COMPLAINTS (COURIER SERVICES): THE UFEX CASE

Subject: Complaints
Community interest
Annulment

Industry: Courier services; parcel delivery services
(Some implications for all industries)

Parties: Union Francaise de l'Express (UFEX, formerly SFEI)
DHL Internationa;
Service CRIE
Commission of the European Communities
May Courier

Source: Judgment of the Court of Justice of the European Communities in Case C-119/97P *(Union Francaise de l'Express et al v Commission et al)*, dated 4 March 1999.

(Note. This case has two aspects which are of great interest and importance. The first is factual and makes entertaining reading: it concerns the terms in which the Commission dismisses a complaint that it has not acted to deal with alleged infringements of Articles 85 and 86 of the EC Treaty. The Commission's letter is set out in Article 9 of the Court's judgment and given in full in the report below. It is hard to read the letter without feeling how cavalier, how literally dismissive and how thoroughly self-satisfied the officials responsible for the letter seem to be; and this is discreetly reflected in the Court's view that the Commission's duties go beyond its own appreciation in that letter. This leads to the second point, which is one of law. It is set out in paragraphs 94 to 96 of the judgment and - to paraphrase it - makes clear that, if anti-competitive effects continue after the practices which caused them have ceased, the Commission still has power to act and cannot plead that it is unnecessary to do so unless it has examined their extent. The Court therefore annulled the decision of the Court of First Instance upholding the Commission's decision. It should just be added that the judgment of the Court is not, at the time of writing, available in English - a lamentable state of affairs - and has therefore been translated by ourselves. The warning about the status of judgments issued on the Internet applies a fortiori.)

Judgment

1 On 22 March 1997, the Union Francaise de l'Express (UFEX), formerly the Syndicat Francais de l'Express International (SFEI), lodged an appeal against the judgment of the Court of First Instance dated 15 January 1997 (Case T-77/95: *SFEI et al v Commission*), in which the Court had rejected their action for the annulment of the Commission Decision, dated 30 December 1994, rejecting their complaint under Article 86 of the EC Treaty.

2 On 21 December 1990, SFEI, DHL International, Service CRIE and May Courier had lodged a complaint with the Commission claiming that there had been an infringement of Article 86 of the EC Treaty by La Poste, the French

postal service.

3 With regard to Article 86, the complainants had criticised the logistical and commercial help which La Poste had given to its subsidiary, the Societe Francaise de Messageries Internationales (SFMI, which became GDEW France in 1992), which was operating in the international express courier sector. The abuse alleged against La Poste consisted of benefiting SFMI's infrastructure on conditions which were abnormally advantageous so as to extend to the connected market of international express courier service the dominant position which it already held in the market for a basic postal service.

4 In a letter dated 10 March 1992, the Commission informed the complainants that their complaint had been rejected.

5 In its judgment (in Case T-36/92: *SFEI et al v Commission*), dated 30 November 1992, the Court of First Instance had declared inadmissible the action for annulment which had been taken by [the four complainants]. However, the judgment was annulled by the Court of Justice (in Case C-39/93:*SFEI et al v Commission*), dated 16 June 1994, which had referred the case back to the Court of First Instance.

6 In a letter dated 4 August 1994, the Commission withdrew the Decision which had been the subject of proceedings in the Court of First Instance. In a judgment dated 3 October 1994, (Case T-36/92: *SFEI et al v Commission*), the Court of First Instance therefore decided that there was no case on which it needed to act.

7 On 29 August, 1994, SFEI called on the Commission to take action, in accordance with Article 175 of the EC Treaty.

8 On 28 October 1994, the Commission addressed a letter to SFEI, on the basis of Article 6 of Commission Regulation 99/63, ... informing SFEI of its intention to reject the complaint.

9 After receiving the observations of SFEI, the Commission adopted the disputed Decision, which was in the following terms:

> The Commission refers to your complaint lodged with my services on 21 December 1990 to which was annexed a copy of a separate complaint lodged on 20 December 1990 with the French Competition Council. The two complaints concerned the express international services of the French postal administration.
>
> On 28 October 1994, the services of the Commission addressed a letter to you on the basis of Article 6 of Regulation 99/63, in which it was indicated that the elements contained in the initial proceedings did not allow the Commission to give a favourable response to your complaint about those aspects regarding Article 86 of the Treaty, and in which you were invited to submit your comments thereon.
>
> In your comments of 28 November last, you maintained your position on the abuse of the dominant position of the French Post Office and of SFMI.

On this basis and in the light of your comments, the Commission informs you in this letter of its final position on your complaint of 21 December 1990 concerning the opening of proceedings under Article 86.

The Commission considers, for the detailed reasons set out in its letter of 28 October last, that in the case in question there are insufficient elements proving that the alleged infringements continued to enable a favourable response to be given to your request. In this connection, your comments of 28 November last contain no new factor enabling the Commission to modify that conclusion, which is supported by the considerations set out below.

In the first place, the Green Paper relating to postal services in the single market, as well as the guidelines for the development of the Community's postal services, deal with among other things the main problems raised in SFEI's complaint. Although these documents contain propositions only *de lege ferenda*, they do have to be taken into account in evaluating the appropriateness of the use which it is making of its limited resources and particularly whether its services are employed in developing a regulatory framework for the future of the market for postal services rather than enquiring on its own initiative into alleged infringements brought to its notice.

In the second place, an enquiry conducted under Regulation 4064/89 concerning the joint venture (GD Net) created by TNT, La Poste and four other postal administrations, led to the Commission's publication of its Decision (IV.M.102) on 2 December 1991. In this decision, the Commission decided not to oppose the notified concentration and to declare it compatible with the common market. It attached particular importance to the evidence that, as regards the joint venture, "the proposed operation neither creates no strengthens a dominant position which would significantly restrict competition in the common market or in a significant part of it".

Several essential points in the Decision have a bearing on the impact which the former SFMI could have on competition: the exclusive access by SFMI to the facilities of La Poste were reduced within its field of activities and would come to an end within two years of the merger, thus being held at arm's length from any activity subordinate to those of La Poste. Any right of access granted by La Poste to SFMI would be offered, on the same terms, to any other express operator with which La Poste signed a contract.

This outcome combines in their entirety the solutions which you proposed for the future in your letter of 21 December 1990. You had insisted that SFMI should be required to pay for the services of the PTT at the same rate as if it bought them from a private company, assuming that SFMI chose to continue to use those services; that "there should be an end to all forms of aid and discrimination"; and that SFMI should adjust its prices according to the real value of the services offered by La Poste".

From then on, it is clear that the present and future competition

problems in the international express services were resolved in an adequate manner by the measures already taken by the Commission.

If you consider that the conditions imposed on La Poste in case IV.M.102 were not observed, particularly in the areas of transport and publicity, it is up to you to provide proof - so far as possible - and in that case to lodge a complaint on the basis of Article 3(2) of Regulation 17/62. However, statements "that at present the tariffs (leaving aside possible rebates) offered by SFMI remain substantially lower than those of members of SFEI" (page 3 of your letter of 28 November) and that "Chronopost uses P & T trucks as an aid to publicity" (statement annexed to your letter) must be supported by factual material to justify an enquiry by the Commission's services.

Action taken by the Commission under Article 86 of the Treaty aims to maintain genuine competition in the internal market. In the case of the Community market for express international services, taking into account the significant development set out in detail above, it would be necessary to provide new information about possible infringements of Article 86 to enable the Commission to justify its intention to investigate those activities.

Moreover, the Commission considers that it is not required to investigate possible infringements of the rules on competition which have taken place in the past if the sole object or effect of the investigation is to serve the individual interests of the parties. The Commission sees no point in undertaking an investigation under Article 86 of the Treaty.

For the reasons set out above, I am informing you that your complaint is rejected.

[Paragraphs 10 to 36 describe the application to the Court of First Instance to have the Commission's Decision annulled and the judgment of the Court of First Instance rejecting the application.]

The Appeal

37 In support of their appeal, the applicants rely on twelve pleas.

38 The first plea is that the Court of First Instance had distorted the contested Decision.

39 The second plea is that the Court of First Instance committed an error of law in stating that the Commission could base the contested Decision on another case concerning different parties, having a partly different subject and a separate legal basis.

40 The third and subsidiary plea is that the Court of First Instance, in proceeding in this way, introduced a contradiction in the reasoning of the disputed judgment.

41 The fourth plea is that the disputed judgment lacks a basis in law.

42 The fifth plea is that the Court of First Instance could not legally infer from the items in the file that the Commission could validly determine that the infringements had come to an end.

43 The sixth plea is that the Court of First Instance had misinterpreted the rules of law regarding the Community interest.

44 The seventh plea is that the Court of First Instance disregarded Article 86, read in conjunction with Articles 3(g), 89 and 155 of the EC Treaty.

45 The eighth plea is that the Court of First Instance misinterpreted the principles of equality, legal certainty and protection of legitimate expectations.

46 The ninth plea is that the Court of First Instance disregarded the notion of "comparable situations" in the context of its examination of the reasoning on the principle of equality.

47 The tenth plea is that the Court of First Instance misinterpreted the principle of good administration.

48 The eleventh plea is that the Court of First Instance failed to respond to a fundamental point in the applicants' case concerning the basis on which the Commission had rejected their complaint.

49 Finally, the Court of First Instance had committed errors of law in the application of the concept of misuse of powers in that it had not examined all the items referred to.

[Paragraphs 50 to 63 are concerned with the first three pleas, which were more or less summarily rejected. The fourth plea was also rejected; but the reasons were given in a little more detail.]

64 In their fourth plea, the applicants criticise the Court of First Instance for not having proceeded with the research necessary to establish whether the Commission was in a position to determine the alleged absence of subsidies passing between La Poste and its subsidiary.

65 It was their particular complaint not have taken into account a series of factors which they had brought to the Court's attention and which supported their thesis about the continuance of subsidies after 1991, such as the absence of any analytical accountability on the part of La Poste, the use of the latter's graphic mark by SFMI and an economic study submitted by the French government in the case which gave rise to the judgment dated 11 July 1996 (Case C-39/94, *SFEI et al v Commission*).

66 In this respect it is sufficient to recall that the appreciation by the Court of First Instance of evidence presented to it does not constitute a question of law subject to control by the Court in the context of an appeal, except where the evidence is distorted or where the material inexactitude of the Court's decisions results from documents in the file (see Case C-53/92, *Hilti v Commission*, paragraph 42; Case C-136/92, *Commission v Brazzelli Lualdi*, paragraphs 48 and 49; and Cases 241-2/91P, *ITP v Commission*, paragraph 67; see also the judgment of 17 September 1996 in Case 19/95P, *San Marco v*

Commission, paragraph 39). None of these supports the applicants.

67 The fourth plea is therefore inadmissible.

[In paragraphs 68 to 82, the fifth, sixth and eighth pleas are rejected.]

The seventh plea

83 In their seventh plea the applicants argue that the concept accepted by the Court of First Instance of the Commission's role in the context of enforcing Article 86 of the Treaty was mistaken. Contrary to what is said in paragraphs 56 to 58 of the contested judgment, the cessation of anti-competitive practices would not suffice to re-establish an acceptable competitive situation given the persistence of structural disequilibria which those practices had created. Intervention by the Commission in these circumstances would have been more consistent with its mission, which is to ensure the establishment and maintenance of a system of undistorted competition in the common market.

84 The applicants add that, in the case in point, the subsidies made over by La Poste to its subsidiary SFMI-Chronopost enabled the latter to enter the market for international express courier services and to acquire for itself in only two years a leading position. Even assuming that these subsidies had ceased, they would have altered the competitive situation and would necessarily have continued to distort it.

85 Determination of the infringements in question would have allowed the Commission to include in the contested Decision all measures tending towards the re-establishment of a healthy competitive situation.

86 It has to be remembered at the outset that, according to the settled case-law of the Court, the Commission is required to examine carefully the whole of the factual and legal matters brought to its attention by complainants (see Case 210/81, *Demo-Studio Schmidt v Commission*, paragraph 19; Case 298/83, *CICCE v Commission*, paragraph 18; and Cases 142 and 156/84, *BAT and Reynolds v Commission*, paragraph 20). Moreover, complainants are legally bound by the outcome of their complaint by a Commission Decision, which is capable of being the subject of jurisdictional proceedings (see Case C-282/95, *Guerin Automobiles v Commission*, point 36).

87 At the same time, Article 3 of Regulation 17/62 does not confer on the author of a demand submitted by virtue of that Article the right to insist on a definitive Commission Decision as to the existence or non-existence of the alleged infringement (see Case 125/78, *GEMA v Commission*, paras 17 and 18).

88 Indeed, the Commission, empowered under Article 89(1) of the EC Treaty to ensure the application of the principles laid down in Articles 85 and 86, is required to define and put in place the orientation of the Community's competition policy (see Case C-234/89, *Delimitis*, paragraph 44). To carry out this task efficiently, it has the right to award different degrees of priority to the complaints brought to its attention.

89 The Commission's discretionary power to this end is, however, not without limits.

90 On the one hand, the Commission is under an obligation to explain its reasons when it refuses to pursue the examination of a complaint.

91 Since the reasoning must be sufficiently precise and detailed to put the Court of First Instance in a position to exercise effective control of the Commission's exercise of its discretionary power to define its priorities (see Case C-19/93, Rendo et al v Commission, paragraph 27), that institution is required to set out the matters of fact on which depend the justification of the Decision and the legal considerations which led it to take that Decision (see *BAT and Reynolds v Commission*, cited above, paragraph 72; and Cases 43 and 63/82, *VBVB and VBBB v Commission*, paragraph 22).

92 On the other hand, the Commission cannot, when allocating priorities in the treatment of complaints referred to it, consider as excluded *a priori* from its field of activity certain situations which relate to the duties imposed on it by the Treaty.

93 In this context, the Commission is required to make an appreciation in each case of the gravity of the alleged restrictions on competition and the persistence of their effects. This obligations implies in particular that it should take account of the duration and importance of the infringements complained about, as well as their effects on the competitive situation within the Community.

94 When the anti-competitive effects continue after the cessation of the practices which caused them, the Commission therefore remains competent, by virtue of Articles 2, 3(g) and 86 of the Treaty, to act with a view to their elimination or neutralisation (see, in this respect, Case 6/72, *Europemballage and Continental Can v Commission*, paragraphs 24 and 25).

95 The Commission cannot therefore, solely on the fact that the practices alleged to be contrary to the Treaty have ceased, base its Decision on refusing to pursue, in the absence of a Community interest, a complaint against those practices, unless it has ascertained that the anti-competitive effects were not continuing and, as the case may be, that the gravity of the alleged restrictions of competition or the continuance of their effects were not of such a nature as to give the complaint a Community interest.

96 In view of the foregoing considerations, it has to be concluded that the Court of First Instance, in ruling, without making sure that it had ascertained that the anti-competitive effects were not continuing and, as the case may be, that the gravity of the alleged restrictions of competition or the continuance of their effects were not of such a nature as to give the complaint a Community interest, that the investigation of a complaint about past infringements was not one of the duties imposed on the Commission by the Treaty, but merely served to give the complainants evidence of a fault, so that they could obtain damages and interest before the national courts, represented an erroneous conception of the Commission's rile in the competition field.

97 The seventh plea is therefore well founded.

[Paragraphs 98 to 106 cover the ninth, tenth and eleventh pleas, which were rejected.]

107 In their twelfth plea, the applicants criticise the Court of First Instance for having ruled on the plea based on a misuse of power without having examined all the items of evidence on which they had relied.

108 Thus, in paragraph 117 of the contested judgment, the Court of First Instance had taken the view that a letter addressed by Sir Leon Brittan [then the Member of the Commission responsible for competition policy] to the President of the Commission did not constitute adequate evidence of a misuse of power because it had not been produced in the file and there was no way in which its existence could be confirmed.

109 When the applicants had expressly requested the Court of First Instance to order the production of the letter in question, the Court committed an error of law in as to the application of the principle of misuse of powers in ruling, without giving an opportunity to examine it, that it did not constitute adequate evidence.

110 It has to be pointed out that the Court of First Instance could not reject the applicants' request for production of a document apparently relevant to the outcome of the litigation for reasons that the document was not part of the file and that there was no way to confirm its existence.

111 Indeed, it is clear from paragraph 113 of the contested judgment that applicants had indicated the author, the addressee and the date of the letter whose production they had requested. Given these factors, the Court of First Instance could not simply reject the parties' allegations in the absence of proof when it was up to the Court, in meeting the applicants' request, to order the production of items bearing on the uncertainty which could exist as to the basis of these allegations or to explain the reasons for which such a document, in all the circumstances and whatever its contents, could not be relevant to the outcome of the case.

112 The twelfth plea is therefore well founded.

113 In view of the foregoing, it is appropriate to declare the seventh and twelfth pleas well founded and, consequently, to annul the contested judgment.

Reference back to the Court of First Instance

114 Under the first paragraph of Article 54 of the Statute of the Court of Justice, when the appeal is sustained, the Court of Justice annuls the decision of the Court of First Instance. It may also pass final judgment on the case itself, when there has been a judgment in the case or to refer the case back to the Court of First Instance for judgment. As there has not yet been a judgment in the case, it is referred back to the Court of First Instance.

Court's Ruling

The Court rules:

1 The judgment of the Court of First Instance of 15 January 1997 (Case T-77/95, *SFEI et al v Commission*) is annulled.

2 The case is referred back to the Court of First Instance.

3 Costs are reserved. □