

## Case T-111/96

ITT Promedia NV

v

Commission of the European Communities

(Competition — Action for annulment — Rejection of a complaint — Article 86 of the EC Treaty — Abuse of a dominant position — Actions before national courts — Right of access to the courts — Claim for performance of an agreement — Manifest error of assessment — Obligation to carry out an examination — Error of characterisation — Inadequate statement of reasons)

Judgment of the Court of First Instance (Fourth Chamber, Extended Composition), 17 July 1998 ..... II - 2941

### Summary of the Judgment

1. *Competition — Dominant position — Abuse — Meaning — Action before national courts — Assessment criteria adopted by the Commission — Restrictive interpretation — General principle of access to the courts taken into consideration*  
(EC Treaty, Article 86)
2. *Competition — Administrative procedure — Examination of complaints — Decision to close the file — Review by the Court*  
(Council Regulation No 17, Art. 3(2))

3. *Acts of the institutions — Statement of reasons — Obligation — Scope — Decision applying the competition rules*  
(EC Treaty, Art. 190)
4. *Competition — Community rules — Application — Anti-competitive conduct in conformity with national legislation — Irrelevant*  
(EC Treaty, Arts 85 and 86)
5. *Actions for annulment — Actionable measures — Commission's refusal to issue instructions to a Member State or adopt a decision concerning compliance with the competition rules by public undertakings — Not actionable*  
(EC Treaty, Arts 90 and 173)
6. *Competition — Dominant position — Abuse — Meaning — Claim for performance of a contractual clause*  
(EC Treaty, Art. 86)

1. The ability to assert one's rights through the courts and the judicial control which that entails constitutes the expression of the general principle of law which underlies the constitutional traditions common to the Member States and which is also laid down in Articles 6 and 13 of the European Convention for the Protection of Human Rights and Fundamental Freedoms. As access to the courts is a fundamental right and a general principle ensuring the rule of law, it is only in wholly exceptional circumstances that the fact that legal proceedings are brought is capable of constituting an abuse of a dominant position within the meaning of Article 86 of the Treaty.

Where the Commission has set out two cumulative criteria on the basis of which to identify cases in which legal proceedings are an abuse within the meaning of Article 86 of the Treaty — that they cannot reasonably be considered to be an

attempt to assert the rights of the undertakings and can therefore only serve to harass the opposing party and that they were conceived in the framework of a plan whose goal was to eliminate competition — those two criteria must be interpreted and applied restrictively in a manner which does not frustrate the general rule of access to the courts. As regards the application of the first criterion, it is the situation existing when the action in question is brought which must be taken into account. Moreover, it is not a question of determining whether the rights which the undertaking concerned was asserting when it brought its action actually existed or whether that action was well founded, but rather of determining whether such an action was intended to assert what that undertaking could, at that moment, reasonably consider to be its rights.

2. Where the Commission has decided to reject a complaint submitted under

Article 3(2) of Regulation No 17 without holding an investigation, the purpose of review by the Court of First Instance is to ensure that the decision at issue is not based on materially incorrect facts, and not vitiated by any error of law, manifest error of assessment or abuse of power.

3. The statement of reasons for a decision must be such as to enable the addressee to ascertain the matters justifying the measure adopted so that he can, if necessary, defend his rights and verify whether or not the decision is well founded and, second, to enable the Community judicature to exercise its power of review; the scope of that obligation depends on the nature of the act in question and on the context in which it was adopted. Since a decision constitutes a single whole, each of its parts must be read in the light of the others.
4. The compatibility of national legislation with the Treaty rules on competition cannot be regarded as decisive in an examination of the applicability of Articles 85 and 86 of the Treaty to the conduct of undertakings which are complying with that legislation. In such an examination by the Commission, the prior evaluation of national legislation which has an effect on the conduct of undertakings concerns only the question whether the national legislation leaves open the possibility of competition which might be prevented, restricted or distorted by autonomous conduct on their part. If that is not the case, Articles 85 and 86 of the Treaty do not apply.
5. The exercise of the power conferred by Article 90(3) of the Treaty to assess the compatibility of State measures with the Treaty rules is not coupled with an obligation on the part of the Commission to take action. Consequently, legal and natural persons who request the Commission to take action under Article 90(3) do not have the right to bring an action against a Commission decision not to use the powers which it has in that regard.

The Commission, in stating the reasons for the decision which it is led to take in order to apply the competition rules, is not obliged to adopt a position on all the arguments relied on by the parties concerned in support of their request; it is sufficient if it sets out the facts and legal considerations having decisive importance in the context of the decision.

6. An 'abuse' for the purposes of Article 86 of the Treaty is an objective concept referring to the behaviour of an undertaking in a dominant position which is such as to influence the structure of a market on which, as a consequence of the very

presence of the undertaking in question, the degree of competition is already weakened and which, through recourse to methods different from those conditioning normal competition in products or services on the basis of the transactions of commercial operators, has the effect of hindering the maintenance of the degree of competition still existing in the market or the growth of that competition.

It follows from the nature of the obligations imposed by Article 86 of the Treaty that, in specific circumstances, undertakings in a dominant position may be deprived of the right to adopt a course of conduct or take measures which are not in themselves abuses and which would

even be unobjectionable if adopted or taken by non-dominant undertakings. Thus, the conclusion of a contract or the acquisition of a right may amount to an abuse for the purposes of Article 86 of the Treaty if they are effected by an undertaking in a dominant position.

A claim for performance of a contractual obligation may also constitute an abuse for the purposes of Article 86 of the Treaty if, in particular, that claim exceeds what the parties could reasonably expect under the contract or if the circumstances applicable at the time of the conclusion of the contract have changed in the meantime.