality, which thus remains the subject of some ongoing debate. In this regard, it should in my view be argued that such a requirement was hardly compatible with the ECJ's functional notion of undertaking and association of undertakings as addressees of Articles 101 or 102 TFEU (see e.g. case C-41/90 *Höfner*, para 21; case 123/83 *BNIC/Clair*, para 17), which is independent of the legal status and the legal personality of the entity concerned and covers any entity that is capable of distorting competition because itself or its members engage in economic activity. As a corollary, the Commission needs to have investigative powers which are independent from the legal personality of the entity investigated. In fact, Article 18(4) Reg.1/2003 presupposes that undertakings and associations without legal personality can be the addressee of requests for information, which will trigger certain obligations for the persons representing them, and the same concept should by analogy apply to inspections. In order to safeguard the practical effectiveness ('*effet utile*') of Commission inspections, the importance of which is regularly stressed by the Court and reiterated in the GC judgment at hand, the legal personality of the addressee of investigative measures should be immaterial and it should consequently be possible to address an inspection decision to any entity which is not manifestly—and for reasons other than alleged lack of legal personality—incapable of qualifying as an undertaking or association of undertakings within the meaning of Article 20(4) Reg.1/2003 and Articles 101 or 102 TFEU.

In essence, this proposition is supported by the GC's handling of the second and third plea in which the ONP's alleged lack of legal personality plays no role: according to the GC, an inspection decision addressed under Article 20(4) Reg.1/2003 to professional associations and their governing bodies simply has to deliver some elements allowing the addressees to understand why the Commission currently considers it possible that they constitute associations of undertakings and that they, and/or third parties such as their members, may have infringed Articles 101 or 102 TFEU. Requiring more would on the one hand not be necessary to safeguard the addressees' rights of defence at this stage of the procedure, but would on the other hand jeopardise the effectiveness of inspections as an investigative tool. Therefore, the GC is right to accept that at the stage of the inspection decision the Commission need not, and often cannot, provide a specific argumentation why a professional association and its governing bodies, such as the ONP, CNOP, and CCG, have to be considered associations of undertakings, nor has it to make a specific analysis whether and to what extent the suspected anticompetitive behaviour amounts to an agreement between undertakings or to a decision of an association of undertakings.

Under the functional approach of the Court's case law, one and the same entity can have two faces (see e.g. case T-128/98 *Aéroports de Paris*, paras 107–109, upheld by the ECJ in case C-82/01, paras 74–83; case C-309/99 *Wouters*, paras 56–71), that is at the same time be and not be an undertaking or association of undertakings, depending on the economic or non-economic nature of the several activities in which itself or its members engage. In practice this means that professional associations and their governing bodies cannot escape their obligations under EU competition law with reference to the fact that they or their members exercise public authority tasks on behalf of the State, as long as, and to the extent to which, they themselves or at least some of their members also engage in economic activity. The GC's judgment has the merit of making it absolutely clear that this principle does not only apply to the ultimate responsibility under Articles 101/102 TFEU but also to the duty to submit to the Commission's compulsory investigative measures, which is independent from the questions whether or not the professional association or its governing bodies are suspected to have themselves infringed the substantive competition law of the TFEU or whether any infringements of Articles 101 or 102 TFEU by undertakings or associations of undertakings will ultimately be found in a final Commission decision. The GC's reference to the *Wouters*-message that professional associations are not *a priori* excluded from the scope of application of Article 101 TFEU means in turn that those associations likewise cannot *a priori* be excluded from the duty to submit to compulsory investigative measures under Reg.1/2003 either. Therefore, on the basis of the functional approach to the notions of undertaking and association of undertakings, and taking account of the *Wouters* case law, the logical consequence needs to be that professional

associations and their governing bodies in principle always have to submit to the Commission's compulsory investigative measures under Reg.1/2003. This principle applies even if only thereafter the result of these investigative measures will enable the Commission to safely judge whether and to what extent the investigated entity is an association of undertakings, or an undertaking or neither of the two, and the investigated behaviour, be it the conduct of third parties and/or of that association or its governing bodies themselves, amounts to restrictive agreements/concerted practices of undertakings and/or restrictive decisions of an association of undertakings within the meaning of Articles 101 or 102 TFEU or possibly to the exercise of public authority which would not be caught by either prohibition.

Nevertheless, the fact that the GC enters into a simple examination whether or not some members of the ONP and of the applicants could possibly be undertakings within the meaning of EU competition law and stresses the *Wouters*-message that professional associations are not *a priori* excluded from the scope of application of EU competition law, confirms the above proposition that compulsory investigative measures under Reg.1/2003 would be unlawful where, on the basis of the information available to the Commission already at the time of imposing them, it was manifestly excluded that the entities investigated could ultimately qualify as undertakings or associations of undertakings within the meaning of Reg.1/2003 and Articles 101/102 TFEU. This position strikes the right balance between the effectiveness of the Commission's compulsory investigative measures on the one hand and the right of entities, which are neither undertakings nor associations of undertakings, to remain free of such measures on the other hand.

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