COMPLAINTS (PORT SERVICES): THE COE CLERICI LOGISTICS CASE

Subject: Complaints
Abuse of dominant position
"Essential facilities"
Public undertakings

Industry: Port Services
(Implications for most industries)

Parties: Coe Clerici Logistics SpA
Commission of the European Communities
Autorità Portuale di Ancona (intervener)

Source: Judgment of the Court of First Instance, dated17 June 2003, in Case T-52/00 (Coe Clerici Logistics SpA, v Commission of the European Communities)

(Note. It is hard to avoid having some sympathy for the applicants in this case, who fitted out a ship for special deliveries at the port of Ancona, Italy, where they had reason to believe that they would be able to take advantage of the special port facilities there. But they found themselves entangled in legal complexities. They faced a system governed by local laws relating to public undertakings and found that their complaint to the Commission about the difficulty of obtaining port facilities was in an inappropriate form: the Commission could not simply override the local laws without adopting a directive under the provisions of the EC Treaty relating to public undertakings. Moreover, the Commission did not accept, on the basis of the evidence before it, that the port facilities were "essential facilities", within the meaning of the Court of Justice decision in the Bronner case; as the Court pointed out, the applicant neither disputed the Commission's finding of fact nor offered additional facts in support of its contention: see paragraphs 99 and 100 of the judgment. The case serves to emphasise some of the pitfalls in the complaints procedure, especially in relation to public undertakings, and the importance, when pleading for access to essential facilities, of observing to the letter the legal and factual criteria laid down in the Bronner case.)

Judgment

Legal Background

1. As a result of the judgment of the Court of Justice in Case C-179/90, *Merci Convenzionali Porto di Genova* v *Siderurgica Gabrielli*, the Italian authorities adopted *inter alia* Law No 84/94 of 28 January 1994 amending the legislation applicable in respect of ports (... Law No 84/94 and ... Decree No 585/95), which reformed the legal framework applicable to the Italian port sector.

2. As part of that reform, the activity of the former dock-work companies, which became port authorities under Law No 84/94, was confined to managing the ports and they are now prohibited from supplying, directly or indirectly, dock-work services, which are defined in Article 16(1) of Law No 84/94 as the loading, unloading, transshipment, storage and general movement of goods or material of any kind, performed on the site of the port.

3. Those port authorities have legal personality under public law and are responsible, *inter alia*, for granting quay concessions to dock businesses.

[Paragraphs 4 to 8 describe the local laws applying to the case.]

9. Article 5a provides that the Autorità Portuale di Ancona is to request one or more concession-holders to make available quays which they have not planned to use during the period which is the subject of a request for self-handling operations where it is found that there are no or insufficient quays already allocated or still to be allocated for public use. In that regard, loading or unloading operations only are to be authorised without the use of a storage area held under concession. Authorisation to carry out such operations is to be granted in accordance with the detailed rules laid down in Article 3 of Bye-Law No 6/98, specifying which quays are available after obtaining from the concession-holder a declaration of availability, an indication of the berthing quay and agreements on the practical arrangements. In addition, although the concession-holder is obliged not to hinder availability of the quays during the period for which authorisation is granted, he may, at any time, have the self-handling operations suspended if he wishes to make use of mechanical equipment installed on one of his quays. Finally, self-handling operators are to pay to concession-holders a fee in return for the use of the quay. Where the concession-holder considers that he is unable to satisfy the requirements of the Autorità Portuale di Ancona, the latter may, at any time, check whether the quays are unavailable.

Facts

10. The applicant, Coe Clerici Logistics SpA, operates in the bulk dry raw materials shipping sector. Among other things, it transports coal for ENEL SpA, the electricity generating undertaking which is also responsible for the distribution of electricity in Italy. ENEL has a storage depot for its goods in the Port of Ancona. That depot is linked, by a fixed system of conveyors and hoppers also belonging to ENEL, to quay No 25 in the Port of Ancona, over which the company Ancona Merci has been given a concession.

11. The applicant claims that, in order to adapt itself to that fixed system of conveyors and hoppers belonging to ENEL, it fitted its ships, including the *Capo Noli*, with special equipment.

12. According to the applicant, quay No 25 is the only one suitable for its coal unloading operations for ENEL, it being:
- the only quay equipped with a crane with which goods can be unloaded;
- the only quay with sufficient depth;

- the only quay directly linked to ENEL's depot by means of a fixed system of conveyors and hoppers.

13. In August 1996, the applicant applied to the Autorità Portuale di Ancona for authorisation to carry out self-handling on quay No 25.

[Paragraphs 14 to 18 describe the resulting difficulties and delays.]

19. Since it considered that the provisions adopted by the Autorità Portuale di Ancona interfered with the exercise of its right of self-handling by according Ancona Merci exclusive rights to carry on its business on the quays over which concessions had been granted, the applicant, on 30 March 1999, complained to the Commission of infringement of Articles 82 and 86 of the EC Treaty...

[Paragraphs 20 to 22 describe the formal handling of the complaint.]

23. By letter of 20 December 1999 (the contested act), the Commission informed the applicant that it was going to take no action on its complaint.

[Paragraph 24 gives the Commission's reasons in detail, of which the most significant in this context is the finding that "the only factor which can justify the usefulness to the applicant of quay No 25 is the presence on that landing stage of the fixed system of conveyors and hoppers".]

25. In the contested act, the Commission argues that the presence of that fixed system of conveyors and hoppers is not, however, sufficient to justify the classification of quay No 25 as an essential facility. It states that the conditions laid down by the Court of Justice in Case C-7/97, *Bronner* v *Mediaprint and Others*, for establishing an abuse of a dominant position are not satisfied in this case. The applicant had continued to carry out its operations for ENEL for two years despite the refusal which it had received and also had alternative solutions available to it for unloading its customer's coal.

26. In the contested act, the Commission concludes by stating that it is unable to take any action on the complaint. Moreover, since the complaint concerns breach of the competition rules by a Member State, it does not confer on the complainant standing under Council Regulation 17 of 1962, ... as amended and supplemented by Regulation 59, Regulation EEC/118/63 and Regulation EEC/2822/71 and under Commission Regulation EEC/2842/98 on the hearing of parties in certain proceedings under Articles [81] and [82] of the EC Treaty. That standing is granted only to complainants who allege breach of the rules on competition by undertakings.

27. By letter of 5 January 2000, the applicant requested the Commission to make clear whether the contested act was in the nature of a decision. The applicant reiterated its request by letter of 9 February 2000.

28. The Commission did not reply in writing to those letters.

[Paragraphs 29 to 39 describe the formal legal proceedings, including the forms of order sought by the parties.]

Law

Arguments of the parties

[Paragraphs 40 to 55 set out the parties' arguments on the question of the admissibility of the action.]

[Paragraphs 56 to 69 set out the parties' arguments of the substance of the case.]

Findings of the Court

70. The parties disagree, first, on the question whether the contested act constitutes in part a rejection of the applicant's complaint as regards an independent infringement of Article 82 of the EC Treaty by Ancona Merci. Secondly, the parties disagree on whether the applicant is entitled to bring an action for annulment of the contested act to the extent that the Commission decided not to take any action on the applicant's complaint in so far it relates to infringement of Article 82, in conjunction with Article 86, by the Autorità Portuale di Ancona.

71. With regard to the first of those questions, it must first be observed that, although the Commission did not express a view on an alleged independent infringement of Article 82 of the EC Treaty, such a failure to do so cannot be held unlawful in the context of a review of legality under Article 230. Consequently, the applicant may not plead a manifest error of assessment in the application of Article 82 and an associated failure to investigate, or claim the benefit of Regulation 2842/98, unless the rejection of its complaint relates separately to Article 82.

72. In that regard, the contested act states that the refusal of the applicant's request to unload coal on a self-handling basis onto quay No 25 of the Port of Ancona constitutes, in the applicant's view, an infringement of Article 86 of the EC Treaty,in conjunction with Article 82.

73. The contested act then states that the Commission's investigation enabled it to establish certain factual discrepancies in relation to the claims in the applicant's complaint and that quay No 25 of the Port of Ancona is not an essential facility within the meaning of the *Bronner* judgment.

74. In the conclusion of the contested act, the Commission states:

> In the light of the above, we find no need to act on the [applicant's] complaint. Moreover, [the Commission] wishes ... to point out that since the [complaint] concerns an alleged infringement of the Treaty rules on competition by a Member State, it does not confer on [the applicant] the standing which follows from Council Regulation 17 and Commission

Regulation 2842/98. That standing is recognised only in relation to an applicant who pleads breach of those rules by undertakings.

75. It is therefore clear from the wording of the contested act that the Commission, having taken the view that the complaint did not relate to an alleged infringement by Ancona Merci of Article 82 of the EC Treaty, did not express any view on conduct which might be contrary to that article.

76. Moreover, it must be pointed out that the Commission's interpretation of the complaint as relating only to infringement of Article 82 of the EC Treaty, in conjunction with Article 86, by the Autorità Portuale di Ancona was already apparent from the letters which the Commission sent to the applicant during the administrative procedure.

77. Thus, it is clear from the letter of 26 April 1999 sent to the applicant, acknowledging receipt of the complaint, that the Commission had interpreted the complaint as relating only to the conduct of the public authority concerned.

78. Contrary to what is maintained by the applicant, the same may be inferred from the letter sent to it by the Commission on 10 August 1999, which states, in particular, as follows:

> ... according to this complaint, the Port Authority has allegedly infringed Article 82 and Article 86 [of the EC Treaty] by using its exclusive regulatory power to obstruct the carrying out by Coe Clerici Logistics SpA of self-handling operations ...

79. At that stage of the administrative procedure and in the light of those letters, it was open to the applicant, if it disagreed as to the scope of the complaint, to draw the Commission's attention to the fact that it also intended to allege in that complaint, in addition to infringement of Article 82 of the EC Treaty, in conjunction with Article 86, by the Autorità Portuale di Ancona, an independent infringement of Article 82 by Ancona Merci.

80. In any event, if, on reading the contested act, the applicant considered that the Commission had failed to give a decision on an alleged infringement of Article 82 of the EC Treaty by Ancona Merci, the onus was then on it to request the Commission to express a view on that aspect of the complaint and, if necessary, to bring an action under the second paragraph of Article 232 for a declaration by the Community judicature that the Commission had failed to act.

81. Consequently, since the Commission did not make any assessment of the alleged independent infringement by Ancona Merci of Article 82 of the EC Treaty, the action, in so far as it relies on that article on its own, is devoid of purpose. It follows that there is no need to rule on an error of assessment by the Commission in relation to Article 82 on its own, on a failure to investigate that aspect, on infringement of the applicant's procedural rights under Regulation 2842/98 or on an abuse of process.

82. With regard to the second of those questions, the admissibility of the action must be examined in so far as it relates to the Commission's decision not to act on the applicant's complaint of infringement of Article 82 of the EC Treaty, in conjunction with Article 86.

83. It is clear from the applicant's complaint and from its written submissions, as clarified at the hearing, that it disputes the compatibility with Community law of Article 5a of Bye-Law 6/98 of the Autorità Portuale di Ancona (see paragraph 9 above) in so far as it makes access by the applicant to quay No 25, the concession held by Ancona Merci, subject to conditions, thereby permitting a restriction on the applicant's freedom to exercise the right of self-handling. The Autorità Portuale di Ancona thereby acted contrary to Articles 82 and 86 of the EC Treaty.

84. The applicant's complaint constitutes, in that regard, a request made to the Commission to use the powers which it has under Article 86(3) of the EC Treaty. In that context, the contested act constitutes a refusal by the Commission to address a decision or directive to Member States pursuant to Article 86(3).

85. It is settled case-law that Article 86(3) of the EC Treaty requires the Commission to ensure that Member States comply with their obligations as regards the undertakings referred to in Article 86(1) and expressly empowers it to take action, where necessary, for that purpose by way of directives or decisions. The Commission is empowered to determine that a given State measure is incompatible with the rules of the Treaty and to indicate what measures the State to which a decision is addressed must adopt in order to comply with its obligations under Community law (Case C-107/95 P, *Bundesverband der Bilanzbuchhalter* v *Commission*, paragraph 23).

86. As is apparent from Article 86(3) of the EC Treaty and from Article 86 as a whole, the supervisory power which the Commission enjoys *vis-à-vis* Member States responsible for infringing the rules of the Treaty, in particular those relating to competition, necessarily implies the exercise of a wide discretion by the Commission as regards, in particular, the action which it considers necessary to be taken (*Bundesverband der Bilanzbuchhalter* v *Commission*, paragraph 27, and Case T-266/97, *Vlaamse Televisie Maatschappij* v *Commission*, paragraph 75).

87. Consequently, the exercise of the Commission's power to assess the compatibility of State measures with the Treaty rules, which is conferred by Article 86(3) of the EC Treaty, is not coupled with an obligation on the part of the Commission to take action (order in *Bilanzbuchhalter* v *Commission*, paragraph 31, and judgments in Case T-32/93, *Ladbroke* v *Commission*, paragraphs 36 to 38, and Case T-575/93, *Koelman* v *Commission*, paragraph 71).

88. It follows that legal or natural persons who request the Commission to take action under Article 86(3) of the EC Treaty do not, in principle, have the right to bring an action against a Commission decision not to use the powers which it has under that article (order in *Bilanzbuchhalter* v *Commission*, paragraph 31, and judgment in *Koelman* v *Commission*, paragraph 71).

89. However, it has been held that it cannot be ruled out that an individual may find himself in an exceptional situation conferring on him standing to bring proceedings against a refusal by the Commission to adopt a decision in the context of its supervisory functions under Article 86(1) and (3) of the EC Treaty (*Bundesverband der Bilanzbuchhalter* v *Commission*, paragraph 25, and, with regard to an action for failure to act, see, to that effect, Case T-17/96, *TF1* v *Commission*, paragraphs 51 and 57).

90. However, in this case, the applicant has not pleaded any exceptional circumstance which would enable its action against the Commission's refusal to act to be regarded as admissible. The only circumstance cited by the applicant, namely that it competes with Ancona Merci, could not, even if proved, constitute an exceptional situation such as to confer on the applicant standing to bring proceedings against the Commission's refusal to act in regard to the measures adopted by the Autorità Portuale di Ancona in order to regulate the grant of authorisations to maritime carriers to carry out self-handling on quays held under concessions.

91. Consequently, the applicant is not entitled to bring an action for annulment of the contested act in so far as the Commission decides in it not to use the powers conferred on it by Article 86(3) of the EC Treaty.

92. However, at the hearing, the applicant claimed that its action, in so far as it relates to infringement by the Autorità Portuale di Ancona of Articles 82 and 86 of the EC Treaty, should be declared admissible pursuant to the principle established in Case T-54/99, *max.mobil* v *Commission*. The Commission contends that the principle in question, under which an individual is entitled to bring an action for annulment against its decision not to use the powers conferred on it by Article 86(3), constituted a reversal of precedent and that the judgment of the Court of First Instance in question was the subject of an appeal now pending before the Court of Justice.

93. In that regard, if the contested act, in so far as it concerns infringement of Article 82 of the EC Treaty, in conjunction with Article 86, must be classified as a decision rejecting a complaint as referred to in *max.mobil* v *Commission*, the applicant should, as complainant and addressee of that decision, be regarded as entitled to bring the present action (*max.mobil* v *Commission*, paragraph 73).

94. In such a case, it has been held that, in view of the broad discretion enjoyed by the Commission in the application of Article 86(3) of the EC Treaty, the review carried out by the Court of First Instance must be limited to verification of the Commission's fulfilment of its duty to undertake a diligent and impartial examination of the complaint alleging infringement of Article 86(1) (see, to that effect, *max.mobil* v *Commission*, paragraphs 58 and 73, and order of 27 May 2002 in Case T-18/01, *Goldstein* v *Commission*, not published in the ECR, paragraph 35).

95. In the present case, the applicant alleges that the Commission adopted the contested act without taking into consideration certain facts or on the basis of

incorrect facts. At the hearing, the applicant asserted that this shows that the Commission did not undertake a diligent and impartial examination of the complaint.

96. However, it cannot be held that the Commission failed in this case in its duty to undertake a diligent and impartial examination of the applicant's complaint.

97. It is apparent from the contested act that the Commission identified the central objection among the arguments set forth in the complaint of infringement by the Autorità Portuale di Ancona of Articles 82 and 86 of the EC Treaty by taking into consideration the main relevant matters relied on by the applicant in that complaint. That is clear from the fact that the Commission indicated, in the contested act, that the investigation which it had carried out had enabled it to establish certain discrepancies in relation to the facts which the applicant had set out in its complaint.

98. Those facts were relied on by the applicant in order to demonstrate that there is no alternative to the use of quay No 25 in order to unload, by self-handling, the coal which it transports on behalf of ENEL. The applicant infers from this that the quay in question therefore constitutes an essential facility within the meaning of the *Bronner* judgment, which lays down the conditions under which access to a facility must be regarded as essential to the exercise by the undertaking in question of its activity.

99. In that regard, the reasoning followed by the Commission in the contested act seeks to show that, as the facts alleged by the applicant in support of its argument are unproven, quay No 25 cannot be classified as an essential facility. The Commission therefore concludes, as it maintained at the hearing, that application of the regulations adopted by the Autorità Portuale di Ancona, and more specifically of Article 5a of Bye-Law No 6/98, cannot have had the effect of impeding access by the applicant to an essential facility. Consequently, without expressing a view on liability for the conduct in question, the Commission considered that it did not have to use the powers conferred on it by Article 86(3) of the EC Treaty against the Autorità Portuale di Ancona.

100. It is important to note that in its action the applicant has either not disputed the correctness of the facts as stated by the Commission in the contested act, offered supporting evidence which does not establish the truth of its allegations, or merely relied on matters which it had not mentioned in its complaint.

101. Thus, with regard to quay No 22, the applicant did not dispute the Commission's assertion in the contested act that it is a public quay. As to the applicant's allegation that quays Nos 20 and 22 are intended exclusively for loading and unloading grain and not coal, it is important to note that that factual situation is not apparent from the triennial operational plan annexed by the applicant to its application, which merely indicates that those quays are suitable for handling cereals.

102. Furthermore, the applicant did not dispute the Commission's assertion in the contested act, and confirmed by the Autorità Portuale di Ancona at the hearing, that those quays are deep enough and long enough to allow the applicant's ship, the *Capo Noli*, to berth.

103. As regards the complaint alleging failure by the Commission to consider the argument that the contract which the applicant has concluded with ENEL prevents it from concluding, with quay concession-holders, commercial agreements relating to the performance of its dock work, the Court notes that there is no clause in that contract, which is annexed to the application, to substantiate that argument, as indeed the applicant acknowledged at the hearing. It must be pointed out in that regard that none of the clauses in that contract relates to the conditions for unloading coal for ENEL.

104. The applicant also challenges the Commission's interpretation of the concept of essential facility and submits that quay No 25 of the Port of Ancona must be classified as such under the principle in *Bronner*. However, it is sufficient in that regard to observe that that argument cannot be a matter for review by the Community judicature of the Commission's compliance with its duty to examine the complaint diligently and impartially.

105. It follows that the present action, in so far as it seeks the annulment of a Commission decision not to initiate the procedure under Article 86 of the EC Treaty, must be dismissed as inadmissible and, in any event, as unfounded in law.

106. It follows from all the foregoing that the application must be dismissed in its entirety.

Costs

107. Under Article 87(2) of the Rules of Procedure, 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 applicant has been unsuccessful and the Commission has applied for costs, the applicant must be ordered to pay the costs.

108. As the Autorità Portuale di Ancona has not applied for costs, it must bear its own costs.

Court's Ruling

The Court of First Instance hereby:
1. Dismisses the application;
2. Orders the applicant to bear its own costs and to pay those incurred by the Commission;
3. Orders the Autorità Portuale di Ancona to bear its own costs. ■

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