COMPLAINTS (TELEVISION): THE METROPOLE CASE

Subject: Complaints
Annulment (of Commission Decision)
Trade associations

Industry: Television; broadcasting
(Implications for other industries)

Parties: Métropole Télévision SA
Commission of the European Communities

Source: Judgment of the Court of First Instance, dated 21 March 2001 in Case
T-206/99 (*Métropole Télévision SA v Commission of the European Communities*)

(Note. This case adds to the body of case-law on the Commission's handling of complaints by parties aggrieved by what they regard as anti-competitive behaviour, in this case the alleged refusal of the European Broadcasting Union to admit the complainant to its membership. When the Commission rejects a complaint, it need not set out all the facts leading to its Decision; but it must state its reasoning clearly enough for the Court to be able to judge, if called on to do so, the merits of the Commission's case. In the present case, the Commission had already reached an opinion on the merits five years previously and had had its Decision annulled. This did not prevent the Commission from reverting to the position before that annulment and, if it thought fit, taking a different view of the circumstances; but, whatever it decides, it must state its reasons for its revised opinion. The present case, by the way, contains some interesting views on the need for trade association rules to be clear and non-discriminatory.)

Judgment

1. The European Broadcasting Union (EBU) is a non-profit-making trade association of radio and television organisations set up in 1950 with headquarters in Geneva (Switzerland). According to Article 2 of its Statutes, as amended on 3 July 1992, its objectives are to represent its members' interests in the field of programmes and in the legal, technical and other spheres and in particular to promote radio and television programme exchanges by all possible means - for example, Eurovision and Euroradio - and any other form of cooperation among its members and with other broadcasting organisations or groups of such organisations, and also to assist its active members in negotiations of all kinds and, when asked, to negotiate on their behalf.

2. The Statutes of the EBU had already been amended on 9 February 1988, to limit the number of members of Eurovision in accordance with its objectives and

its method of operation, those members being defined as a particular group of broadcasters.

3. Article 3 of the Statutes, in the version of 3 July 1992, reads as follows:

> 1 There are two categories of EBU members:
> - active members
> - associate members.
>
> ...
>
> 3Active membership of the EBU is open to broadcasting organisations or groups of such organisations from a member country of the International Telecommunication Union (ITU) situated in the European Broadcasting Area as defined by the Radio Regulations annexed to the International Telecommunication Convention, which provide in that country, with the authorisation of the competent authorities, a broadcasting service of national character and national importance, and which furthermore prove that they fulfil all the conditions set out below:
> (a) they are under an obligation to cover the entire national population and in fact already cover at least a substantial part thereof, while using their best endeavours to achieve full coverage in due course;
> (b) they are under an obligation to, and actually do, provide varied and balanced programming for all sections of the population, including a fair share of programmes catering for special/minority interests of various sections of the public, irrespective of the ratio of programme cost to audience;
> (c) they actually produce and/or commission under their own editorial control a substantial proportion of the programmes broadcast.

4. Article 6 of the Statutes, in the version of 3 July 1992, reads as follows:

> 1 Any member no longer fulfilling the conditions described in Article 3 shall cease to be a member of the EBU by decision of the Administrative Council, which will have immediate effect, subject to a ratifying decision by the following General Assembly taken by a majority of at least three-quarters of the votes that may be cast by those present, if members holding together at least three-quarters of the totality of EBU votes are present or represented. However, this shall not apply to members which on 1 March 1988 did not meet all the requirements laid down in Article 3[3] (as entered into force that day). For such members, the membership conditions laid down in the previous version of Article 3 continue to be applicable.

5. Eurovision constitutes the main framework for the exchange of programmes among the active members of the EBU. It has been in existence since 1954 and is one of the main objectives of the EBU. According to Article 3(6) of the Statutes, in the version of 3 July 1992, Eurovision is a television programme exchange system organised and coordinated by the EBU, based on the understanding that members offer to the other members, on the basis of reciprocity, ... their coverage of sports and cultural events taking place in their countries and of potential interest to other members, thereby enabling each other to provide a high quality service in these fields to their respective national audiences. Eurovision members

are active members of the EBU as well as consortia of such members. All active members of the EBU may participate in a system of joint acquisition and sharing of television rights (and of the costs relating thereto) to international sports events, which are referred to as Eurovision rights.

6. Until 1 March 1988, the benefit of the services of the EBU and Eurovision was exclusively reserved to their members. However, when the Statutes were amended in 1988, a new paragraph (paragraph 6) was added to Article 3 providing that contractual access to Eurovision may be granted to associate members and non-members of the EBU.

7. Following a complaint of 17 December 1987 from the television channel Screensport, the Commission investigated the compatibility of the rules governing that system of joint acquisition and sharing of television rights to sports events with Article 85 of the EC Treaty (now Article 81 EC). The complaint related in particular to the refusal of the EBU and its members to grant it sub-licences for the retransmission of sports events. On 12 December 1988, the Commission sent the EBU a statement of objections concerning the rules governing the acquisition and use of television rights to sports events within the framework of the Eurovision System, which are generally exclusive in nature. The Commission declared itself willing to envisage an exemption in favour of those rules on condition that the EBU and its members accepted an obligation to grant non-members sub-licences for a substantial part of the rights in question and on reasonable terms.

8. On 3 April 1989, the EBU notified the Commission of its Statutes and other rules on the acquisition of television rights to sports events, the exchange of sports broadcasts in the context of Eurovision and contractual access of third parties to such broadcasts, with a view to obtaining negative clearance or, failing that, an exemption under Article 85(3) of the Treaty.

9. After EBU had agreed to relax the rules for obtaining sub-licences for the broadcasts in question, the Commission adopted Decision 93/403/EEC of 11 June 1993 relating to a proceeding pursuant to Article 85 of the EEC Treaty (OJ 1993 L 179, p. 23), whereby it granted an exemption under Article 85(3) ('the exemption decision).

10. That decision was annulled by the judgment of the Court of First Instance in Joined Cases T-528/93, T-542/93, T-543/93 and T-546/93, *Métropole Télévision and Others v Commission* (the judgment of 11 July 1996).

11. Since 1987, Métropole Télévision (M6) has lodged an application to join the EBU six times. Each time, its application has been rejected on the ground that it did not fulfil the membership conditions laid down by the EBU's Statutes. Following the last refusal of the EBU, on 2 June 1997, M6 filed a complaint with the Commission, complaining of EBU's practices towards it, and in particular of the systematic *a priori* refusal of its applications for admission.

12. By decision of 29 June 1999 (the contested decision), the Commission dismissed the applicant's complaint.

[Paragraphs 13 to 17 concern the forms of order sought by the parties.]

Law

18. In its complaint, the applicant made essentially two claims. In the first, it complained of the fact that the EBU continued to invoke against it the former admission criteria under its Statutes in breach of the judgment of 11 July 1996 annulling the exemption decision. Taking the view that those admission criteria could no longer be applied, the applicant requested the Commission to take all necessary steps to put an end to the EBU's practices, and in particular to order the latter to give it access to the television rights to sports events acquired by the EBU on behalf of its members within the Eurovision framework, and to give it access to news pictures within the framework of the system for exchanging such pictures called News Access/EBU, on the same conditions as those enjoyed by rival undertakings, namely live retransmission.

19. In its second claim, the applicant complained of the 'acquired rights clause laid down in Article 6 of the EBU Statutes (see paragraph 4 above), allowing that association to impose on the applicant conditions for joining that its members did not fulfil. In that respect, M6 complained, in particular, of the situation of CANAL+ and certain subsidiaries of television channels which were members of the EBU, such as Eurosport and LCI, which benefited from the EBU's system of joint acquisition without fulfilling the criteria which the EBU imposed on the applicant for joining.

20. In the contested decision, the Commission rejected the complaint because, first, it considered that it did not have the necessary legal powers to order the EBU to grant M6 live access to television rights for sporting events acquired by the association on behalf of its members, and, secondly, it did not share the opinion of M6 as to the scope of the judgment of 11 July 1996. In that respect, the Commission stated:

> The Court of First Instance did not as such express a view as to the applicability of [Article 81(1) EC] to the membership rules, any more than did the Commission, as is proved by the wording of Article 1 of the exemption decision of 11 June 1993, which is limited to granting exemption for the system of acquiring television rights for sporting events; to the exchange of sports broadcasts in the context of Eurovision and contractual access of third parties to such broadcasts. That Article 1 does not at any time refer to the membership rules, which are therefore not at issue. The Commission considers that the former membership rules of the EBU do not fall within the scope of [Article 81(1) EC]; that is to say the criteria are not in themselves restrictions on competition. (Point 5.1.)

21. Thirdly, concerning the applicant's second claim, the Commission made the following observation:

It should be noted that CANAL+ does not participate in the EBU's joint acquisition group for sports rights. (Point 6.)

22. The applicant makes two pleas in law in support of its action. The first, its main argument, alleges infringement of the Treaty and of the rules concerning its application. The second, in the alternative, alleges misuse of powers.

The plea alleging infringement of the Treaty and of the rules concerning its application

[Paragraphs 23 to 34 set out the parties' arguments.]

Findings of the Court

35. It should be noted as a preliminary observation that, when the Court of First Instance annuls an act of an institution, that institution is required, under Article 233 EC, to take the measures necessary to comply with the Court's judgment. In that connection, both Community courts have held that, in order to comply with their judgments and to implement them fully, the institution is required to observe not only the operative part of the judgment but also the grounds which led to the judgment and constitute its essential basis, inasmuch as they are necessary to determine the exact meaning of what is stated in the operative part. It is those grounds which, on the one hand, identify the precise provision held to be illegal and, on the other, indicate the specific reasons which underlie the finding of illegality contained in the operative part and which the institution concerned must take into account when replacing the annulled measure (Joined Cases 97/86, 99/86,193/86 and 215/86, *Asteris v Commission*, paragraph 27; Case T-224/95, *Tremblay v Commission*, paragraph 72).

36. As regards the interpretation of the judgment of 11 July 1996, it should be noted that, at paragraph 94, the Court held: "... according to point 50 of the [exemption] decision, competition vis-à-vis purely commercial channels, which are not admitted as members, is to some extent distorted by the EBU's membership rules, since those channels cannot participate in the rationalisation and cost savings achieved by the Eurovision System. According to point 72 et seq., the restrictions of competition caused by those membership rules are nevertheless indispensable within the meaning of Article 85(3)(a) of the Treaty."

37. To assess whether the conditions set out in Article 85(3) of the Treaty were fulfilled, the Court first examined the three conditions imposed on channels wishing to join the EBU: the obligation to cover the entire national population, the obligation to provide varied and balanced programming for all sections of the population, and the obligation to produce a substantial proportion of the programmes broadcast themselves. It then stated that, in accordance with settled case-law, the Commission had to examine whether those membership rules were 'objective and sufficiently determinate so as to enable them to be applied uniformly and in a non-discriminatory manner vis-à-vis all potential active members (see, for example, Case 26/76, *Metro v Commission*, paragraph 20). The Court added: "The indispensable nature of the restrictions of competition

resulting from those rules cannot be correctly assessed unless that prior condition is fulfilled" (paragraph 95 of the judgment of 11 July 1996).

38. It then held that: "the content of the three conditions laid down by Article 3(3) of the EBU's Statutes relating to coverage of the population, to programming and to the production of the programmes broadcast is not sufficiently determinate. Since they refer essentially to unquantified quantitative criteria, they are vague and imprecise. Consequently, in the absence of further specification, they cannot form the basis for uniform, non-discriminatory application" (paragraph 97 of the judgment of 11 July 1996).

39. The Court of First Instance concluded that the Commission was wrong to refrain from carrying out an examination of the application of the three membership criteria in the case in question and held that the Commission should have concluded that it was not even in a position to assess whether the corresponding restrictions were indispensable within the meaning of Article 85(3)(a) of the Treaty. Consequently, it was not entitled to exempt them on that ground (paragraph 99 of the judgment of 11 July 1996).

40. It therefore follows from the judgment of 11 July 1996 that, as the EBU's membership rules were not sufficiently determinate in content, they were not capable of being applied uniformly and without discrimination and could not therefore benefit from an exemption under Article 81(3) EC.

41. However, contrary to what the applicant maintains, the Court did not rule on the application of Article 81(1) EC to the membership criteria. In paragraph 94 of the judgment of 11 July 1996, the Court merely found that the Commission had held in the exemption decision that the membership rules restricted competition, but did not give a ruling on that qualification. In the action for annulment brought against the exemption decision, the application of Article 81(1) EC to the membership rules was not raised by the applicants. Since that is a plea which goes to the substantive legality of a decision, it was not for the Court to raise it of its own motion in an action for annulment brought pursuant to Article 230 EC (see, to that effect, Case C-367/95 P, *Commission v Sytraval and Brink's France*, paragraph 67).

42. In those circumstances, the judgment of 11 July 1996 cannot have the effect of preventing the Commission from going back on its position concerning the application of Article 81(1) EC to the EBU's membership rules. Such a change of position did, however, require a statement of reasons.

43. In that respect, and in so far as the insufficiency or lack of reasoning constitutes an infringement of essential procedural requirements within the meaning of Article 230 EC and is a plea of public policy which the Community judicature must raise of its own motion (*Sytraval*, paragraph 67), it needs to be examined whether sufficient reasons are stated for such an adoption of position.

44. For that purpose, it should be recalled that, according to consistent case-law, the statement of reasons on which a decision adversely affecting a person is based

must, first, be such as to enable the person concerned to ascertain the matters justifying the measure adopted so that, if necessary, he can defend his rights and verify whether the decision is well founded and, secondly, enable the Community judicature to exercise its power of review as to the legality of the decision. In that connection, the Commission is not obliged, in stating the reasons for the decisions which it takes to ensure the application of the competition rules, to adopt a position on all the arguments relied on by the persons concerned but need only set out the facts and legal considerations which are of decisive importance in the context of the decision (see, for example, Case T-5/93, *Tremblay v Commission*, paragraph 29).

[Paragraphs 45 to 50 refer to the Commission's decision.]

51. It therefore follows from a reading of the exemption decision as a whole that, contrary to what it claims, the Commission considered in 1993 that the EBU's membership rules were restrictive of competition and that they could be exempted from the application of Article 85(1) of the Treaty.

52. Moreover, none of the arguments raised by the Commission is capable of calling that conclusion into question. Even if the heading of a decision were relevant in determining its scope, it is sufficient to note that the heading of the exemption decision contains the words 'EBU/Eurovision system and not, as the Commission claims, merely the words 'Eurovision system. Furthermore, concerning the subject-matter of the application for negative clearance or exemption submitted by the EBU and on the basis of which the Commission adopted the exemption decision, it is also sufficient to note that the membership rules were notified in point I of Title III of that application.

53. In those circumstances, the dismissal of the applicant's complaint on the ground that the former membership rules of the EBU do not fall within the scope of [Article 81(1) EC], that is to say, the criteria are not in themselves restrictions on competition, constitutes a substantial change in the Commission's position which it has not in any way justified. It follows that the statement of reasons for the contested decision does not allow the applicant to ascertain the grounds on which its complaint was dismissed and that the Commission has not therefore complied with its obligation under Article 253 EC.

54. That lack of reasoning is all the more serious if the contested decision is placed in its context and, in particular, if it is interpreted in the light of the correspondence exchanged between the EBU and the applicant concerning the latter's application for membership. It emerges from that correspondence, and in particular from the letters of 20 December 1996 and 8 May and 3 June 1997, that the EBU's membership rules and, more particularly, the consequences of the annulment by the Court of First Instance of the exemption which those rules previously enjoyed, are at the heart of the difference between the applicant and the EBU, in relation to which the Commission was led to take a position. Therefore, the Commission could not remove the EBU's membership conditions from the argument without putting forward grounds enabling the applicant to understand such a decision.

55. It follows that the contested decision must be annulled for insufficient statement of reasons.

56. In its second claim, the applicant argues that the Commission did not reply to the part of the complaint concerning the discrimination which it suffered from the EBU vis-à-vis some of its members.

57. It should be noted that, according to consistent case-law, where the Commission has a power of appraisal in order to carry out its duties, respect for the rights guaranteed by the Community legal order in administrative procedures is all the more fundamental. Those guarantees include, in particular, the duty of the competent institution to examine carefully and impartially all the relevant aspects of the individual case (Case C-269/90, *Technische Universität München*, paragraph 14; and Case T-44/90, *La Cinq v Commission*, paragraph 86).

58. Thus, in the context of investigating applications submitted to the Commission pursuant to Article 3 of Regulation No 17, the Court of First Instance has held that 'although the Commission cannot be compelled to conduct an investigation, the procedural safeguards provided for by Article 6 of Regulation No 99/63 oblige it nevertheless to examine carefully the factual and legal particulars brought to its notice by the complainant in order to decide whether they disclose conduct of such a kind as to distort competition in the common market and affect trade between the Member States (see Case T-7/92, *Asia Motor France v Commission*, paragraph 35, and the judgments referred to therein).

59. Lastly, although in accordance with the case-law of the Court of First Instance cited above the Commission is not obliged to investigate each of the complaints lodged with it, in contrast, once it decides to proceed with an investigation, it must, in the absence of a duly substantiated statement of reasons, conduct it with the requisite care, seriousness and diligence so as to be able to assess with full knowledge of the case the factual and legal particulars submitted for its appraisal by the complainants (*Asia Motor France v Commission*, cited above, paragraph 36).

60. It is in the light of those considerations that it needs to be assessed whether the contested decision contains an appropriate examination of the factual and legal particulars submitted for the Commission's appraisal.

61. In point 5 of the complaint, the applicant states that Article 5 of the EBU's Statutes expressly provided, in the 1988 version, that any member which did not fulfil the conditions imposed in order to become an active member of the EBU ceased to belong to that association. However, to take account of the rights acquired by former members, Article 21 of the Statutes provided that Article 3(2) (now Article 3(3) in the 1992 version) of the Statutes would not be applicable to bodies which, at the time of its entry into force on 1 March 1988, were already active members and did not fulfil all the membership conditions laid down by that

latter provision. The applicant states that, in the 1992 version of the EBU's Statutes, the content of Article 21, cited above, appears in Article 6.

62. It then states that a company which was a member of the EBU before 1 March 1988 could retain that capacity even if it had never satisfied the membership conditions notified to the Commission. The applicant thus points out in its complaint that 'thanks to that article, CANAL+ remained an active member of theEBU even though that channel never fulfilled the membership criteria before they were annulled by the Court of First Instance, in particular as to the coverage of national territory, which does not exceed 72%. According to the applicant, the situation of CANAL+ was the most striking example of the competitive disadvantage which it suffered, especially 'if one bears in mind that the EBU's main complaint against [the applicant] was always that it did not offer sufficient coverage of the national population.

63. At the hearing, the Commission stated that CANAL+ no longer formed part of the Eurovision system but that it continued to enjoy rights previously acquired.

64. It should be remembered that, when examining complaints, the Commission is required to assess in each case how serious the alleged interferences with competition are and how persistent their consequences are. That obligation means in particular that it must take into account the duration and extent of the infringements complained of and their effect on the competition situation in the Community.

65. In deciding to dismiss a complaint of practices allegedly contrary to the Treaty, the Commission cannot therefore rely solely on the fact that those practices have ceased, without having ascertained whether anti-competitive effects still continue (see, to that effect, Case C-119/97 P, *UFEX v Commission*, paragraphs 92 to 96).

66. In this case, the Commission refused to examine the part of the complaint concerning the EBU's treatment of CANAL+, giving as its reason the mere fact that the practices allegedly contrary to the Treaty had ceased in that CANAL+ no longer formed part of the Eurovision system, thereby omitting in this case to assess the possible persistence of anti-competitive effects and their impact on the market in question, consequently infringing the obligations upon it when examining a complaint for infringement of Article 81 EC.

67. It follows from the whole of the above that the contested decision must be annulled on the grounds that, first, the Commission infringed its obligation to state reasons under Article 253 EC, and, second, it infringed the obligations which it has when dealing with complaints of infringements of competition law.

[The Court annulled the Commission's decision of 29 June 1999, which had rejected the complaint submitted by Métropole Télévision SA, and ordered the Commission to pay the costs.] ■