PROCEDURE (GLASS): THE KISH CASE

Subject: Procedure
Admissibility
Complaints
Relevant market

Industry: Glass
(Implications for other industries)

Parties: Kish Glass Co. Ltd
Commission of the European Communities
Pilkington United Kingdom Ltd (intervener)

Source: Order of the Court of Justice of the European Communities, dated 18 October 2001, in Case C-241/00 P (Kish Glass Co. Ltd v Commission of the European Communities)

(Note. Although this appeal, from a judgment of the Court of First Instance in 2000, reported in our June 2000 issue, on page 137, was unsuccessful, it has three points of interest: first, in the discussion of the admissibility of an action in a case in which "it is not likely to procure any advantage to the party bringing it" discussed in paragraphs 19ff; second, in a reminder of the rights of complainants, discussed in paragraphs 30ff; and, third, in the rejection, in paragraphs 38ff, of a largely factual argument about the geographical market, on the grounds that this was not an appropriate matter for appeal. This last point is undoubtedly correct in law, but is nevertheless unsatisfactory, since the ruling of the Court of First Instance on the relationship between transport costs and the geographical market was not entirely convincing.)

Order

1. By application lodged at the Court Registry on 15 June 2000, Kish Glass Co. Ltd (hereinafter Kish Glass) brought an appeal under Article 49 of the EC Statute of the Court of Justice against the judgment of the Court of First Instance of 30 March 2000 in Case T-65/96 (*Kish Glass v Commission*) (hereinafter the judgment under appeal) in which it dismissed the action brought by Kish Glass for annulment of the Commission Decision of 21 February 1996 (IV/34.193 - Kish Glass, hereinafter the contested decision) rejecting the complaint made by the applicant on 17 January 1992 pursuant to Article 3(2) of Council Regulation 17 of 1962, alleging an infringement of Article 86 (now Article 82)of the EC Treaty.

Facts and legal background to the dispute

2. The judgment under appeal sets out the facts behind the action before the Court of First Instance and the legal background as follows:

[The statement sets out the facts and concludes with paragraph 18.]

> 18 By decision of 21 February 1996, received by the applicant on 1 March 1996, the Commission definitively rejected the complaint lodged by Kish Glass (Case IV/34.193 - Kish Glass, hereinafter the contested decision). The Commission maintained its previous position that the relevant product market was the sale of float glass of all thicknesses to dealers, that the relevant geographical market was the Community as a whole, or at least the northern part of the Community, and that Pilkington did not hold a dominant position on that market.

3. It is against that background that Kish Glass brought an action before the Court of First Instance on 11 May 1996.

The judgment under appeal

4. By the judgment under appeal, the Court of First Instance dismissed the action brought by Kish Glass in its entirety.

5. First, in paragraphs 32 to 39 of the judgment under appeal, the Court of First Instance dismissed as unfounded the plea by Kish Glass alleging breach of the right to be heard and of the principle of legal certainty and misuse of powers.

6. Second, in paragraphs 44 to 47 of the judgment under appeal, the Court of First Instance dismissed as unfounded the plea by Kish Glass alleging breach of procedural rules.

7. Third, in paragraphs 51 to 53 of the judgment under appeal, the Court dismissed as unfounded the plea by Kish Glass alleging breach of essential procedural requirements and of the principle of legal certainty.

8. Fourth, in paragraphs 62 to 70 of the judgment under appeal, the Court dismissed as unfounded the plea by Kish Glass alleging a manifest error of assessment in the definition of the relevant product market.

9. Fifth, in paragraphs 81 to 100 of the judgment under appeal, the Court dismissed as unfounded the plea by Kish Glass alleging a manifest error of assessment of the geographical market.

The appeal

10. In its appeal Kish Glass claims that the Court should:
- annul the judgment under appeal and the contested decision;
- order the Commission to bear the costs, including those incurred in proceedings before the Court of First Instance.

11. The Commission contends that the Court should:
- dismiss the appeal as inadmissible or, in the alternative, as unfounded;

- order Kish Glass to bear the costs.

12. Pilkington contends that the Court should:
- dismiss the appeal as unfounded;
- order Kish Glass to bear the costs.

13. Kish Glass relies on three pleas in support of its appeal, the first alleging the misinterpretation by the Court of First Instance of the requirements of Article 11 of Regulation 17, the second alleging the misapplication by the Court of First Instance of the case-law of the Court of Justice concerning the rights of a complainant and the third alleging the misapplication by the Court of First Instance of Article 190 (now Article 253) of the EC Treaty and misrepresentation of the evidence put before the Court of First Instance.

14. As a preliminary point, it must be observed that, under Article 119 of the Rules of Procedure of the Court of Justice, where the appeal is clearly inadmissible or clearly unfounded, the Court may at any time dismiss it by reasoned order.

Admissibility of the appeal

15. The Commission contends that the appeal is inadmissible in its entirety on the ground that it is not likely to procure any advantage to the party bringing it.

16. In the contested decision the Commission dismissed the argument of Kish Glass to the effect that Pilkington held a dominant position on the market in 4 mm float glass in Ireland, on the ground that both the analysis of the relevant product market and that of the geographical market were incorrect. In other words, in order to challenge the contested decision it is necessary to refute both aspects of the Commission's analysis.

17. Although the appellant's third plea relates to the geographical market selected by the Commission in the contested decision, the Commission takes the view that the appeal by Kish Glass does not challenge the part of the judgment under appeal which confirms its analysis as to the relevant product market.

18. Therefore, according to the Commission, Kish Glass has not established that, if the appeal were granted, it would affect the result brought about by the contested decision. The treatment of the first two pleas relied on by the appellant, which are of a procedural nature, is not liable to alter that conclusion since, even if those pleas were upheld, they could not, in any event, affect the legality of the contested decision.

19. Kish Glass counters that, in relying on the inadmissibility of the appeal on the ground that the third plea of the appeal concerns only the analysis of the geographical market, the Commission disregards the fact that the first two pleas of the appeal concern matters of procedure which affected the analysis of the relevant product market.

20. In that regard, it must be borne in mind that, according to settled case-law, for an applicant to have an interest in bringing proceedings the appeal must be likely, if successful, to procure an advantage to the party bringing it (Case C-19/93 P, *Rendo and Others v Commission*, paragraph 13, and Case C-174/99 P, *Parliament v Richard*, paragraph 33).

21. Although it is true that the applicant's third plea relates only to the relevant geographical market and that the first two pleas are procedural in nature, it must nonetheless be held that the second plea concerns matters which are directly connected with the analysis of the relevant product market. Therefore, contrary to the Commission's contention, in order to conclude that this second plea cannot affect the legality of the contested decision, it is necessary to examine it as to its substance.

22. On the face of it, it would not be possible to rule out repercussions on the analysis of the relevant product market if this second plea were upheld. Consequently, if the third plea were also founded, the situation brought about by the contested decision might be affected, with the result that the applicant does have an interest in bringing proceedings.

23. Accordingly, the appeal in its entirety must be declared admissible.

The first plea

24. In its first plea, Kish Glass submits that the Court of First Instance misinterpreted the requirements of Article 11 of Regulation 17 in holding that the Commission could justifiably obtain evidence by telephone and follow up that oral request with a written request in the proper form.

25. First, Kish Glass submits that there is a contradiction in the Court's reasoning in paragraphs 38 and 44 of the judgment under appeal. Second, the Court confused the argument by Kish Glass that the Commission had exceeded its powers in asking for information by telephone and its argument on the misuse of powers by the Commission. Third, the Court was wrong to hold that information obtained from undertakings by telephone following an oral request under Article 11 of Regulation 17 is presumed to be correct in the absence of evidence to the contrary.

26. In that regard, it must be observed that, at paragraph 38 of the judgment under appeal, the Court of First Instance held that Article 11 of Regulation 17 does not prevent the Commission from obtaining information by means of oral requests followed by requests in the proper form.

27. Furthermore, it is clear from paragraphs 16 and 17 of the judgment under appeal, set out at paragraph 2 of this order, that, on 14 November 1995, the Commission sent written requests for information to the undertakings operating on the Irish market, pursuant to Article 11 of Regulation 17, and that it received replies to those requests. Those findings were not disputed by the appellant.

28. Accordingly, given that the contested decision is based on written information properly obtained by the Commission in accordance with the procedure laid down by Article 11 of Regulation 17, the question whether the Commission is entitled, in dealing with a competition case, to make oral requests for information to undertakings operating on the relevant market is of no relevance to the outcome of the appeal.

29. It follows that the first plea is inoperative.

The second plea

30. In its second plea, Kish Glass submits that the Court of First Instance made an error of law as to the rights of a complainant in competition cases in emphasising the distinction between those rights and those of the defendant in such cases. That procedural error had repercussions on the analysis made by the Commission of the relevant product market.

31. In support of this plea the appellant submits, first, that the Court of First Instance misapplied the judgment in Joined Cases 142/84 and 156/84, *BAT & Reynolds v Commission*, and, second, that the Court of First Instance misconstrued the judgment in Case C-282/95 P, *Guérin Automobiles v Commission*, according to which the right to have access to a file entails the right to comment on it. Accordingly, the appellant considers, first of all, that it should have been given a reasonable opportunity to submit comments on the replies given by the undertakings operating on the Irish market, secondly, that the period of nine days between the time when Kish Glass received those replies and the date of the adoption of the contested decision was insufficient to comment on them and, finally, that even if a period of nine days were sufficient to submit comments, the Commission should have informed Kish Glass of the deadline set.

32. First, it must be observed that the Court of First Instance held, at paragraphs 33 and 34 of the judgment under appeal that, as regards the right to be heard and the right of access to the file, the undertakings making a request under Article 3 of Regulation 17 could not claim the same protection as those subject to a competition investigation.

33. In that regard, suffice it to note that nothing in the conclusions reached on this subject in the judgment under appeal suggests an error of law.

34. Second, as regards the rights of the applicant as a complainant, the Court of First Instance held at paragraph 35 of the judgment under appeal that, in the present case, the investigation of the complaint lasted more than four years and ... the applicant had the opportunity to put its point of view on several occasions. It went on to state in the same paragraph: in particular, the last five replies of the Irish companies of which the applicant was notified did not alter the essential points with which the procedure was concerned so that the fact that the Commission only allowed the applicant nine days to comment on the replies before adopting the contested decision did not prevent it from making its views known.

35. It must be observed in that regard that the conclusions of the Court of First Instance are based on findings of fact, which cannot be subject to review in an appeal unless it is established that the Court of First Instance distorted the evidence before it. However, that has not been established by the appellant.

36. In any event, even if the rights of the complainant had been infringed, in order for the plea to be upheld it would have to be established that, had it not been for that irregularity, the outcome of the procedure might have been different (see Joined Cases 209/78 to 215/78 and 218/78, *Van Landewyck and Others v Commission*, paragraph 47, and Case C-142/87, *Belgium v Commission*, paragraph 48).

37. It must be held, as the Commission correctly observed, and as is clear *inter alia* from the proceedings before the Court of First Instance, that Kish Glass had no more substantive comments to make on the replies of the undertakings operating on the relevant market. Under the circumstances, the fact that Kish Glass had only nine days to comment on those replies was not such as to affect the analysis of the relevant product market or the result which the contested decision brought about.

38. Accordingly, the second plea put forward by the appellant must be rejected as manifestly unfounded.

The third plea

39. In its third plea the appellant claims that the Court of First Instance incorrectly applied Article 190 of the EC Treaty in not holding that the contested decision was vitiated by a failure to state adequate reasons as to the transport costs of float glass. That failure was referred to by the Court of First Instance itself at the hearing but was not mentioned in the judgment under appeal, which therefore misrepresented the facts.

40. The appellant submits that the Commission's written reply to the Court, which states that transport costs are no more than 19% of the value of the product within a 500 km radius of the factory, is inconsistent with point 33 of the contested decision, according to which those costs are approximately 10% of product value. That inconsistency should, in any event, have entailed the annulment of the contested decision for failure to state reasons. Accordingly, the Court of First Instance was wrong to hold at paragraph 89 of the judgment under appeal that, contrary to what appeared to emerge from the hearing, the contested decision is not vitiated by contradiction in referring in point 33 to the *Pilkington-Techint/SIV* decision.

41. In that regard, it must be observed that, since the second plea relied on by the appellant, relating to the analysis of the relevant product market, is manifestly unfounded, the third plea cannot procure an advantage to it because it only concerns the part of the judgment under appeal concerning the relevant geographical market.

42. Since the analysis of the relevant product market on which the contested decision is based cannot be subject to review in this appeal and as that analysis on its own suffices to warrant the rejection of the complaint by Kish Glass, even if the third plea were upheld, it would not entail the annulment of the judgment under appeal, as the Commission correctly argued in its observations set out at paragraphs 16 and 17 of this order. Accordingly, this plea is inoperative (see, to that effect, the order in Case C-137/95 P, *SPO v Commission*, paragraph 47, and the judgment in Case C-362/95 P, *Blackspur DIY and Others v Council and Commission*, paragraph 43).

43. It follows that the appeal must be dismissed in its entirety as manifestly unfounded.

Costs

44. Under Article 69(2) of the Rules of Procedure, which is applicable to the appeal procedure by virtue of Article 118 of those rules, 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 Commission and Pilkington have applied for costs to be awarded against the appellant and since the appellant has ben unsuccessful, it must be ordered to pay the costs.

Court's Order

The Court hereby orders:
1. The appeal is dismissed.
2. Kish Glass Co. Ltd is to pay the costs. ■

The La Poste / SNELPD Case

The Commission has adopted a Decision on the monitoring of relations between the French company La Poste and firms specialising in the making-up and preparation of mail. The Commission sees a conflict of interests in the relations between La Poste and private mail-preparation firms in that La Poste is both a competitor of those firms and, in view of its postal monopoly, their unavoidable partner. In the Commission's view, this conflict of interests encourages La Poste to abuse its dominant position. Since French legislation does not provide for sufficiently effective or independent monitoring to neutralise this conflict of interest, the Commission takes the view that the French State has contravened Article 86(1), read in conjunction with Article 82, of the Treaty. The Decision is the result of proceedings initiated by the Commission at the end of 1998 at the request of the SNELPD, a trade association representing the majority of French mail-preparation firms. The SNELPD's members provide a variety of services ranging from the making-up of mail on behalf of large mail originators to the delivery of mail in pre-sorted bags to certain offices of La Poste. The mail-preparation sector is particularly linked to that of direct mail.

Source: Commission Statement IP/01/1476, 23 October 2001