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The International Competition Network

At the end of their second annual conference held in Merida, Mexico, members of the International Competition Network (ICN) adopted a series of recommended practices and presented reports aimed at improving merger review, competition advocacy, and capacity building throughout the world. As a consensus-based organisation, the 80-strong ICN has already contributed significantly to an effective dissemination of sound competition principles, with the ultimate purpose of promoting consumer welfare and job creation. At the same time the ICN is working to reduce costs and burdens on industry, in particular those associated with having to seek merger clearance in a multiplicity of jurisdictions.

ICN members have adopted seven recommended practices according to which authorities should:

- examine a deal only if it has a real impact in their national market;
- adopt clear and objective notification thresholds;
- allow for flexibility in the timing of notification;
- require only the information strictly necessary for a proper assessment;
- ensure that investigation timetables are predictable and no longer than necessary;
- provide for transparency in their laws, procedures and individual decisions;
- periodically review their merger control systems.

As part of its periodic review of the European Community's Merger Regulation, the Commission of the European Communities has proposed to Member States of the European Community that the one-week deadline for notification of a deal and the requirement that filing must be based upon a binding agreement should be abandoned. This would bring the European Community's merger control regime fully into line with the recommendations of the ICN.

Essential facilities

In this issue, two separate and quite different cases raise the question, how far the rules on competition can guarantee that a trader may gain access to facilities necessary to his business. Much depends on whether legislation already provides, either directly or indirectly, some form of access; and, failing that, whether the general principles of law, laid down by the Court of Justice in the *Bronner* case, may help the trader in question. Coditel's difficulties in securing access to a telecommunications network were at issue in the *Luxembourg case* (on page 159), while CCL's difficulties in securing access to a particular dock in the Port of Ancona were the subject of proceedings in the *CCL* case (on page 167). ■

DISTRIBUTION ARRANGEMENTS (STICKERS): THE TOPPS CASE

Subject: Distribution arrangements
Differential pricing
Import restrictions
Parallel imports

Industry: Stickers, cards
(Implications for other industries)

Parties: Topps Europe Ltd (a subsidiary of Topps Company Inc)

Source: Commission Statement IP/03/866, dated 19 June 2003

(Note. This appears to be a classic case of using distribution arrangements to restrict imports and prevent parallel trade between Member States. By requiring its distributors to trace back parallel imports and monitor the final destination of Pokémon products, Topps kept a grip on the import and export market within the European Union and were able to charge unduly high prices in some Member States as compared with others. Distributors who did not comply with this policy were threatened with supply cuts. Topps has two months in which to respond.)

The Commission has decided to open formal proceedings against Topps, a company which produces collectible stickers and cards popular with young children, for impeding cross-border trade in products bearing the image of the Pokémon cartoon characters. In the period investigated by the Commission it was found that the cards, produced under a licence from trade mark owner Nintendo (which is not involved in the present proceedings), were 2.5 times more expensive in Finland than in Portugal. The evidence obtained by the Commission showed that Topps and its distributors put in place an elaborate strategy to prevent imports from low-price to high-price countries, a practice which distorted competition within the European Union's single market at the expense of European households. In the Commission's view, agreements and behaviour designed to prevent cross-border trade have the effect of keeping consumer prices artificially high and constitute a breach of antitrust rules. The Commission said that it had fought such illicit behaviour in the past and would continue to do so vigorously.

This case concerns a series of agreements or concerted practices (or both) put in place by Topps Europe Ltd together with three other European subsidiaries of the Topps Company Inc. of the United States, and several of its distributors in the United Kingdom, Italy, Finland, Germany, France and Spain. The objective was to achieve "a complete ban on exports", as acknowledged by Topps Europe, from low to high-price countries.

Behaviour of this kind, which is detailed in a Statement of Objections sent to five companies of the Topps group, constitutes a hardcore violation of Article 81 of

the EC Treaty and is thought to have taken place for most of the year 2000. The Commission's investigation was triggered by a complaint at the end of that year.

The product concerned is collectible cards and stickers bearing Pokémon figures. (Pokemon started as a game created from the Nintendo Game Boy videogame console in 1996: it is the general name given to the 250 characters – Pikachu and others – which feature in the game and are printed on the cards.) Topps has obtained a licence to use Pokémon for the production of collectibles from trademark owner Nintendo of Japan. Collecting stickers and cards as well as exchanging them is a favourite pastime of young consumers, especially when they bear the picture of their heroes in the / fields of cinema or literature or in the sports area. These products are usually sold in packs of several units at groceries and newsagent's stores and are directed at children. The European market for stickers, cards and other collectible products bought by children was worth more than €600 million in the European Economic Area in 2000, according to estimates by the Commission.

The craze for Pokémon cards reached European playgrounds in the autumn of 1999. In 2000 the price invoiced by Topps to its distributors in the different Member States of the European Communities varied widely, with the French distributors charging twice as much as distributors in Spain for the same volumes. The biggest difference (243%) was found when comparing invoice prices for the Finnish and Portuguese distributors, the latter benefiting from the best rates. This, of course, created the conditions for parallel imports, that is, products destined for one country ending up in another.

According to the strong evidence and detailed information in the Commission file, in 2000 Topps involved its distributors in a strategy designed to prevent wholesalers and retailers in countries where Pokémon products were sold at a comparably high price (such as Finland and France) from importing those products from low-priced countries (such as Spain, Portugal and Italy). To prevent parallel trade, Topps repeatedly asked its distributors in several Member States to help it trace back parallel imports and monitor the final destination of Pokémon products. Those who did not comply with this distribution policy were threatened with supply cuts. As a result of this unlawful partitioning of the European market, families in high-price countries paid more for those products than they would have done if competitive market forces had been at play.

After it received a request for information from the Commission in November 2000, Topps said it would be taking steps to bring its distribution arrangements into compliance with competition rules. There is no evidence that it has since engaged in anti-competitive behaviour. Restrictions of parallel trade represent an infringement of Article 81 of the EC Treaty. Experience has proved that parallel trade leads to efficiency gains and lower prices in the EU and is therefore beneficial to consumers.

Statements of objections are the first formal step in antitrust investigations. The companies now have two months to reply to the Commission's objections and can also request an oral hearing. ■

MERGERS (DAIRY PRODUCTS): THE ARLA CASE

Subject: Mergers
National laws

Industry: Dairy products
(Some implications for other industries)

Parties: Arla Foods amba
Express Dairies plc

Source: Commission Statement IP/03/820, dated 11 June 2003

(Note. This case is an illustration of the interaction between Community law and national law in the application of the rules on competition; in this case, under the special rules applicable to mergers. It will be noted that the Commission reserved to itself the right to decide on one of the aspects of the case which the UK had asked to have referred to its own authorities.)

The Commission has decided to refer part of the proposed merger between Danish-based dairy products company Arla Foods and Britain's Express Dairies to the UK competition authorities, which will further assess the competitive impact in the markets for the supply of processed fresh milk and fresh cream in Britain. The Commission has, at the same time, cleared the operation in respect of the other product and geographical markets.

On 16 April, the Commission received notification of a deal whereby Arla Foods amba would acquire control of Express Dairies plc, two of the four largest dairies in the UK.

The United Kingdom asked the Commission on 15 May to refer the examination of parts of the case to its competition authorities, namely:

(i) the market for the procurement of raw milk in the UK,
(ii) the market for the supply of fresh processed milk in Great Britain and
(iii) the market for the supply of fresh potted cream (non-bulk cream) in the UK.

On these markets the UK argued that the transaction would create significant competition concerns and that they were better placed to deal with these markets. In addition, the UK authorities asked for the market for bottled milk, primarily supplied to milkmen, in certain areas in England, where the transaction might affect competition.

The Commission's preliminary assessment is that the market for the supply of fresh milk as well as fresh non-bulk cream raises potential competition concerns which will be better dealt with by the British competition authorities. The same goes for the supply of bottled milk where the merger could affect competition.

However, the Commission was not able to establish any competition concerns of its own in the market for the procurement of raw milk either on the basis of single or collective dominance. Therefore, the Commission rejected this part of the request and cleared the proposed transaction with regard to the non-referred markets. The Commission took great care to establish that the impact of the merger on the markets subject of a referral request was limited to the UK and, therefore, that the one-stop shop principle provided by the European merger control rules was respected.

Arla is a large dairy co-operative and is present in all standard dairy product markets with production facilities mainly in Denmark, Sweden and the UK; it has sales subsidiaries in most Member States of the European Community, as well as in a number of non-member states. Express is a publicly listed company in the UK, which purchases raw milk and currently uses it to process and supply fresh liquid milk and cream from seven processing dairies in Great Britain. It also produces and sells a number of ancillary products. ■

Mergers: the Austrian Electricity Case

The Commission has approved a link between the Austrian power company Österreichische Elektrizitätswirtschafts-AG (Verbund) and five Austrian regional power suppliers grouped together as EnergieAllianz, subject to conditions and obligations. The initial plan would have created or strengthened dominant positions held by Verbund and EnergieAllianz, especially on the market for the supply of electricity to large customers. But the parties have entered into significant undertakings, which fully resolve the Commission's concerns. One of theseundertakings - the sale of Verbund's controlling stake in APC, its distributor for large customers, - will need to be fulfilled before the merger can take place.

The Commission notes that, while the liberalisation of the energy market in Austria already covers all categories of customers and there is no shortage of capacity on the interconnectors with Germany, in geographic terms the relevant product markets do not currently extend beyond Austria's own borders; and there is not sufficient certainty that the situation will change in the near future. This is because foreign competitors in Austria have so far secured market shares of less than 5%, leaving aside some foreign holdings in Austrian regional suppliers. The geographic market is also kept separate by the fact that electricity prices to final consumers (not including through-transmission and other charges) are lower in Austria than in Germany due to established customer relations and to marketing and cost advantages conferred on Austrian companies by their access to domestic production capacity, especially hydroelectric power. These factors also act as barriers to foreign competitors wishing to enter the Austrian market.

Source: Commission Statement IP/03/825, dated 11 June 2003

ACQUISITIONS (PUBLISHING): THE VIVENDI CASE

Subjects: Acquisitions
National law

Industry: Publishing

Parties: Vivendi Universal Publishing
Lagardere
Hachette Livres
Natexis Banques Populaires

Source: Commission Statement IP/03/808, dated 5 June 2003

(Note. On the face of it, the Commission is right to question the possible effects of the proposed acquisition of Vivendi, for the reasons given in the fourth paragraph of its statement below. The French government's request, somewhat similar to the British government's request in the Arla case, will be considered at a later stage in the Commission's "in-depth" or "second stage" investigation.)

The Commission has initiated a detailed inquiry into the planned acquisition of Vivendi Universal Publishing (VUP) by the French group Lagardère; the two groups are the two largest publishers of French-language books. At this stage the Commission has serious doubts about the impact of the transaction on several markets, including the markets in publishing rights and the distribution and sale of books. As it has opened a detailed inquiry, the Commission takes the view that under the Merger Regulation there is no need at this stage to decide on the request made by the French Government that the case be referred to the French authorities.

VUP is the biggest publisher, marketer and distributor of French-language books. Lagardère, through its subsidiary Hachette Livre, is second, just behind VUP. Lagardère also does business in the retail sale of books, television and radio, and the publication and distribution of newspapers; by this transaction it would acquire control of VUP's entire publishing assets in Europe, which are currently held in trusteeship on its behalf by Natexis Banques Populaires.

From author to reader a book follows a chain in which various intermediate players have a role: the publisher, the distributor, the wholesaler and the retailer. The Commission's preliminary enquiry has shown that, through their many publishing houses and their distribution and logistics systems, Lagardère and VUP both perform all these functions in the French-speaking countries of the European Union.

At this preliminary stage the results of the Commission's inquiry show that there may be anti-competitive effects in three major clusters of markets all the way along the book chain: the purchase and sale of publishing rights, the distribution

and sale of books by publishers to retailers (notably fiction in hard covers and paperback, books for young people, practical guides, school books and other textbooks, dictionaries and general encyclopaedias). The Commission has decided that a detailed investigation is needed in order to assess the danger that dominant positions might be created or strengthened on these markets.

The Commission will therefore make a detailed analysis of the threat of a reduction of supply or an increase in prices as a result of the strong positions the merged company may hold on several of these markets. The Commission will in particular consider whether the consolidation of VUP's and Lagardère's positions might marginalise competitors to a point where consumers, booksellers and readers would ultimately be deprived of the advantages in terms of quality, variety and prices which are conferred on them by competition.

On 14 May 2003 the French competition authorities lodged an application asking that the case be referred to them under Article 9 of the Merger Regulation; the Regulation otherwise confers exclusive jurisdiction on the Commission once a merger is of a certain size, a principle known as the "one stop shop". According to the application, the transaction threatens to create or strengthen dominant positions on the markets in the publication of hard-cover fiction, the publication of paperback fiction, the acquisition of authors' rights for paperback publication, the publication of school books and other textbooks, the publication of single-language dictionaries, the publication of single-volume general encyclopaedias, and distribution to publishers. The French authorities consider that all of these markets have a domestic rather than an international dimension. ■

State Aids: Belgian Tax Scheme

Following an in-depth investigation initiated in April 2002, the Commission has concluded that the special tax regime available to the activities of the so-called "US-Foreign Sales Corporations" (FSCs) located in Belgium does not meet the requirements of the Eueropean Community's State aid rules. Because at the time of the implementation of the scheme the Belgian authorities as well as the beneficiaries had legitimate reasons to believe that the scheme was not a state aid, the Commission has decided not to seek the reimbursement of the fiscal advantages that might have been received. The use of a flat-rate method to determine taxable profits is not in itself challenged by the Commission. However, the Commission considers that the Belgian FSC scheme reduces the normal tax burden that FSCs or the multinational groups to which they belong would face. The benefits derive from the use of a fixed 8% profit margin and from excluding the most relevant activities undertaken by an FSC in Belgium - advertising, sales promotion, carriage of goods and credit - from the base for calculating the taxable income by derogation from the Belgian Tax Code.

Source: Commission Statement IP/03/887, dated 24 June 2003

STATE AIDS (SHIPBUILDING): COMMISSION STATEMENT

Subject: "Temporary Defensive Mechanisms"

Industry: Shipbuilding; liquefied natural gas carriers

Source: Commission Statement IP/03/895, dated 25 June 2003

(Note. State aids are rightly regarded as one of the Commission's bugbears: they distort competition and are generally prohibited under the European Community's state aid rules – except, that is, when they are deemed necessary in the interests of the industry. There is constant pressure on the Commission to make exceptions to the rules on competition: in the bad old days of the 1970s, the Commission even supported what were cynically known as "crisis cartels"; and it appears from press reports that even now the Commission is relaxing its views on airline restrictions, in view of the crisis in the airline industry. The Commissioner for Competition makes the best of a bad job in his statement below; and at least there is a specific time limit in the shipbuilding sector, ostensibly designed to give time for the World Trade Organisation to reach a decision in this field.)

The Commission has decided to extend the granting of temporary and limited state aids in the shipbuilding sector (so-called temporary defensive mechanism-TDM) to liquefied natural gas carriers (LNGs). The EU Trade Commissioner Pascal Lamy said: "Today's decision offers a temporary relief to European LNG shipyards which are facing serious difficulties, while Korea continues to price ships below cost. I trust the WTO will soon condemn these unfair practices and that Korea will put an end to them." The EU Commissioner for Competition, Mario Monti said: "While State aid is certainly not the way forward to make EU shipbuilding more competitive globally, today's decision does show that the Commission recognises the exceptional circumstances in this case where Community interests are at stake".

This decision takes place after an in-depth investigation in the framework of the Trade Barriers Regulation has confirmed that Korean unfair practices have injured EU shipyards in this sector. Direct aid in support of contracts for the building of LNG carriers will now be authorised in accordance with the provisions of Council Regulation EC/1177/2002 of 27 June 2002 concerning a temporary defensive mechanism for shipbuilding. Since October 2002, such aid is already authorised for containerships and product and chemical tankers.

The principal provisions of the temporary defensive mechanism are the following:

- maximum aid intensity of 6% of contract value;
- scope now covering container ships, product and chemical tankers and Liquefied Natural Gas (LNG) tankers;
- expiry of the Regulation on 31 March 2004 to take account of the time necessary for a WTO panel to reach its conclusions. ■

EXCLUSIVITY (TELECOMMUNICATIONS) THE LUXEMBOURG CASE

Subject: Exclusivity
"Essential requirements"
Implementation of Directive
Transparency

Industry: Telecommunications

Parties: Commission of the European Communities
Grand Duchy of Luxembourg

Source: Judgment of the Court, dated12 June 2003, in Case C-97/01 (*Commission of the European Communities v Grand Duchy of Luxembourg*)

(Note. There are two points of interest here: a point of procedure and a point of substance. The procedural point concerns the failure of a Member State to ensure the full implementation of a Commission Directive on competition in the markets for telecommunications services. The substantive point concerns the importance to the proper working of the Directive of provisions designed to secure access to "rights of way" in the telecommunications sector. The procedural point covers the case in which a Directive is transposed into national law, but not in such a manner as to guarantee fully the effectiveness of the Community legislation. The Court held that the Grand Duchy of Luxembourg was in breach of its duties under the EC Treaty. As to the point of substance, one of the objectives of the Commission Directive was to break the exclusivity enjoyed by certain undertakings in the telecommunications field and to allow wider access to rights of way. This access may be refused only where "essential requirements" for the operation of telecommunications activities are invoked and are clearly and reasonably prescribed by the appropriate national authorities. It was the Commission's complaint in this case that the Grand Duchy had failed to implement the Directive in such a way as to avoid unreasonable refusal of access. Essential requirements are defined in the Directive and referred to in paragraph 5 of the judgment below. The Commission provided an example of the difficulties experienced by a telecommunications operator - Coditel - in the circumstances described in paragraphs 20ff of the judgment. While not pursuing the Commission's point in this regard, the Court made it clear that the aims of a Directive could be frustrated if, as in the present case, there was not enough transparency to enable traders to benefit from its provisions.)

Judgment

1. By application lodged at the Registry of the Court of Justice on 27 February 2001, the Commission of the European Communities brought an action under Article 226 of the EC Treaty for a declaration that, by failing to ensure, in practice, the effective transposition into Luxembourg law of Article 4d of

Commission Directive EEC/388/90 of 28 June 1990 on competition in the markets for telecommunications services, as amended by Commission Directive EC/19/96 of 13 March 1996 (hereinafter the Directive), the Grand Duchy of Luxembourg has failed to fulfil its obligations.

Legal framework

Community legislation

2. Article 2 of the Directive provides:

> 1. Member States shall withdraw all those measures which grant:
> (a) exclusive rights for the provision of telecommunications services, including the establishment and the provision of telecommunications networks required for the provision of such services; or
> (b) special rights which limit to two or more the number of undertakings authorised to provide such telecommunications services or to establish or provide such networks, otherwise than according to objective, proportional and non-discriminatory criteria; or
> (c) special rights which designate, otherwise than according to objective, proportional and non-discriminatory [criteria,] several competing undertakings to provide such telecommunications services or to establish or provide such networks.
> 2. Member States shall take the measures necessary to ensure that any undertaking is entitled to provide the telecommunications services referred to in paragraph 1 or to establish or provide the networks referred to in paragraph 1.
> Without prejudice to Article 3c and the third paragraph of Article 4, Member States may maintain special and exclusive rights until 1 January 1998 for voice telephony and for the establishment and provision of public telecommunications networks.
> Member States shall, however, ensure that all remaining restrictions on the provision of telecommunications services other than voice telephony over networks established by the provider of the telecommunications services, over infrastructures provided by third parties and by means of sharing of networks, other facilities and sites are lifted and the relevant measures notified to the Commission no later than 1 July 1996.
> As regards the dates set out in the second and third subparagraphs of this paragraph, in Article 3 and in Article 4a(2), Member States with less developed networks shall be granted upon request an additional implementation period of up to five years and Member States with very small networks shall be granted upon request an additional implementation period of up to two years, provided it is needed to achieve the necessary structural adjustments. ...
> 3. Member States which make the supply of telecommunications services or the establishment or provision of telecommunications networks subject to a licensing, general authorisation or declaration procedure aimed at compliance with the essential requirements shall ensure that the relevant conditions are objective, non-discriminatory, proportionate and

transparent, that reasons are given for any refusal, and that there is a procedure for appealing against any refusal.

The provision of telecommunications services other than voice telephony, the establishment and provision of public telecommunications networks and other telecommunications networks involving the use of radio frequencies, may be subjected only to a general authorisation or a declaration procedure...

3. Following a request made on 28 June 1996 by the Grand Duchy of Luxembourg pursuant to the fourth subparagraph of Article 2(2) of the Directive, the Commission granted the Grand Duchy, by Decision EC/568/97 of 14 May 1997, additional periods for the implementation of the Directive as regards full competition in the telecommunications markets. Such periods postponed until 1 July 1998 the abolition of exclusive rights in respect of voice telephony (Article 1 of that decision) and until 1 July 1997 the lifting of the other restrictions on the provision of already liberalised telecommunications services (Article 2 of that decision).

4. In the terms of Article 4d of the Directive:

Member States shall not discriminate between providers of public telecommunications networks with regard to the granting of rights of way for the provision of such networks.

Where the granting of additional rights of way to undertakings wishing to provide public telecommunications networks is not possible due to applicable essential requirements, Member States shall ensure access to existing facilities established under rights of way which may not be duplicated...

5. Article 2(6) of Council Directive EEC/387/90 of 28 June 1990 on the establishment of the internal market for telecommunications services through the implementation of open network provision, as amended by Directive 97/51/EC of the European Parliament and of the Council of 6 October 1997, provides that, for the purposes of Directive 90/387, "essential requirements" mean:

the non-economic reasons in the public interest which may cause a Member State to impose conditions on the establishment and/or operation of telecommunications networks or the provision of telecommunications services. Those reasons shall be the security of network operations, the maintenance of network integrity and, where justified, the inter-operability of services, data protection, the protection of the environment and town and country planning objectives as well as the effective use of the frequency spectrum and the avoidance of harmful interference between radio-based telecommunications systems and other space-based or terrestrial technical systems...

National legislation

6. Article 7 of the Luxembourg Law of 21 March 1997 on telecommunications (*Mémorial* A 1997, p. 761, hereinafter the Law on telecommunications)

establishes a licensing system for the provision of telecommunications networks, telephony, mobile telephony and radio-messaging services.

7. The first subparagraph of Article 34(1) of the Law on telecommunications provides:

> ... the holder of a licence to provide a telecommunications network ... may make use of the public land of the State and municipalities to install cables, overhead lines and associated equipment and carry out all works in connection therewith, having regard to their purpose and the laws, regulations and administrative provisions governing such use.

8. Under Article 35 of the Law on telecommunications:

> 1. Prior to installing the cables, overhead lines and associated equipment on public land of the State and municipalities, the holder of a licence for the provision of a telecommunications network ... shall submit a location plan and system details for the approval of the authority responsible for the public land of the State and municipalities.
>
> 2. The authorities may not impose on the holder of a licence for the provision of a telecommunications network ... any tax, fee, toll, charge or payment whatsoever for the right to use the public land of the State and municipalities.
>
> The holder of a licence for the provision of a telecommunications network ... shall also be entitled, free of charge, to a right of way for the cables, overhead lines and associated equipment in the public infrastructure situated on the public land of the State and municipalities.

9. Article 35(3) of the Law on telecommunications provides that the costs inherent in the modification of the cables, overhead lines and associated equipment are the responsibility of the holder of a licence for the provision of a telecommunications network.

Pre-litigation procedure

10. By letter of 22 July 1999 to the Luxembourg authorities, the Commission reminded them of the obligations resulting from Article 4d of the Directive.

11. Since it was not satisfied with the results of a bilateral meeting held on 10 September 1999 nor by the reply of the Luxembourg authorities by letter of 16 September 1999, on 17 January 2000, the Commission sent the Grand Duchy of Luxembourg a letter of formal notice requesting it to submit its observations regarding the transposition of Article 4d of the Directive.

12. In default of any reply to that letter, on 3 August 2000, the Commission issued a reasoned opinion requesting that Member State to take the measures necessary to comply with that opinion within a period of two months from its notification.

13. Having received no response from the Luxembourg authorities, the Commission brought this action.

The action

Arguments of the parties

14. According to the Commission, the failure to provide, in a non-discriminatory way, rights of way to telecommunications providers may arise either from the fact that the provisions of the Law on telecommunications are not correctly applied, or from the fact that it would be necessary to enact additional measures in the Luxembourg legal system to ensure the effective transposition of Article 4d of the Directive.

15. In order to show that the Grand Duchy of Luxembourg has not taken all the measures necessary to ensure the effective and non-discriminatory grant of rights of way to holders of licences, the Commission relies on three arguments:
- the uncertainties of the Luxembourg legal framework;
- the failure to prescribe the essential requirements of the grounds for a refusal to grant rights of way, and
- possible discrimination.

[Paragraphs 16 to 18 describe the complex distribution of powers among various Luxembourg municipal and other authorities.]

19. In addition, Article 35(1) of the [Luxembourg] Law on telecommunications provides that the right is subject to the prior approval of the technical location plan and details of the system by the authority responsible for the relevant public land. First, it is for that body to determine, in practice, the conditions for access to the land of the State and municipalities. Second, it is necessary for a telecommunications provider to obtain a particular highway permit. According to the Commission, the question whether the procedure for obtaining a highway permit forms part of the application for approval of the location plan and details of the system mentioned in Article 35(1) of that law or whether it is additional to that application is not clearly established.

20. That statement can be substantiated by a concrete example. The Compagnie générale pour la diffusion de la télévision (hereinafter Coditel), which is a holder of a licence to establish and provide a fixed telecommunications network under the Law on telecommunications, has, since March 1999, made applications to various relevant Luxembourg organisations and administrative authorities for permission to lay cables.

21. CFL has informed Coditel that the application for cable laying cannot be granted, giving as the only reason for such refusal considerations connected to its own strategy. With regard to the application for a highway permit lodged by Coditel with the Administration des Ponts et Chaussées, the latter invoked, in its reply of 23 September 1999, technical difficulties connected to the coordination of the applications from various telecommunications providers in order to justify postponing dealing with the file. The letter which Coditel sent to the

Administration de l'Enregistrement et des Domaines as well as various letters sent to the Luxembourg Minister for Public Works have elicited no reply.

22. Secondly, the Commission points out that the Directive recognises the possibility of the grant of rights of way being refused in the case of applicable essential requirements. In this case, however, the decisions by the various organisations and administrative authorities refusing Coditel's applications for the grant of rights of way, in particular those of the Administration des Ponts et Chaussées and CFL, make no reference to applicable essential requirements as referred to in Article 4d of the Directive.

23. Thirdly, the Commission observes that the first subparagraph of Article 4d of the Directive prohibits "discriminat[ion] between providers of public telecommunications networks with regard to the granting of rights of way for the provision of such networks". However, according to information available to the Commission, no new provider which has sought the grant of rights of way over public land to enable it to connect local networks to foreign networks and thus to offer telecommunications services in competition with the Entreprise des Postes et Télécommunications (Post and Telecommunications Undertaking, hereinafter EPT), has yet obtained any. It is EPT which has been awarded the contract for cable laying along certain motorways, whereas rights of way have so far been refused to other holders of telecommunications network provider's licences.

24. In its defence, the Luxembourg Government contends that the principle of non-discrimination between providers of public telecommunications networks set out in Article 4d of the Directive has been transposed into Luxembourg law, which the Commission does not dispute. The exercise of rights of way is subject to precise rules established and published by the respective competent authorities. Those rules are the same for every applicant for a right of way and are not specific to the telecommunications sector, which enjoys no special rights.

[Paragraphs 25 to 29 set out the detailed arguments in support of the propositions in paragraph 24.]

Findings of the Court

30. It is settled case-law that the question whether a Member State has failed to fulfil its obligations must be determined by reference to the situation obtaining in the Member State at the end of the period laid down in the reasoned opinion and that the Court cannot take account of any subsequent changes (see, in particular, Case C-103/00, *Commission* v *Greece*, paragraph 23, and Case C-323/01, *Commission* v *Italy*, paragraph 8).

31. Consequently, the changes which the Règlement Grand-Ducal of 8 June 2001 introduced into Luxembourg law cannot be taken into account in the Court's consideration of the merits of this action for failure to fulfil obligations.

32. Also, according to settled case-law, in relation to the transposition of a directive into the legal order of a Member State, it is essential that the national

legislation in question effectively ensures that the directive is fully applied, that the legal position under national law is sufficiently precise and clear and that individuals are made fully aware of their rights (Case C-365/93, *Commission* v *Greece*, paragraph 9, and Case C-144/99, *Commission* v *Netherlands*, paragraph 17).

33. In view of the foregoing considerations, it is necessary to assess whether the Luxembourg law in force at the time when the period laid down in the reasoned opinion expired met the requirements of Article 4d of the Directive.

34. According to the first subparagraph of that provision, "Member States shall not discriminate between providers of public telecommunications networks with regard to the granting of rights of way for the provision of such networks".

35. Under the first subparagraph of Article 34(1) of the Law on telecommunications, a right of way subject to the laws, regulations and administrative provisions governing the use of the public land of the State and municipalities forms part of the licence granted for the provision of a telecommunications network.

36. However, such a measure does not suffice to meet the requirements of Article 4d of the Directive, which seeks to ensure the effective exercise of rights of way with the aim of liberalising the provision of telecommunications infrastructures. Effective transposition of that provision requires that the competent authority for the grant of such rights be clearly designated and that transparent administrative procedures be established to implement them. It is not thus in this case.

37. In relation to the designation of the competent authority, even if the Member States are free to delegate powers to their domestic authorities as they consider fit and to implement directives by means of measures adopted by various authorities (see Joined Cases 227/85 to 230/85, *Commission* v *Belgium*, paragraph 9), the fact remains that individuals must be made fully aware of their rights.

38. The system of licensing in issue in respect of the granting of rights of way over public land lacks transparency. In respect of public railway land, it is clear from the contents of the file that the Luxembourg authorities themselves disagree on the question whether the authority competent to deal with an application to lay cables along the rail network is CFL, as the Luxembourg Minister for Transport contended, or the State, as maintained by the Luxembourg Institute of Telecommunications.

39. In relation to the procedures for the granting of rights of way, the use of public land of the State and municipalities is, according to Article 35(1) of the Law on telecommunications, subject to the prior approval of the location plan and system details by the authority responsible for the relevant land. In addition, holders of a telecommunications network provider's licence which envisage using the rights of way that the latter includes must obtain highway permits from the State authorities and all the local authorities concerned according to the locations of the networks. The Luxembourg Government does not maintain that it has

established and published implementing provisions in that regard. Even if the procedures applied by the various competent authorities may be obtained on request by interested parties or, in certain cases, through the internet, the fact remains that all the administrative procedures as a whole are far from transparent and that, therefore, such situation is capable of discouraging interested parties from making applications for rights of way.

40. In the light of all the foregoing considerations, it must be held that, by failing to ensure the effective transposition of Article 4d of the Directive, the Grand Duchy of Luxembourg has failed to fulfil its obligations.

Costs

41. Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Commission has applied for costs to be awarded against the Grand Duchy of Luxembourg and the latter has been unsuccessful, the Grand Duchy of Luxembourg must be ordered to pay the costs.

Court's Ruling

The Court hereby:
1. Declares that, by failing to ensure the effective transposition of Article 4d of Commission Directive EEC/388/90 of 28 June 1990 on competition in the markets for telecommunications services, as amended by Commission Directive EC/19/96 of 13 March 1996, the Grand Duchy of Luxembourg has failed to fulfil its obligations;
2. Orders the Grand Duchy of Luxembourg to pay the costs. ■

Acquisitions: Deutsche Post / Securicor

Commission clears Deutsche Post's sole control of Securicor distribution activities
The Commission has granted clearance under the Merger Regulation to the acquisition by Deutsche Post AG (DPAG) of sole control of Securicor Omega Holdings Ltd, a mail, parcel, freight delivery and logistics company currently controlled by DPAG and Securicor Plc. The deal gives rise to only limited overlaps which do not trigger dominance concerns in either the UK or Ireland, which are the only two Member States of the European Community where both are active in these postal distribution activities.

Source: Commission Statement IP/03/868, dated 19 June 2003

COMPLAINTS (PORT SERVICES): THE COE CLERICI LOGISTICS CASE

Subject: Complaints
Abuse of dominant position
"Essential facilities"
Public undertakings

Industry: Port Services
(Implications for most industries)

Parties: Coe Clerici Logistics SpA
Commission of the European Communities
Autorità Portuale di Ancona (intervener)

Source: Judgment of the Court of First Instance, dated17 June 2003, in Case T-52/00 (Coe Clerici Logistics SpA, v Commission of the European Communities)

(Note. It is hard to avoid having some sympathy for the applicants in this case, who fitted out a ship for special deliveries at the port of Ancona, Italy, where they had reason to believe that they would be able to take advantage of the special port facilities there. But they found themselves entangled in legal complexities. They faced a system governed by local laws relating to public undertakings and found that their complaint to the Commission about the difficulty of obtaining port facilities was in an inappropriate form: the Commission could not simply override the local laws without adopting a directive under the provisions of the EC Treaty relating to public undertakings. Moreover, the Commission did not accept, on the basis of the evidence before it, that the port facilities were "essential facilities", within the meaning of the Court of Justice decision in the Bronner case; as the Court pointed out, the applicant neither disputed the Commission's finding of fact nor offered additional facts in support of its contention: see paragraphs 99 and 100 of the judgment. The case serves to emphasise some of the pitfalls in the complaints procedure, especially in relation to public undertakings, and the importance, when pleading for access to essential facilities, of observing to the letter the legal and factual criteria laid down in the Bronner case.)

Judgment

Legal Background

1. As a result of the judgment of the Court of Justice in Case C-179/90, *Merci Convenzionali Porto di Genova* v *Siderurgica Gabrielli*, the Italian authorities adopted *inter alia* Law No 84/94 of 28 January 1994 amending the legislation applicable in respect of ports (... Law No 84/94 and ... Decree No 585/95), which reformed the legal framework applicable to the Italian port sector.

2. As part of that reform, the activity of the former dock-work companies, which became port authorities under Law No 84/94, was confined to managing the ports and they are now prohibited from supplying, directly or indirectly, dock-work services, which are defined in Article 16(1) of Law No 84/94 as the loading, unloading, transshipment, storage and general movement of goods or material of any kind, performed on the site of the port.

3. Those port authorities have legal personality under public law and are responsible, *inter alia*, for granting quay concessions to dock businesses.

[Paragraphs 4 to 8 describe the local laws applying to the case.]

9. Article 5a provides that the Autorità Portuale di Ancona is to request one or more concession-holders to make available quays which they have not planned to use during the period which is the subject of a request for self-handling operations where it is found that there are no or insufficient quays already allocated or still to be allocated for public use. In that regard, loading or unloading operations only are to be authorised without the use of a storage area held under concession. Authorisation to carry out such operations is to be granted in accordance with the detailed rules laid down in Article 3 of Bye-Law No 6/98, specifying which quays are available after obtaining from the concession-holder a declaration of availability, an indication of the berthing quay and agreements on the practical arrangements. In addition, although the concession-holder is obliged not to hinder availability of the quays during the period for which authorisation is granted, he may, at any time, have the self-handling operations suspended if he wishes to make use of mechanical equipment installed on one of his quays. Finally, self-handling operators are to pay to concession-holders a fee in return for the use of the quay. Where the concession-holder considers that he is unable to satisfy the requirements of the Autorità Portuale di Ancona, the latter may, at any time, check whether the quays are unavailable.

Facts

10. The applicant, Coe Clerici Logistics SpA, operates in the bulk dry raw materials shipping sector. Among other things, it transports coal for ENEL SpA, the electricity generating undertaking which is also responsible for the distribution of electricity in Italy. ENEL has a storage depot for its goods in the Port of Ancona. That depot is linked, by a fixed system of conveyors and hoppers also belonging to ENEL, to quay No 25 in the Port of Ancona, over which the company Ancona Merci has been given a concession.

11. The applicant claims that, in order to adapt itself to that fixed system of conveyors and hoppers belonging to ENEL, it fitted its ships, including the *Capo Noli*, with special equipment.

12. According to the applicant, quay No 25 is the only one suitable for its coal unloading operations for ENEL, it being:
- the only quay equipped with a crane with which goods can be unloaded;
- the only quay with sufficient depth;

- the only quay directly linked to ENEL's depot by means of a fixed system of conveyors and hoppers.

13. In August 1996, the applicant applied to the Autorità Portuale di Ancona for authorisation to carry out self-handling on quay No 25.

[Paragraphs 14 to 18 describe the resulting difficulties and delays.]

19. Since it considered that the provisions adopted by the Autorità Portuale di Ancona interfered with the exercise of its right of self-handling by according Ancona Merci exclusive rights to carry on its business on the quays over which concessions had been granted, the applicant, on 30 March 1999, complained to the Commission of infringement of Articles 82 and 86 of the EC Treaty...

[Paragraphs 20 to 22 describe the formal handling of the complaint.]

23. By letter of 20 December 1999 (the contested act), the Commission informed the applicant that it was going to take no action on its complaint.

[Paragraph 24 gives the Commission's reasons in detail, of which the most significant in this context is the finding that "the only factor which can justify the usefulness to the applicant of quay No 25 is the presence on that landing stage of the fixed system of conveyors and hoppers".]

25. In the contested act, the Commission argues that the presence of that fixed system of conveyors and hoppers is not, however, sufficient to justify the classification of quay No 25 as an essential facility. It states that the conditions laid down by the Court of Justice in Case C-7/97, *Bronner* v *Mediaprint and Others*, for establishing an abuse of a dominant position are not satisfied in this case. The applicant had continued to carry out its operations for ENEL for two years despite the refusal which it had received and also had alternative solutions available to it for unloading its customer's coal.

26. In the contested act, the Commission concludes by stating that it is unable to take any action on the complaint. Moreover, since the complaint concerns breach of the competition rules by a Member State, it does not confer on the complainant standing under Council Regulation 17 of 1962, ... as amended and supplemented by Regulation 59, Regulation EEC/118/63 and Regulation EEC/2822/71 and under Commission Regulation EEC/2842/98 on the hearing of parties in certain proceedings under Articles [81] and [82] of the EC Treaty. That standing is granted only to complainants who allege breach of the rules on competition by undertakings.

27. By letter of 5 January 2000, the applicant requested the Commission to make clear whether the contested act was in the nature of a decision. The applicant reiterated its request by letter of 9 February 2000.

28. The Commission did not reply in writing to those letters.

[Paragraphs 29 to 39 describe the formal legal proceedings, including the forms of order sought by the parties.]

Law

Arguments of the parties

[Paragraphs 40 to 55 set out the parties' arguments on the question of the admissibility of the action.]

[Paragraphs 56 to 69 set out the parties' arguments of the substance of the case.]

Findings of the Court

70. The parties disagree, first, on the question whether the contested act constitutes in part a rejection of the applicant's complaint as regards an independent infringement of Article 82 of the EC Treaty by Ancona Merci. Secondly, the parties disagree on whether the applicant is entitled to bring an action for annulment of the contested act to the extent that the Commission decided not to take any action on the applicant's complaint in so far it relates to infringement of Article 82, in conjunction with Article 86, by the Autorità Portuale di Ancona.

71. With regard to the first of those questions, it must first be observed that, although the Commission did not express a view on an alleged independent infringement of Article 82 of the EC Treaty, such a failure to do so cannot be held unlawful in the context of a review of legality under Article 230. Consequently, the applicant may not plead a manifest error of assessment in the application of Article 82 and an associated failure to investigate, or claim the benefit of Regulation 2842/98, unless the rejection of its complaint relates separately to Article 82.

72. In that regard, the contested act states that the refusal of the applicant's request to unload coal on a self-handling basis onto quay No 25 of the Port of Ancona constitutes, in the applicant's view, an infringement of Article 86 of the EC Treaty,in conjunction with Article 82.

73. The contested act then states that the Commission's investigation enabled it to establish certain factual discrepancies in relation to the claims in the applicant's complaint and that quay No 25 of the Port of Ancona is not an essential facility within the meaning of the *Bronner* judgment.

74. In the conclusion of the contested act, the Commission states:

> In the light of the above, we find no need to act on the [applicant's] complaint. Moreover, [the Commission] wishes ... to point out that since the [complaint] concerns an alleged infringement of the Treaty rules on competition by a Member State, it does not confer on [the applicant] the standing which follows from Council Regulation 17 and Commission

Regulation 2842/98. That standing is recognised only in relation to an applicant who pleads breach of those rules by undertakings.

75. It is therefore clear from the wording of the contested act that the Commission, having taken the view that the complaint did not relate to an alleged infringement by Ancona Merci of Article 82 of the EC Treaty, did not express any view on conduct which might be contrary to that article.

76. Moreover, it must be pointed out that the Commission's interpretation of the complaint as relating only to infringement of Article 82 of the EC Treaty, in conjunction with Article 86, by the Autorità Portuale di Ancona was already apparent from the letters which the Commission sent to the applicant during the administrative procedure.

77. Thus, it is clear from the letter of 26 April 1999 sent to the applicant, acknowledging receipt of the complaint, that the Commission had interpreted the complaint as relating only to the conduct of the public authority concerned.

78. Contrary to what is maintained by the applicant, the same may be inferred from the letter sent to it by the Commission on 10 August 1999, which states, in particular, as follows:

> ... according to this complaint, the Port Authority has allegedly infringed Article 82 and Article 86 [of the EC Treaty] by using its exclusive regulatory power to obstruct the carrying out by Coe Clerici Logistics SpA of self-handling operations ...

79. At that stage of the administrative procedure and in the light of those letters, it was open to the applicant, if it disagreed as to the scope of the complaint, to draw the Commission's attention to the fact that it also intended to allege in that complaint, in addition to infringement of Article 82 of the EC Treaty, in conjunction with Article 86, by the Autorità Portuale di Ancona, an independent infringement of Article 82 by Ancona Merci.

80. In any event, if, on reading the contested act, the applicant considered that the Commission had failed to give a decision on an alleged infringement of Article 82 of the EC Treaty by Ancona Merci, the onus was then on it to request the Commission to express a view on that aspect of the complaint and, if necessary, to bring an action under the second paragraph of Article 232 for a declaration by the Community judicature that the Commission had failed to act.

81. Consequently, since the Commission did not make any assessment of the alleged independent infringement by Ancona Merci of Article 82 of the EC Treaty, the action, in so far as it relies on that article on its own, is devoid of purpose. It follows that there is no need to rule on an error of assessment by the Commission in relation to Article 82 on its own, on a failure to investigate that aspect, on infringement of the applicant's procedural rights under Regulation 2842/98 or on an abuse of process.

82. With regard to the second of those questions, the admissibility of the action must be examined in so far as it relates to the Commission's decision not to act on the applicant's complaint of infringement of Article 82 of the EC Treaty, in conjunction with Article 86.

83. It is clear from the applicant's complaint and from its written submissions, as clarified at the hearing, that it disputes the compatibility with Community law of Article 5a of Bye-Law 6/98 of the Autorità Portuale di Ancona (see paragraph 9 above) in so far as it makes access by the applicant to quay No 25, the concession held by Ancona Merci, subject to conditions, thereby permitting a restriction on the applicant's freedom to exercise the right of self-handling. The Autorità Portuale di Ancona thereby acted contrary to Articles 82 and 86 of the EC Treaty.

84. The applicant's complaint constitutes, in that regard, a request made to the Commission to use the powers which it has under Article 86(3) of the EC Treaty. In that context, the contested act constitutes a refusal by the Commission to address a decision or directive to Member States pursuant to Article 86(3).

85. It is settled case-law that Article 86(3) of the EC Treaty requires the Commission to ensure that Member States comply with their obligations as regards the undertakings referred to in Article 86(1) and expressly empowers it to take action, where necessary, for that purpose by way of directives or decisions. The Commission is empowered to determine that a given State measure is incompatible with the rules of the Treaty and to indicate what measures the State to which a decision is addressed must adopt in order to comply with its obligations under Community law (Case C-107/95 P, *Bundesverband der Bilanzbuchhalter* v *Commission*, paragraph 23).

86. As is apparent from Article 86(3) of the EC Treaty and from Article 86 as a whole, the supervisory power which the Commission enjoys *vis-à-vis* Member States responsible for infringing the rules of the Treaty, in particular those relating to competition, necessarily implies the exercise of a wide discretion by the Commission as regards, in particular, the action which it considers necessary to be taken (*Bundesverband der Bilanzbuchhalter* v *Commission*, paragraph 27, and Case T-266/97, *Vlaamse Televisie Maatschappij* v *Commission*, paragraph 75).

87. Consequently, the exercise of the Commission's power to assess the compatibility of State measures with the Treaty rules, which is conferred by Article 86(3) of the EC Treaty, is not coupled with an obligation on the part of the Commission to take action (order in *Bilanzbuchhalter* v *Commission*, paragraph 31, and judgments in Case T-32/93, *Ladbroke* v *Commission*, paragraphs 36 to 38, and Case T-575/93, *Koelman* v *Commission*, paragraph 71).

88. It follows that legal or natural persons who request the Commission to take action under Article 86(3) of the EC Treaty do not, in principle, have the right to bring an action against a Commission decision not to use the powers which it has under that article (order in *Bilanzbuchhalter* v *Commission*, paragraph 31, and judgment in *Koelman* v *Commission*, paragraph 71).

89. However, it has been held that it cannot be ruled out that an individual may find himself in an exceptional situation conferring on him standing to bring proceedings against a refusal by the Commission to adopt a decision in the context of its supervisory functions under Article 86(1) and (3) of the EC Treaty (*Bundesverband der Bilanzbuchhalter* v *Commission*, paragraph 25, and, with regard to an action for failure to act, see, to that effect, Case T-17/96, *TF1* v *Commission*, paragraphs 51 and 57).

90. However, in this case, the applicant has not pleaded any exceptional circumstance which would enable its action against the Commission's refusal to act to be regarded as admissible. The only circumstance cited by the applicant, namely that it competes with Ancona Merci, could not, even if proved, constitute an exceptional situation such as to confer on the applicant standing to bring proceedings against the Commission's refusal to act in regard to the measures adopted by the Autorità Portuale di Ancona in order to regulate the grant of authorisations to maritime carriers to carry out self-handling on quays held under concessions.

91. Consequently, the applicant is not entitled to bring an action for annulment of the contested act in so far as the Commission decides in it not to use the powers conferred on it by Article 86(3) of the EC Treaty.

92. However, at the hearing, the applicant claimed that its action, in so far as it relates to infringement by the Autorità Portuale di Ancona of Articles 82 and 86 of the EC Treaty, should be declared admissible pursuant to the principle established in Case T-54/99, *max.mobil* v *Commission*. The Commission contends that the principle in question, under which an individual is entitled to bring an action for annulment against its decision not to use the powers conferred on it by Article 86(3), constituted a reversal of precedent and that the judgment of the Court of First Instance in question was the subject of an appeal now pending before the Court of Justice.

93. In that regard, if the contested act, in so far as it concerns infringement of Article 82 of the EC Treaty, in conjunction with Article 86, must be classified as a decision rejecting a complaint as referred to in *max.mobil* v *Commission*, the applicant should, as complainant and addressee of that decision, be regarded as entitled to bring the present action (*max.mobil* v *Commission*, paragraph 73).

94. In such a case, it has been held that, in view of the broad discretion enjoyed by the Commission in the application of Article 86(3) of the EC Treaty, the review carried out by the Court of First Instance must be limited to verification of the Commission's fulfilment of its duty to undertake a diligent and impartial examination of the complaint alleging infringement of Article 86(1) (see, to that effect, *max.mobil* v *Commission*, paragraphs 58 and 73, and order of 27 May 2002 in Case T-18/01, *Goldstein* v *Commission*, not published in the ECR, paragraph 35).

95. In the present case, the applicant alleges that the Commission adopted the contested act without taking into consideration certain facts or on the basis of

incorrect facts. At the hearing, the applicant asserted that this shows that the Commission did not undertake a diligent and impartial examination of the complaint.

96. However, it cannot be held that the Commission failed in this case in its duty to undertake a diligent and impartial examination of the applicant's complaint.

97. It is apparent from the contested act that the Commission identified the central objection among the arguments set forth in the complaint of infringement by the Autorità Portuale di Ancona of Articles 82 and 86 of the EC Treaty by taking into consideration the main relevant matters relied on by the applicant in that complaint. That is clear from the fact that the Commission indicated, in the contested act, that the investigation which it had carried out had enabled it to establish certain discrepancies in relation to the facts which the applicant had set out in its complaint.

98. Those facts were relied on by the applicant in order to demonstrate that there is no alternative to the use of quay No 25 in order to unload, by self-handling, the coal which it transports on behalf of ENEL. The applicant infers from this that the quay in question therefore constitutes an essential facility within the meaning of the *Bronner* judgment, which lays down the conditions under which access to a facility must be regarded as essential to the exercise by the undertaking in question of its activity.

99. In that regard, the reasoning followed by the Commission in the contested act seeks to show that, as the facts alleged by the applicant in support of its argument are unproven, quay No 25 cannot be classified as an essential facility. The Commission therefore concludes, as it maintained at the hearing, that application of the regulations adopted by the Autorità Portuale di Ancona, and more specifically of Article 5a of Bye-Law No 6/98, cannot have had the effect of impeding access by the applicant to an essential facility. Consequently, without expressing a view on liability for the conduct in question, the Commission considered that it did not have to use the powers conferred on it by Article 86(3) of the EC Treaty against the Autorità Portuale di Ancona.

100. It is important to note that in its action the applicant has either not disputed the correctness of the facts as stated by the Commission in the contested act, offered supporting evidence which does not establish the truth of its allegations, or merely relied on matters which it had not mentioned in its complaint.

101. Thus, with regard to quay No 22, the applicant did not dispute the Commission's assertion in the contested act that it is a public quay. As to the applicant's allegation that quays Nos 20 and 22 are intended exclusively for loading and unloading grain and not coal, it is important to note that that factual situation is not apparent from the triennial operational plan annexed by the applicant to its application, which merely indicates that those quays are suitable for handling cereals.

102. Furthermore, the applicant did not dispute the Commission's assertion in the contested act, and confirmed by the Autorità Portuale di Ancona at the hearing, that those quays are deep enough and long enough to allow the applicant's ship, the *Capo Noli*, to berth.

103. As regards the complaint alleging failure by the Commission to consider the argument that the contract which the applicant has concluded with ENEL prevents it from concluding, with quay concession-holders, commercial agreements relating to the performance of its dock work, the Court notes that there is no clause in that contract, which is annexed to the application, to substantiate that argument, as indeed the applicant acknowledged at the hearing. It must be pointed out in that regard that none of the clauses in that contract relates to the conditions for unloading coal for ENEL.

104. The applicant also challenges the Commission's interpretation of the concept of essential facility and submits that quay No 25 of the Port of Ancona must be classified as such under the principle in *Bronner*. However, it is sufficient in that regard to observe that that argument cannot be a matter for review by the Community judicature of the Commission's compliance with its duty to examine the complaint diligently and impartially.

105. It follows that the present action, in so far as it seeks the annulment of a Commission decision not to initiate the procedure under Article 86 of the EC Treaty, must be dismissed as inadmissible and, in any event, as unfounded in law.

106. It follows from all the foregoing that the application must be dismissed in its entirety.

Costs

107. Under Article 87(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. As the applicant has been unsuccessful and the Commission has applied for costs, the applicant must be ordered to pay the costs.

108. As the Autorità Portuale di Ancona has not applied for costs, it must bear its own costs.

Court's Ruling

The Court of First Instance hereby:
1. Dismisses the application;
2. Orders the applicant to bear its own costs and to pay those incurred by the Commission;
3. Orders the Autorità Portuale di Ancona to bear its own costs. ■

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