



EUROPEAN COMMISSION

Brussels 13.1.2023
C(2023) 386 final

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

Subject: Case AT.40683 – Belgian Sand
Commission decision pursuant to Article 7(2) of Commission Regulation (EC) No 773/2004 rejecting the complaint
(Please quote this reference in all correspondence)

Dear Sir,

1. I am writing to inform you that the European Commission (the “Commission”) has decided to reject your complaint of 16 October 2019 (the “complaint”) against SCR-Sibelco NV (“Sibelco”), Cimenteries C.B.R. Cementbedrijven NV (“Cimenteries”), Grintbedrijf SBS NV (“Grintbedrijf”), Kiezelgroeve Varenberg NV (“Varenberg”), Dragages Graviers et Travaux (Dragratra) NV (“Dragratra”), Sibelco Nederland BV (“Sibelco Nederland”), Van Nieuwpoort Groep BV (“Van Nieuwpoort”), Heidelbergcement AG (“Heidelbergcement”), and Hülskens Holding GmbH & Co (“Hülskens”) – collectively, “the undertakings envisaged in the complaint”, pursuant to Article 7(2) of Commission Regulation (EC) No 773/2004¹.

¹ Commission Regulation (EC) No 773/2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty (OJ L 123, 27.4.2004, p. 18). With effect from 1 December 2009, Articles 81 and 82 of the EC Treaty have become Articles 101 and 102, respectively, of the Treaty on the Functioning of the European Union (the “TFEU”). The two sets of provisions are, in substance, identical. Pursuant to Article 5(3) of the Treaty of Lisbon, references in legal acts to Articles 81 and 82 of the EC Treaty are to be understood as references to Articles 101 and 102 TFEU when appropriate.

1. THE COMPLAINT

2. By letter dated 16 October 2019, you requested the Commission to launch an investigation into an alleged infringement of, on the one hand, Article 101 of the Treaty on the Functioning of the European Union (“TFEU”) by the undertakings envisaged in the complaint, and, on the other hand, an alleged infringement of Article 102 TFEU by Sibelco.
3. Your complaint relates to the market for extraction and supply of quartz sand in the European Union/European Economic Area (“EU”/“EEA”).²
4. You allege that the undertakings envisaged in the complaint breached and are breaching Article 101(1) TFEU by engaging in several agreements and contracts relating to the extraction and supply of quartz sand in Maasmechelen, Belgium. You also allege that Sibelco has a dominant position on the aforementioned market and breached and is breaching Article 102 TFEU by compelling you and the undertakings envisaged in the complaint to take part in agreements and contracts which, in your view, formed part of an overall plan intended to reserve and allocate the right to extract and supply the quartz sand in Maasmechelen exclusively to Sibelco.
5. On 6 January 2020, the Commission sent you a request for clarification of the complaint, to which you responded on 7 January 2020.
6. On 13 August 2020, a telephone conference took place between the Commission’s case team and you and your legal representative, to discuss follow-up and possible additional considerations related to your allegations.
7. On 7 October 2020, you sent an e-mail to the Commission’s case team, reiterating some of your allegations.
8. On 11 August 2022, the Commission’s case team inquired by email as to the status of the civil proceedings against Sibelco and Dragatra mentioned in the complaint.
9. By letter of 5 October 2022, the Commission informed you that there are insufficient grounds for acting on your complaint (the “Article 7(1) letter”).
10. In response, you made observations in your letter of 2 November 2022 stating that you disagree with the Commission’s position that national courts and administrative authorities would be well placed to deal with the case.
11. In your view, the fact that the Commission needs to refer to national courts and competition authorities, as well as to administrative courts or authorities competent for the supervision of tender procedures and concessions for the extraction of resources, demonstrates that the situation requires a comprehensive approach that only the Commission can provide.

² Or at least the Benelux countries, France, Germany, and the Scandinavian countries (Finland, Sweden, Norway and Denmark). For the purposes of this letter, “EU/EEA” refers to the Member States of the European Union and the European Economic Area, such as amended over the period of time for which data was requested. The EEA comprises the EU Member States together with Iceland, Liechtenstein and Norway.

12. You further refer to the importance for the economy of rare raw materials in the current geopolitical situation, as well as to the multinational nature of Sibelco and its, in your view, monopolistic market position in Belgium and quasi-monopoly in other EU Member States.
13. You request that the Commission reassess its initial position and open an investigation against the undertakings envisaged in the complaint.

2. THE NEED FOR THE COMMISSION TO SET PRIORITIES

14. Complaints facilitate the detection of infringements of the Union competition rules. They bring to the Commission's attention matters of fact and of law which the Commission examines.³
15. It is inherent to the complaints procedure that the obligation to substantiate the allegations lies with the complainant⁴, while the Commission is responsible for defining and implementing the orientation of the Union's competition policy. In order to perform that task effectively, it is entitled to give differing degrees of priority to the complaints brought before it.⁵
16. The Commission has limited resources and is unable to pursue every alleged infringement of the Union competition rules which is brought to its attention. Therefore, the Commission must set priorities, in accordance with the principles set out notably at points 41 to 45 of the Notice on the handling of complaints⁶, and reject a complaint when it considers that the case does not display a sufficient Union interest to justify a further investigation.
17. When deciding which cases to pursue, the Commission takes various factors into account. As the assessment of the Union interest raised by a complaint depends on the circumstances of each individual case, there is no fixed set of criteria for the assessment.⁷ The Commission may have to balance the significance of the alleged infringement for the functioning of the internal market, the probability of being able to establish its existence and the extent of the investigative measures necessary.⁸ The Commission may also take into account whether a national court might be well-placed to examine the allegations made in the complaint and whether the complainant has brought or can bring an action to assert its rights before national

³ Judgment of 19 September 2013, *EFIM v Commission*, C-56/12 P, EU:C:2013:575, paragraph 71.

⁴ See, to that effect, judgment of 19 September 2013, *EFIM v Commission*, C-56/12 P, EU:C:2013:575, paragraph 72.

⁵ Judgment of 4 March 1999, *Ufex e.a. v Commission*, C-119/97 P, EU:C:1999:116, paragraph 88; judgment of 19 September 2013, *EFIM v Commission*, C-56/12 P, EU:C:2013:575, paragraph 72.

⁶ Commission Notice on the handling of complaints by the Commission under Articles 81 and 82 of the EC Treaty (OJ C 101, 27.4.2004, p. 65).

⁷ Judgment of 4 March 1999, *Ufex e.a. v Commission*, C-119/97 P, EU:C:1999:116, paragraphs 79 and 80; judgment of 19 September 2013, *EFIM v Commission*, C-56/12 P, EU:C:2013:575, paragraph 85; judgment of 20 September 2018, *Agria Polska e.a. v Commission*, C-373/17 P, EU:C:2018:756, paragraph 61.

⁸ Joined Cases T-104/07 and T-339/08 *BVGD v Commission* (EU:T:2013:366, para. 212, and the case-law cited) and Commission Notice on Handling of Complaints, cited *supra*, para. 44, third indent.

courts.⁹ The possibility of seeking redress before national courts may confer advantages to the complainant, for instance: (i) national courts may award damages and cost; (ii) they may uphold payment claims and contract performance claims; (iii) they may apply and draw consequences of nullity; (iv) they may order interim measures, and (v) they may apply EU competition law and the relevant national law.¹⁰

3. ASSESSMENT OF YOUR COMPLAINT

18. In light of the above principles and after a careful assessment of your complaint and the additional information provided by you, the Commission does not intend to conduct a further investigation into your claims for the reasons set out below.
19. In the case at hand, the Commission notes that most of the undertakings envisaged in your complaint are located in Belgium and that the resources, as well as the practices you complain of are located or take place exclusively in Belgium. Therefore, the alleged infringements appear to concern a single Member State.
20. Furthermore, quartz sand extraction and exploitation in Belgium is subject to national, regional and local government rules (including reserve exploitation area designation¹¹ and extraction rights allocation). The national courts and the national competition authority would be particularly well placed to evaluate the relevance and application of these rules when assessing the alleged anticompetitive practices you complain of.
21. The national courts and authorities are in a position to assess the relevant facts in order to determine whether the contractual relationships and commercial practices reported in your complaint constitute an infringement of Articles 101 and/or 102 TFEU. In particular, they are in a position to examine whether these relationships and practices (i) restrict competition within the meaning of Article 101(1) TFEU, (ii) benefit from an exemption under Article 101(3) TFEU, (iii) infringe Article 102 TFEU and (iv) benefit from any objective justification and/or efficiencies that could be brought forward by the respondents.¹²
22. Should they find an infringement of Articles 101 and/or 102 TFEU, national courts and NCAs can require such infringement to be brought to an end. The national courts can also award damages for breach of Articles 101 and 102 TFEU and apply the nullity sanction provided for in Article 101(2) TFEU.¹³
23. In view of the above considerations, the Commission is of the opinion that the Belgian courts and authorities are well placed to deal with the allegations in your complaint.

⁹ Commission Notice on Handling of Complaints, cited *supra*, paras 17 and 44, first indent, and the case law cited in the associated footnote.

¹⁰ Commission Notice on the handling of complaints, cited *supra*, point 16.

¹¹ Extraction areas are defined by law in regional plans (point 9 of the complaint).

¹² Commission Notice on the co-operation between the Commission and the courts of the EU Member States in the application of Articles 81 and 82 EC (OJ C 101, 27.4.2004, p. 54), paras 3-8.

¹³ *Ibid.*

24. In your complaint, you indicated that you have brought two proceedings before the same Belgian national court, the Commercial Court (Rechtbank van Koophandel) of [REDACTED], now the Ondernemingsrechtbank of [REDACTED] Division. The first proceeding was initiated [REDACTED] against Dragratra and Sibelco and the second proceeding, on [REDACTED] against Sibelco. From the judgments attached to your complaint, it appears that in both proceedings the court examined your claims based on infringements of Articles 101 and/or 102 TFEU and subsequently rejected those claims. You noted that you have appealed the two judgments rendered by this court [REDACTED] in these proceedings before the Court of Appeal (Hof van Beroep) [REDACTED]. At the time of filing the complaint, these appeals were still pending and you did not provide to the Commission any further information on the possible outcome of these proceedings.¹⁴
25. The fact that a national court has already examined your claims regarding an infringement of Articles 101 and/or 102 TFEU, further argues against the Commission conducting a further investigation in parallel. The fact that your claims were rejected by the court in first instance does not alter this assessment.
26. During the telephone conference of 13 August 2020 between you and the Commission's case team, you emphasised that the abovementioned court proceedings relate only to the agreements to which you were a party. [REDACTED]
[REDACTED] and you insist that the Commission look into its alleged anti-competitive effects.
27. Any challenges of the Concession Agreement on the grounds cited by you, namely that the concession was granted without transparency and without the proper tender procedures, should be addressed to the appropriate Belgian administrative courts or authorities competent for the supervision of tender procedures and concessions for the extraction of resources.
28. In your letter of 2 November 2022, you have not provided additional information that would alter the above assessment.
29. It is in the nature of the complaints procedure under Commission Regulation (EC) No 773/2004 that the Commission can only address alleged infringements of EU competition rules. Alleged infringements of other rules, such as the rules on tender procedures and concessions for the extraction of resources, fall outside the scope of the current procedure.
30. Furthermore, it is not relevant in this case that Sibelco is a multinational undertaking with strong market positions in several EU Member States, because the alleged infringements appear to be limited to the territory of Belgium. That circumstance suggests that the Belgian courts and authorities are well placed to deal with all aspects of the situation at hand.
31. It follows that the present complaint does not present a sufficient degree of Union interest to be pursued by the Commission.

¹⁴ The Commission did not receive a response to its email of 11 August 2022 and the observations of 2 November 2022 do not make mention of the civil proceedings.

4. CONCLUSION

32. For the reasons set out above, and after carefully reviewing your observations made in response to the Article 7(1) letter, the Commission confirms its conclusion that there are insufficient grounds for conducting a further investigation into the alleged infringement(s). Your complaint is consequently rejected pursuant to Article 7(2) of Regulation (EC) No 773/2004.

5. NEXT PROCEDURAL STEPS

5.1. Right to bring an action

33. An action for annulment may be brought against this Decision before the General Court of the European Union, in accordance with Article 263 TFEU.

5.2. Confidential information

34. The Commission may send a copy of this Decision to the undertakings envisaged in the complaint. Moreover, the Commission may decide to make this Decision, or a summary thereof, public on its website.¹⁵
35. If you consider that certain parts of this Decision contain confidential information,  identifying clearly the information that you consider confidential. You are also requested to indicate why you consider that certain information should be treated as confidential.
36. If you do not respond within that time limit, the Commission may assume that you do not consider that this Decision contains confidential information and that it can be published on the Commission's website or sent to the undertakings envisaged in the complaint.
37. The published version of this Decision may conceal your identity upon your request if this is necessary for the protection of your legitimate interests.

For the Commission

*Margrethe VESTAGER
Executive Vice-President*

¹⁵ See paragraph 150 of the Commission notice on best practices for the conduct of proceedings concerning Articles 101 and 102 TFEU (OJ C 308, 20.10.2011, p. 6).