

ORDER OF THE COURT OF FIRST INSTANCE (Fourth Chamber,
Extended Composition)

6 February 1995 *

In Case T-66/94,

Auditel Srl, a company governed by Italian law, established in Milan (Italy), represented by Giuseppe Sena and Paola Tarchini, of the Milan Bar, Mario Siragusa, of the Rome Bar, Giuseppe Scassellati-Sforzolini and Francesca Maria Moretti, of the Bologna Bar, with an address for service in Luxembourg at the Chambers of Elvinger, Hoss & Prussen, 15 Côte d'Eich,

applicant,

v

Commission of the European Communities, represented by Giuliano Marenco, of its Legal Service, assisted by Alberto Dal Ferro, of the Vicenza Bar, with an address for service in Luxembourg at the office of Georgios Kremlis, also of its Legal Service, Wagner Centre, Kirchberg,

defendant,

* Language of the case: Italian.

APPLICATION for the annulment of Articles 1 and 2 of Commission Decision 93/668/EC of 24 November 1993 relating to a proceeding pursuant to Article 85 of the EC Treaty (IV/32 031 — Auditel, OJ 1993 L 306, p. 50),

THE COURT OF FIRST INSTANCE OF THE EUROPEAN
COMMUNITIES (Fourth Chamber, Extended Composition),

composed of: K. Lenaerts, President, R. Schintgen, C. P. Briët, R. García-Valdecasas and C. W. Bellamy, Judges,

Registrar: H. Jung,

makes the following

Order

- 1 By application received at the Court Registry on 13 June 1994, D & B Marketing Information Services SpA (hereinafter 'D & B' or 'the applicant to intervene'), a company governed by Italian law, established at Corsico (Italy), represented by Brian Hartnett, of the Irish Bar, and Egidio Rinaldi, of the Milan Bar, and having an address for service in Luxembourg at the Chambers of Arendt and Medernach, 8-10 Rue Mathias Hardt, has sought leave to intervene in Case T-66/94 in support of the form of order sought by the defendant. The applicant to intervene also submitted an application for leave to use the English language during both the written procedure and the oral procedure.
- 2 The application to intervene was submitted pursuant to the second paragraph of Article 37 of the Statute of the Court of Justice of the EC, which is applicable to

proceedings before the Court of First Instance by virtue of the first paragraph of Article 46 of that statute, and was lodged in accordance with Article 115 of the Rules of Procedure of the Court of First Instance.

- 3 By letter from the Registrar of 13 June 1994, the applications were served on the parties in accordance with Article 116 of the Rules of Procedure. On 19 July 1994, the parties submitted their observations on those applications; the applicant also asked that certain documents in its file should be treated as confidential in the event that leave to intervene was granted. By letter of 5 September 1994, the defendant made it known that it did not oppose the applicant's request for confidential treatment.
- 4 The President referred the application to intervene to the Court of First Instance (Fourth Chamber, Extended Composition) on the terms laid down in Article 116(1) of the Rules of Procedure.

Background to the case

- 5 The applicant, Auditel Srl (hereinafter 'Auditel'), is a company governed by Italian law, whose shareholders comprise all Italian public and private television stations together with the advertisers' and advertising agencies' associations; its objects are to record objectively and impartially and to disseminate systematically information on audiences for television broadcasts in Italy.
- 6 In parallel to the formation of Auditel, its shareholders concluded an agreement, Article 11 of which provided that 'Auditel's partners undertake, as regards all matters which may be of advertising or business importance, to use exclusively the services provided by Auditel and to recognize the validity only of the figures resulting from Auditel's measurements and research'. According to Auditel, the purpose of Article 11 was to avoid conflict between television channels as to audience measurement systems.

7 Lastly, Auditel concluded with AGB Italia SpA (hereinafter 'AGB') a contract relating to the setting-up and administration by AGB on behalf of Auditel of the entire audience-measurement system.

8 Auditel notified those three agreements to the Commission in September 1986.

9 Article 11 of the agreement between Auditel's shareholders was amended twice during the administrative procedure so as to restrict its scope and it was eventually deleted on 24 July 1993.

10 AC Nielsen Italia SpA (hereinafter 'Nielsen'), a company specializing in market studies and market research, submitted a complaint to the Commission in June 1987 in which it claimed, in particular, that the exclusive nature of the AGB/Auditel contract and the requirement imposed on Auditel's members by Article 11 of the agreement constituted infringements of Article 85 of the EEC Treaty (now the EC Treaty, hereinafter 'the Treaty'). It also claimed that Article 11 of the agreement gave Auditel a dominant position on the market for basic audience ratings data, which it was abusing.

11 On 24 November 1993, the Commission adopted Decision 93/668/EEC relating to a proceeding pursuant to Article 85 of the EC Treaty (IV/32 031 — Auditel, OJ 1993 L 306, p. 50), in which it ruled as follows:

- Article 11 of the agreement between the members of Auditel constituted an infringement of Article 85(1) of the Treaty until its formal deletion on 24 July 1993 (Article 1 of the decision);
- the request for the exemption of Article 11 of the agreement pursuant to Article 85(3) of the Treaty was rejected (Article 2 of the decision);

— there was no need for it to take action pursuant to Articles 85 and 86 of the Treaty in respect of the instrument of incorporation and the articles of association of Auditel, the agreements between Auditel and AGB, the provisions still in force of the agreement or the conduct of Auditel on the market (Article 3 of the decision).

- 12 Auditel has brought an action (Case T-66/94) for the annulment of Articles 1 and 2 of the decision.

The application to intervene

Arguments of the parties

- 13 The applicant to intervene raises essentially three pleas, which in its view establish its interest in the result of the case.
- 14 First, it observes that it is the legal successor to Nielsen, which submitted a complaint under Article 3 of Regulation No 17 of 6 February 1962, first regulation implementing Articles 85 and 86 of the Treaty (OJ, English Special Edition 1959-62, p. 87) in the procedure which led to the adoption of the contested decision. It adds that it was invited to take part in the hearing before the Commission and provided evidence of the anti-competitive effects of the agreement between the members of Auditel. It follows from the Court's case-law (Joined Cases 6/73 and 7/73 *Istituto Chemioterapico Italiano and Commercial Solvents v Commission* [1974] ECR 223) that the complainant is authorized to intervene in cases in which, like this one, the contested decision upheld its complaint.

15 Secondly, D & B argues that the agreements at issue have a direct effect on its competitive position. As it operates in the field of market studies and market research and in that of services relating to product promotion and advertising, it is a direct competitor of AGB, which was charged by Auditel with organizing and managing Auditel's audience-rating system and with analysing and processing the data obtained for Auditel and its members. Since Article 11 of the agreement provided that 'Auditel's partners undertake, as regards all matters which may be of advertising or business importance, to use exclusively the services provided by Auditel and to recognize the validity only of the figures resulting from Auditel's measurements and research', it prevented D & B from offering a competing service, together with a range of additional, related services, to the members of Auditel, who accounted for around 95% of the market for its services.

16 Lastly, the applicant to intervene justifies its interest in the result of the case by averring that the contested decision provides support for it in the action which Auditel has brought against it in the Tribunale di Milano (District Court, Milan) and evidence in support of its counterclaim (judgment of the Court of Justice in Joined Cases 56 and 58/64 *Consten and Grundig v Commission* [1966] ECR 299).

17 In its observations on the application to intervene, the defendant claims in the light of the reasons relied on by D & B that the latter, as the successor of Nielsen, is directly and effectively affected by fate of the contested decision, because if the decision were annulled it would adversely affect its situation (order of the Court of First Instance of 13 June 1994 in Case T-542/93 *Reti Televisive Italiane v Commission* and order of the Court of Justice of 25 October 1978 in Joined Cases 209/78 to 215/78 *Van Landewyck and Others v Commission*).

18 In contrast, the applicant considers that it does not appear from the arguments relied on by D & B that it has an interest in the result of the case.

- 19 The applicant argues in the first place that D & B holds itself out to be not a competitor of Auditel, which, moreover, it is not, but a competitor of AGB, which has no connection with the present proceedings, since the contract concluded between Auditel and AGB was held in Article 3 of the decision to be compatible with the competition rules and that article has not been contested before the Court. Article 11 of the agreement, which is the only provision at issue in the application, is concerned solely with the requirement — which is purely internal to Auditel and of very limited scope — to use for certain purposes only ‘crude’ data provided by Auditel. It observes that D & B has never contested the requirement contained in Article 11 of the agreement, and states that it is unable to see how that article — which, moreover, has now been deleted — could be of crucial importance to D & B. The applicant surmises that in reality D & B, which did not bring an action against Article 3 of the decision, is trying to procure, through its intervention, a means of redress against that provision in which it can raise arguments which, given that the time for bringing an action against Article 3 of the decision has run out, it no longer has any possibility of asserting.
- 20 The applicant next considers that Article 11 of the agreement could not have prevented D & B from providing members of Auditel with a competing service or associated services. It maintains that Article 11 only ever covered the use of ‘crude’ data, and then only in very limited fields, with the result that D & B could have provided Auditel members, on the one hand, with its own measurements of ‘crude’ data for all uses not covered by Article 11 and, on the other hand, with ‘complex’ data in any form whatsoever. Since ‘crude’ data are of no commercial value so long as they have not been processed and in view of the fact that they are supplied at derisory prices, it follows, in the applicant’s view, that Article 11 cannot affect economic relations between traders.
- 21 As regards the alleged relationship between the present action and the proceedings pending before the national court, Auditel argues that the national proceedings, which it itself has brought, contain no specific reference to Article 11 of the agreement, but relate to the whole of the Auditel agreements, and that consequently the subject-matter of the present proceedings does not coincide with the ‘basis of the

action' pending before the Tribunale di Milano. It adds that the Commission itself has described those domestic proceedings as separate and independent of the Community proceedings and as relating to issues which only coincide to some extent therewith.

- 22 Lastly, the applicant considers that the fact that D & B had the status of a complainant before the Commission is not enough to establish that it has an interest in intervening, and states in that connection that it was not the complaint which gave rise to the contested decision, but the notification of the agreements by Auditel itself. Moreover, D & B has never raised any objection to the requirement imposed on Auditel members to use 'crude' data from only one source or to the content of Article 11.

Assessment of the Court

- 23 It should be noted *in limine* that it is undisputed that the applicant to intervene, or at least the Nielsen company of which it is the successor, not only submitted an application under Article 3 of Regulation No 17, but also played an active part in the administrative procedure before the Commission.
- 24 Next, the Court finds that there is manifestly no basis for the applicant to assert that D & B has never raised any objection to the content of Article 11 of the agreement, the assessment of which in the light of the competition rules of the Treaty is the object of this action. As stated in point 9 of the decision, Nielsen maintained *inter alia* in its complaint that the 'requirement imposed on Auditel's members by Article 11 of the agreement' constituted an infringement of Article 85 of the Treaty.

Likewise, at the hearing before the Commission, counsel for the applicant to intervene insisted at length that 'Article 11, which is the object of the Statement of Objections, is clearly one unjustifiable restriction of competition and one which both Nielsen and MTVS have been contesting since 1986' (minutes of the hearing, p. 11).

- 25 It should also be noted that, as the applicant itself pointed out in its application, Auditel has brought proceedings against Nielsen in the Tribunale di Milano with a view to ascertaining whether the agreements at issue are lawful under Community competition law (application, p. 7), and that that court has stayed the proceedings on several occasions pending the results of the inquiry carried out by the Commission (Annex 12 to the application).
- 26 In those circumstances, the Court considers that D & B has established sufficient interest within the meaning of Article 37 of the Statute of the Court of Justice of the EC in supporting the defendant's position in these proceedings.
- 27 The Court further observes that the fears expressed by the applicant that D & B will use its intervention in order to try to take issue with the merits of the finding made in Article 3 of the decision, which is not the subject-matter of these proceedings, are groundless, since the form of order sought by an intervener may only seek to support or to have dismissed the form of order sought by one of the main parties to the proceedings and the intervener therefore cannot alter the subject-matter of the proceedings in any way.
- 28 Accordingly, D & B should be given leave to intervene in this case in support of the form of order sought by the defendant.

The request for confidentiality

- 29 By letter of 19 July 1994, the applicant requested that Annex 1 (form A/B and annexes thereto) and Annex 20 (contract between Auditel and AGB) to its application should not be disclosed to D & B in the event that it should be given leave to intervene. It argues that they concern agreements between individuals which were not disclosed in their entirety to D & B during the administrative procedure and the disclosure of which could cause the applicant injury in view of the direct competitive relationship existing between D & B and AGB.
- 30 By letter of 5 September 1994, the defendant confirmed that, in its opinion, the agreements to which Auditel referred were confidential in so far as they described in great detail the whole of AGB's audience-rating system.
- 31 The Court observes that, for the purpose of determining the conditions under which confidential treatment may be given to certain documents in the file, it is necessary to balance the applicant's legitimate concern to prevent substantial damage to its business interests and the intervener's equally legitimate concern to have the necessary information for the purpose of being fully in a position to assert its rights and to state its case before the Court (see the order in Case T-30/89 *Hilti v Commission* [1990] ECR II-163, paragraph 11).
- 32 It emerges from the Court's examination of Annex 20 to the application in the light of those considerations that that document must indeed be regarded as a

‘confidential or secret document’ within the meaning of Article 116(2) of the Rules of Procedure.

- 33 As regards Annex 1 to the application, it should be recalled *in limine* that the reason given by the applicant for its request for confidentiality was that the documents in question constituted agreements between individuals. Next, the Court finds that the said Annex 1 is made up of both the notification properly so called (form A/B and the annex thereto) and of six annexes to that notification. Apart from a few, infrequent figures which may be regarded as business secrets and therefore qualify for confidential treatment, the Court considers that the remainder of the notification proper contains only a fairly succinct general description of the agreements and an assessment of them in the light of paragraphs 1 and 3 of Article 85, the disclosure of which to the intervener is not likely to cause substantial damage to the applicant’s commercial interests, especially since most of that information is also reproduced in the decision as published and in the parties’ submissions. As regards the annexes to the notification, the Court considers that only Annex 1 (minutes of a meeting of Auditel’s board of directors), 2 (contract setting up Auditel), 4 (agreement between Auditel’s shareholders) and 5 (contract between Auditel and AGB) may be regarded as confidential. In contrast, Annexes 3 (Auditel’s articles of association) and 6 (press cuttings) are documents the public nature of which precludes by definition their being granted confidential treatment.

The request for a derogation from the rules on the use of languages

- 34 D & B has also sought leave to use English during both the oral and written proceedings, or at least during the oral proceedings. It asserts in this connection that, being the subsidiary of a United States company, it uses English in the course of its business, its complaint to the Commission was drawn up in English and it used English throughout the procedure before the Commission, including at the hearing. It adds that if it were refused derogation from the use of the language of the

case, it would be deprived of the services of one of its counsel, who represented it throughout the procedure before the Commission.

35 The applicant has opposed this request.

36 It should be recalled that the fourth subparagraph of Article 35(3) of the Rules of Procedure dispenses only interveners which are Member States from complying with the rule that interveners must use the language of the case determined by the main parties. However, Article 35(2)(b) of the Rules of Procedure allows the Court to authorize the use of a language mentioned in Article 35(1) other than the language of the case for all or part of the proceedings (orders of 1 July 1993 in Case T-3/93 *Air France v Commission* and of 15 July 1993 in Case T-2/93 *Air France v Commission*, not published in the European Court Reports).

37 The Court considers that the arguments put forward by the applicant to intervene do not show that, in the absence of such a derogation, its rights would be adversely affected during the written procedure, since it may obtain, by its own means, English translations of the submissions and other documents in the case and obtain an Italian translation of its own statement, especially since one of its counsel is Italian. Its request must therefore be rejected as far as the written procedure is concerned.

38 In contrast, as far as the oral procedure is concerned, the Court considers that it is appropriate to grant the intervener's request to use English, since, on the one hand, there is an obvious interest on its part in continuing to be able to be assisted by the counsel of its choice and, on the other, that derogation will not impair the procedural rights of the main parties to the proceedings nor, in particular, cause any delay in the proceedings.

On those grounds,

THE COURT OF FIRST INSTANCE (Fourth Chamber, Extended Composition)

hereby orders:

- 1) Leave is granted to D & B Marketing Information Services to intervene in support of the form of order sought by the defendant.
- 2) The request for confidential treatment in relation to the intervener is granted as regards the whole of Annex 20 to the application and to the following extent as regards Annex 1 to the application:
 - the notification (form A/B and the annex thereto) shall be disclosed to the intervener with the exception of those items which have been obscured in the version of that document appended to this order;
 - Annexes 1, 2, 4 and 5 to the notification shall not be disclosed to the intervener;
 - the request for confidential treatment is rejected as regards the remainder, namely Annexes 3 and 6 to the notification.
- 3) The Registrar shall serve on the intervener a non-confidential version of the documents in the case.

- 4) A period shall be prescribed within which the intervener must set out in writing the pleas relied on in support of the form of order which it seeks.
- 5) D & B's request for derogation from the rules on the use of languages is rejected as regards the written procedure.
- 6) D & B is granted leave to use English during the oral procedure.
- 7) The costs are reserved.

Luxembourg, 6 February 1995.

H. Jung
Registrar

K. Lenaerts
President