COMPLAINTS (BROADCASTING): THE TF1 CASE

Subject: Complaints
State aids
Admissibility

Industry: Broadcasting
(Implications for other industries)

Parties: Television Francaise 1 SA (TF1)
Commission of the European Communities
Republic of France (Intervener)
Kingdom of Spain (Intervener)

Source: Judgment of the Court of Justice of the European Communities, dated 12 July 2001, in Joined Cases C-302/99 P and C-308/99 P, (*Commission of the European Communities v Television Francaise 1 SA*)

(Note. This slightly odd case is worth reporting briefly – it has been extensively edited - as a reminder of two principles of law. The first is that, where the Court decides that there is no need to give judgment in an action which has ceased to have any purpose, it is not necessary for it to examine the admissibility of that action; paragraph 28 of the judgment. The second is that, where all the other pleas put forward in an appeal have been rejected, any plea challenging the decision of the Court of First Instance on costs must be rejected as inadmissible by virtue of the second paragraph of Article 51 of the EC Statute of the Court of Justice, which provides that no appeal shall lie regarding only the amount of the costs or the party ordered to pay them; paragraph 31 of the judgment.)

1. By application lodged at the Court Registry on 10 August 1999, the Commission of the European Communities brought an appeal (Case C-302/99 P) pursuant to Article 49 of the EC Statute of the Court of Justice against the judgment of 3 June 1999 of the Court of First Instance in Case T-17/96 *TF1* v *Commission*, (hereinafter "the judgment under appeal").

2. By application lodged at the Court Registry on 13 August 1999, the French Republic brought an appeal (Case C-308/99 P) pursuant to Article 49 of the EC Statute of the Court of Justice against that same judgment.

The background to the action and the judgment under appeal

3. It is apparent from the judgment under appeal that, on 10 March 1993 the applicant at first instance, Télévision Française 1 SA (hereinafter "TF1"), a private television broadcasting channel, submitted a complaint to the Commission concerning the methods used to finance and operate the France-Télévision public broadcasting channels. It is common ground that that complaint

expressly referred to infringement of Article 85 (now Article 81), Article 90(1) (now Article 86(1)) and Article 92 (now, after amendment, Article 87) of the EC Treaty.

4. By letter of 3 October 1995, TF1 formally requested the Commission and, in so far as was necessary, gave it formal notice to define its position and act upon the submissions set out in the complaint of 10 March 1993.

5. By letter of 11 December 1995, the Commission informed TF1 that its enquiries into TF1's complaint were still in progress.

6. On 2 February 1996, TF1 brought an action before the Court of First Instance pursuant to the third paragraph of Article 175 (now Article 232) of the EC Treaty seeking a declaration that, by not defining its position on the complaint which it had submitted to the Commission, the latter had failed to fulfil its obligations under the Treaty and, in the alternative, pursuant to the fourth paragraph of Article 173 (now, after amendment, the fourth paragraph of Article 230) of the EC Treaty seeking annulment of the purported decision rejecting the applicant's complaint, set out in a letter from the Commission of 11 December 1995.

7. During the course of those proceedings, the Commission placed before the Court a copy of its letter of 15 May 1997 sent to TF1 pursuant to Article 6 of Commission Regulation EEC/99/63 of 25 July 1963 on the hearings provided for in Article 19(1) and (2) of Council Regulation 17, in which it informed TF1 that, on the basis of the information in its possession, it was unable to uphold TF1's complaint in so far as it alleged infringement of Articles 85 and 86 (now Articles 81 and 82) of the EC Treaty. The Commission invited TF1 to submit its comments within two months of 15 May 1997, adding that, having considered the allegation of infringement of Article 90 of the Treaty, it had been unable to establish that the matters complained of amounted to an infringement.

8. The Court of First Instance held, at paragraph 57 of the judgment under appeal, that TF1's action, in so far as it was directed against the Commission's failure to act pursuant to Article 90 of the Treaty, was admissible.

9. The Court also considered, at paragraphs 99 to 103 of the judgment under appeal, to what extent the Commission's letter of 15 May 1997 constituted the definition of a position, within the meaning of the second paragraph of Article 175 of the Treaty, putting an end to the Commission's inaction and rendering the action devoid of purpose in so far as it concerned the Commission's alleged failure to act pursuant to Article 90 of the Treaty.

10. At paragraph 103 of the judgment under appeal, the Court concluded that the letter did constitute the definition of a position and that there was therefore no longer any need to adjudicate the claim for a declaration of failure to act in so far as a declaration was sought that the Commission had unlawfully failed to act pursuant to Article 90 of the Treaty.

11. Furthermore, at paragraph 110 of the judgment under appeal, the Court held that, pursuant to Article 87(4) of the Rules of Procedure of the Court of First Instance, the French Republic would bear its own costs. It also ordered the French Republic to bear the costs incurred by TF1 as a result of its intervention.

12. By the judgment under appeal, the Court of First Instance:
1.[Declared] that the Commission [had] failed to fulfil its obligations under the EC Treaty by failing to adopt a decision concerning the part of the complaint lodged by Télévision Française 1 SA on 10 March 1993 concerning State aid;
2.[Held] that there [was] no need to adjudicate on the allegation that the Commission [had] failed to act pursuant to Articles 85 (now Article 81 EC) and 90 (now Article 86 EC) of the EC Treaty;
3.[Declared] the action inadmissible in so far as it [was] directed against the Commission's failure to act under Article 86 of the EC Treaty (now Article 82 EC);
4.[Held] that there [was] no need to adjudicate on the alternative claim for annulment;
5.[Ordered] the Commission to bear its own costs together with those incurred by the applicant, with the exception of the costs incurred by the applicant as a result of the intervention of the French Republic;
6.[Ordered] the French Republic to bear its own costs, together with the costs incurred by the applicant as a result of its intervention.

Procedure before the Court of Justice

13. By its appeal, the Commission challenges the judgment under appeal in so far as it was held therein that TF1's action was admissible to the extent that it was directed against the Commission's failure to act pursuant to Article 90 of the EC Treaty. It thus asks the Court:
-to set aside the judgment under appeal in so far as it was held therein that TF1's action was admissible to the extent that it was directed against the Commission's failure to act pursuant to Article 90 of the Treaty;
-to declare TF1's action inadmissible in so far as it is directed against the Commission's failure to act pursuant to Article 90 of the Treaty;
-to order TF1 to pay the costs of the proceedings before the Court of Justice and to give a new ruling on the costs of the proceedings before the Court of First Instance, limiting the order against the Commission so that it is commensurate with the outcome of the present appeal.

[Paragraphs 14 to 20 set out the respective claims of the parties and the circumstances in which the Republic of France and the Kingdom of Spain were admitted as interveners.]

The appeals against the finding that TF1's action, in so far as it is directed against the Commission's failure to act pursuant to Article 90 of the Treaty, is admissible

21. In support of its appeal against the second paragraph of the operative part of the judgment under appeal, by which the Court of First Instance necessarily,

albeit implicitly, acknowledged the admissibility of TF1's action in so far as it was directed against the Commission's failure to act pursuant to Article 90 of the Treaty, the French Government submits that that paragraph must be read in the light of the grounds of the judgment, which are indispensable to understanding the precise meaning of the ruling in the operative part.

22. According to the French Government, both the second paragraph of the operative part and, in so far as may be necessary, paragraphs 48 to 57 of the grounds of the judgment under appeal confirm that it wholly failed in its submissions on the point, within the meaning of Article 49 of the EC Statute of the Court of Justice, and that, consequently, it ought to be allowed to contest that part of the judgment at first instance by means of an appeal.

23. The Commission also asks for the judgment under appeal to be set aside to the extent that TF1's action for failure to act pursuant to the third paragraph of Article 175 of the Treaty was thereby held to be admissible.

24. On this point, it should be observed that, pursuant to the first paragraph of Article 49 of the EC Statute of the Court of Justice, an appeal may be brought before the Court of Justice against final decisions of the Court of First Instance and decisions of that Court disposing of the substantive issues in part only or disposing of a procedural issue concerning a plea of lack of competence or inadmissibility.

25. In the present case, the final decision for the purposes of the provision of the EC Statute of the Court of Justice just mentioned, and the one to which the French Government explicitly refers in its appeal, namely the second paragraph of the operative part of the judgment under appeal, is the Court of First Instance's ruling that there was no need to adjudicate on the allegation that the Commission had failed to act pursuant to Article 90 of the Treaty

26. The grounds on which that ruling is based are set out in paragraphs 99 to 103 of the judgment under appeal, which explain that the claim of failure to act ceased to have any purpose once the Commission expressed its position.

27. Those grounds alone provide a sufficient legal basis for the decision of the Court of First Instance and thus, in any event, any errors in the grounds of the judgment under appeal concerning the admissibility of TF1's claim of failure to act, as alleged by the Commission and the French Republic, have no effect on the operative part of that judgment.

28. Indeed, it is clear from the consistent case-law of the Court of Justice that, where the Court decides that there is no need to give judgment in an action which has ceased to have any purpose, it is not necessary for it to examine the admissibility of that action (see, in particular, the judgment in Joined Cases C-15/91 and C-108/91, *Buckl and Others* v *Commission*, paragraphs 14 to 17, and the order of 10 June 1993 in Case C-41/92, *Liberal Democrats* v *Parliament*, paragraph 4).

29. It follows from this that the plea whereby the Commission and the French Republic challenge the second paragraph of the operative part of the judgment under appeal is inoperative, and in this regard their appeals must be dismissed.

The plea raised by the French Republic challenging the sixth paragraph of the operative part of the judgment under appeal

30. The French Republic asks for the sixth paragraph of the operative part of the judgment under appeal whereby the Court of First Instance ordered it to bear its own costs together with those incurred by TF1 as a result of its intervention to be set aside.

31. In this connection, suffice it to say that, according to settled case-law, where all the other pleas put forward in an appeal have been rejected, any plea challenging the decision of the Court of First Instance on costs must be rejected as inadmissible by virtue of the second paragraph of Article 51 of the EC Statute of the Court of Justice, which provides that no appeal shall lie regarding only the amount of the costs or the party ordered to pay them (see, in particular, the judgment in Case C-396/93 P, *Henrichs* v *Commission*, paragraph 66, and the order of 13 December 2000 in Case C-44/00 P, *Sodima* v *Commission*, paragraph 93).

[Paragraphs 32 to 34 are concerned with costs, which are dealt with below.]

Court's Ruling

The Court hereby:
1. Dismisses the appeals;
2. Orders the Commission to pay the costs of Case C-302/99 P;
3. Orders the French Republic to pay the costs of Case C-308/99 P;
4. Orders the Kingdom of Spain to bear its own costs in both actions. ■

Producers of Plastic Film

Following journalists' enquiries, the Commission's spokesman for competition policy has confirmed that, on 22 August 2001, Commission inspectors and officials from national competition authorities began simultaneous surprise inspections at the premises of six European producers of plastic film in Austria, Denmark, the Netherlands, Italy, Sweden and the UK. The purpose of these inspections was to uncover evidence of suspected price fixing in the European market for plastic film used in the industrial and agricultural sectors. Customers for these products are present in the following market sectors: Food & Drink; Packaging; Farming; Agricultural Merchants; Horticultural; Building products and Chemicals, among others. The Commission's investigation is at a preliminary stage and does not prejudge the final outcome. (Source: Commission Memorandum MEMO/01/287, dated 5 September 2001)