ADMISSIBILITY (BROADCASTING): THE SATELLIMAGES CASE

Subject: Admissibility
Complaints

Industry: Broadcasting
(Implications for all industries)

Parties: Satellimages TV 5 SA
French Republic (intervener)
Commission of the European Communities
Deutsche Telekom AG (intervener)

Source: Judgment Of The Court Of First Instance, dated 7 March 2002 in Case T-95/99 (*Satellimages TV 5 SA, v Commission of the European Communities*)

(Note. If a formal complaint to the Commission is formally rejected, the complainant has as a rule the right to challenge the Commission's rejection in proceedings before the Court of First Instance. However, a great deal depends on what constitutes a formal rejection; and the interest of the present case lies in the fact that what may have appeared to be a rejection of the complaint was no more than a statement to the effect that, while the Commission was willing to look at any further evidence, it did not have enough to proceed with the case at this stage. In other words, the file had not been formally closed; and the Commission's letter, which is reproduced in the report below, was not justiciable. Since the action was therefore inadmissible, the Court did not consider the substantive elements of the case, based largely on an allegation that Deutsche Telekom had abused its dominant position.)

Background

1. The applicant is a broadcasting undertaking charged with providing a service in the public interest whose shareholders are public undertakings providing French-language broadcasting services and based in France, Belgium, Switzerland and Canada.

2. By letter of 18 March 1998, the applicant filed a complaint with the Commission, requesting that it declare that by requiring broadcasters to pay a tariff for the transmission of their programmes on the cable that it owns, Deutsche Telekom AG (hereinafter 'Deutsche Telekom) abused its dominant position on the cable distribution market, thereby infringing Article 86 of the EC Treaty (now Article 82 EC). The applicant submitted, essentially, that the principle of levying tariffs in itself constituted a breach of Article 86 of the EC Treaty, whatever the precise level of the tariff...

10. The applicant submitted fresh written observations to the Commission, concerning its complaint of 18 March 1998, on 9 July 1998.

11. The applicant states that, following its complaint and written observations, it had informal contacts with representatives of the competent unit of the Commission. During those contacts, the representatives indicated that their position as regards the applicant's complaint was not going to differ from the one already expressed by the Commission in the VPRT report. Those representatives could find no reason for which cable operators could not levy tariffs on the satellite broadcasters whose signals they were retransmitting by cable to connected households.

12. Accordingly, and following repeated requests from the applicant to have a written statement of the Commission's position, the Director in charge of the matter sent the applicant the letter of 15 February 1999, which is the subject of the present action (the contested measure).

The Commission's letter

13. The contested measure is worded as follows:

> ... I refer to your client's complaint of 18 March 1998 alleging that Deutsche Telekom's pricing policy vis-à-vis satellite broadcasting companies such as your client for access to its cable distribution services is abusive and contrary to Article 86 of the EC Treaty.
>
> In broad lines, the complaint attacks two separate aspects of Deutsche Telekom's pricing policy, namely (1) the fact that with regard to its cable television network, Deutsche Telekom applies a system of dual levies, requiring payment from broadcasters such as Satellimages/TV5 as well as from the final consumers, i.e. the cable-connected households; (2) the level of the carriage fee charged by Deutsche Telekom to broadcasters, notably the increases thereof. You allege that Deutsche Telekom's behaviour is abusive in both respects.
>
> My collaborators, Ms. Schiff and Mr. Haag, have indicated to you during the course of various telephone conversations that in our preliminary view, the system of dual levies applied by Deutsche Telekom does not in itself constitute an abuse of a dominant position. Both viewers of cable television and satellite broadcasters such as your client whose programmes are transmitted via satellite into the cable network for final distribution to viewers, benefit from a service for which payment may be required: cable-connected households pay inter alia for the service of having television signals carried over the cable network into their homes where they can be viewed, while broadcasters pay for having their signals fed into Deutsche Telekom's cable network and carried across the cable network into the homes of cable-connected viewers. You have in our preliminary view not presented any arguments which would lead us to consider that Article 86 could be applied against this aspect of Deutsche Telekom's pricing policy.

With respect to the level of the carriage fee charged by Deutsche Telekom to your client, we understand that you are currently seeking a determination by the German national telecommunications regulatory authority. In our view this aspect of the complaint is indeed most appropriately dealt with by the competent national authority.

I should stress that the above comments are provisional and based on the information available to my department at present. They do not constitute a final position of the European Commission and are subject to any further comments you or your client may wish to make. ...

John Temple Lang, Director

Procedure and forms of order sought

20. The applicant and the French Republic claim that the Court of First Instance should:
- declare the application admissible and well founded;
- consequently, annul the contested measure;
- declare that, under Article 176 of the EC Treaty (now Article 233 EC), the Commission is required to take all measures necessary to comply with the judgment to be delivered;
- order the Commission to pay the costs, including those incurred in relation to the objection of inadmissibility.

21. The Commission and Deutsche Telekom contend that the Court of First Instance should:
- declare the application inadmissible or unfounded;
- order the applicant to pay the costs...

Admissibility: Findings of the Court

32. For the purpose of determining whether the present action is admissible, it should be noted at the outset that according to settled case-law only measures which produce binding legal effects and are capable of affecting the interests of the applicant by bringing about a distinct change in his legal position constitute measures challengeable by an action for annulment under Article 173 of the EC Treaty (now, after amendment, Article 230). In the case of acts or decisions adopted by a procedure involving several stages, in particular where they are the culmination of an internal procedure, it is clear from the same case-law that, in principle, an act is reviewable only if it is a measure definitively establishing the position of the Commission at the conclusion of that procedure, and not a provisional measure intended to pave the way for the final decision (Case 60/81, *IBM v Commission*, paragraphs 9 and 10).

33. It is therefore appropriate to examine whether the contested measure shows that the Commission definitively established its position in relation to the complaint submitted to it by the applicant.

34. In that respect, it should be noted that, in the contested measure, the Commission makes it clear that the assessments contained in it are of a provisional nature. The concluding passage of the contested measure could not, in that regard, be expressed in plainer terms, inasmuch as it states that 'the above comments are provisional and based on the information available to [the Commission] at present. They do not constitute a final position of the European Commission and are subject to any further comments you or your client may wish to make. Contrary to what the applicant states, there is nothing to suggest that those concluding statements do not concern all the assessments made by the Commission in that measure.

35. That passage in the contested measure cannot be regarded as a purely formal clause unrelated to the content of the measure, as claimed by the applicant and the French Republic, citing in that respect the judgment in Case T-37/92, *BEUC and NCC v Commission*. With regard to the main subject of the complaint, the provisional nature of the assessments by the Commission officers is emphasised several times, especially in the passage of the contested measure worded as follows: 'in our preliminary view, the system of dual levies applied by Deutsche Telekom does not in itself constitute an abuse of a dominant position ... [the applicant has] in our preliminary view not presented any arguments which would lead us to consider that Article 86 could be applied against this aspect of Deutsche Telekom's pricing policy.

36. Moreover, as the Commission has rightly argued, the contested measure does not in any way show that the complaint has been rejected or that it has been decided to close the file on it.

37. Finally, the Commission made it clear that its comments were subject to any further observations the applicant might wish to make.

38. In those circumstances, it must be concluded that the contested measure is to be regarded as a preparatory statement of position (see, to that effect, Case C-39/93 P, *SFEI and Others v Commission*, paragraph 30).

39. That conclusion cannot be called into question by the existence of the VPRT report. Without its being necessary to decide whether the VPRT report contains a final decision of the Commission in the context of the VPRT/DPB Telekom case, it should be noted that the existence of that report cannot confer on the contested measure the nature of a final position adopted by the Commission in relation to the complaint lodged by the applicant. Contrary to what the applicant maintains, in the context of any final decision applying Article 86 of the Treaty to the facts which form the subject of the applicant's complaint, the Commission is required to make a fresh analysis of the conditions of competition, which will not necessarily be based on the same considerations as those underlying the VPRT report (see, by analogy, Joined Cases T-125/97 and T-127/97, *Coca-Cola v Commission*, paragraph 82).

40. It follows for the reasons set out above that, in the contested measure, the Commission did not definitively state its position in relation to the applicant's

complaint. The contested measure is designed, inter alia, to give the applicant the opportunity of elaborating on its arguments in the light of the initial reaction of the Commission's officers expressed in that measure. The fact that, as it stated at the hearing, the applicant considers that it set out all its arguments in its letters to the Commission, before the Commission sent the letter containing the contested measure, cannot alter that finding. That fact cannot render the contested measure less provisional than the Commission expressly intended it to be.

41. Since the contested measure is not one which definitively establishes the Commission's position, it does not produce binding legal effects capable of affecting the applicant's interests, and is not therefore a reviewable act for the purposes of Article 173 of the EC Treaty. The present action must therefore be dismissed as inadmissible without there being any need to examine the other arguments on admissibility. In those circumstances, it follows that the substantive issues, as presented in the parties' arguments, cannot be examined.

Court's Ruling

The Court hereby:

1. Dismisses the application as inadmissible;

2. Orders the applicant to bear its own costs and to pay the costs incurred by the Commission;

3. Orders the interveners to bear their own costs. ■

Note. The Court cases reported in this Newsletter are taken from the website of the Court of Justice of the European Communities. The contents of this website are freely available. Reports on the website are subject to editing and revision.

The BMW Case (State Aid)

The Commission has decided to open a formal State aid investigation procedure in order to examine aid that the German authorities propose to grant to BMW for a new car plant in Leipzig. The case concerns an investment of around €1.2 billion, €418.6 million of which would be covered by aid. The investigation aims at establishing whether the planned aid meets the requirements of the State aid rules for the automobile sector. The main doubts of the Commission concern the level of the aid and the question whether the amount proposed does not exceed the "regional handicap" of the Leipzig site compared to BMW's alternative location in the Czech Republic.

Source: Commission Statement IP/02/492, dated 3 April 2002

(See also the Opel Case on page 78 of this Issue)