# JUDGMENT OF THE COURT OF FIRST INSTANCE (First Chamber)
9 November 1994 *

In Case T-46/92,

**The Scottish Football Association**, a company incorporated under Scots law, established at Glasgow (United Kingdom), represented by Ian S. Forrester QC, of the Scots Bar, and Alasdair R. M. Bell, Solicitor, with an address for service in Luxembourg at the Chambers of Marc Loesch, 8 Rue Zithe,

applicant,

v

**Commission of the European Communities**, represented by Julian Currall, of the Legal Service, acting as Agent, with an address for service in Luxembourg at the office of Georgios Kremlis, of the Legal Service, Wagner Centre, Kirchberg,

defendant,

APPLICATION for the annulment of the Commission's decision of 31 March 1992 relating to a procedure pursuant to Article 11(5) of Regulation No 17 of the

* Language of the case: English.

Council of 6 February 1962, First Regulation implementing Articles 85 and 86 of the Treaty (IV/33.742 — TESN/Football Authorities),

THE COURT OF FIRST INSTANCE
OF THE EUROPEAN COMMUNITIES (First Chamber),

composed of: R. Schintgen, President, R. García-Valdecasas, H. Kirschner, B. Vesterdorf and K. Lenaerts, Judges,

Registrar: H. Jung,

having regard to the written procedure and further to the hearing on 12 July 1994,

gives the following

## Judgment

### Facts and procedure

1 The applicant is incorporated under Scots law in the form of a company limited by guarantee. It consists principally of football clubs and footballing bodies, and its function is to promote football in Scotland and to represent the interests of Scots clubs at all levels.

2 On 5 December 1991 the Commission sent to the applicant a letter based on Article 11 of Regulation No 17 of the Council of 6 February 1962, First Regulation implementing Articles 85 and 86 of the Treaty (OJ, English Special Edition 1959-1962, p. 87, hereinafter 'Regulation No 17'). In that letter, which reproduced the relevant extracts from Article 11 together with extracts from Article 15 of Regulation No 17, the Commission referred to a complaint made by The European Sports Network (TESN) and indicated its concern over the fact that the applicant appeared to be intending to prevent TESN from broadcasting Argentinian football matches in Scotland. The applicant had apparently contacted the Argentinian Football Association in that regard, in accordance with Article 47 of the rules of the Federation of International Football Associations (hereinafter 'FIFA'), which authorized FIFA's Executive Committee to set up a new scheme of rules governing the international broadcasting of football matches. To the Commission's knowledge, such a new scheme of rules had not yet been set up. It was therefore not clear on what legal basis the applicant's inquiry to the Argentinian Football Association was made. The applicant was thus requested — 'in order to enable the investigation of this matter to be made in full knowledge of the facts and in their correct economic context' — to reply to the following questions:

'1. On what legal basis was your inquiry to the Argentinian Football Association made?

2. Are there any agreements between the National Associations in membership with FIFA governing the transmission of football matches from one country into the other, pending the setting up of a new scheme of rules under Article 47 of the FIFA statutes by the Executive Committee?

3. Are there any instructions by FIFA, its Executive Committee or any other of its legal or executive authorities relating to the application of Article 47, or the former Article 37, with respect to those transmissions, pending the setting up of a new scheme of rules?

4. Please provide copies of your correspondence with the Argentinian Football Association concerning the televising of Argentinian football by TESN.'

The time-limit for replying to those questions was fixed at four weeks. The Commission referred in that regard to Article 11(5) of Regulation No 17.

3 On 14 January 1992 the applicant replied as follows:

We have received your enquiry with some surprise. It is well recognized in Scotland, and also in other countries, that the broadcasting of football matches on television can have a damaging effect on gates at live games. Our duty is to support and encourage football as a sport, both as a spectator sport and as a participative sport. Television is an excellent medium for promoting appreciation of, and support for, the game, but it can also, at the wrong time, damage the game, especially by reducing the numbers of those who would normally go to watch a football match.

For these reasons, this Association is not embarrassed to state that it has a policy, and will continue that policy, of trying to ensure a balance of control over the broadcasting in Scotland of televised football games when these could damage the overall interests of the Scottish football industry, professional, semi-professional and amateur.

Football associations around the world have similar concerns. We therefore regularly consult with each other as a matter of courtesy and within the framework of the game's international governing bodies, to avoid clashes between television and the live game. We feel we do not need any "legal basis" to justify writing to another football association reminding it of our mutual interest in balancing the benefit and the damage which can result from the televising of foreign matches.

We are not informed as to when FIFA will complete the planned revision of its rules on this topic.

Speaking frankly, we do not understand why Mr Barron is so jumpy about this matter, nor why the Commission should have intervened in such a peremptory fashion.

We are happy to meet you at any time to explain our views on the broad topic of television versus live game, but we honestly think that as to the Argentinian matter, the Commission need not be troubled about an exchange of correspondence between two fraternal associations about how the game should best be served. ...'

In the absence of any response from the Commission, the applicant wrote to it on 11 March 1992 to enquire whether its letter of 14 January had been received.

4 Thereafter the Commission sent to the applicant, by telefax of 31 March 1992, a decision bearing the same date — formal notification of which was received by the applicant a few days later — relating to a procedure pursuant to Article 11(5) of Regulation No 17. In that decision, the Commission required the applicant to provide within two weeks from the date of notification the information requested in

the letter of 5 December 1991, stating that if the applicant failed to do so it would be liable to periodic penalty payments of ECU 500 per day (Articles 1 and 2 and the Annex thereto). Article 3 of the decision states that an appeal against it may be made to the Court of First Instance pursuant to Articles 173 and 185 of the Treaty. In the preamble to the decision, the Commission sets out details of the complaint made by TESN (points 1 and 2), the purpose of the initial request for information and the incomplete nature of the reply given by the applicant on 14 January 1992 (point 3), the need for the information requested for the purposes of the Commission's investigation (point 4), the time-limit considered by it to be appropriate for responding to the decision (point 6) and the amount of the periodic penalty payments to be imposed in the event of non-compliance (points 7 and 8).

5 On 15 April 1992 the applicant sent, by way of reply to that decision, a letter in which it emphasized the strong sense of injustice which it felt at the conduct of the Commission, which had not replied to either of the two letters sent to it by the applicant in January and March 1992, and stated as follows in response to the four questions asked in the decision:

1. Several legal bases could be cited to justify the applicant's correspondence with a fellow football association. The applicant's own charter called for it to promote football in Scotland in all its branches; writing to other associations formed part of the applicant's discharge of this duty. The applicant had asked the Argentinian Association that it be consulted, pursuant to Article 47 of the FIFA rules and in accordance with the practice regularly followed by football associations around the world, before Argentinian football matches were transmitted in Scotland. It was clear from the correspondence between the two football associations that the applicant did not seek to prohibit the televising in Scotland of Argentinian football.

2. The FIFA rules relating to the international use and broadcasting of televised football matches were currently under review. Until that revision was completed, the applicant (together with other national football associations all over the world) would continue to respect the established convention of consulting with fellow associations before televised transmissions went ahead.

3. The applicant was aware of no instruction by FIFA, its Executive Committee or any other legal or executive authority relating to the application of Article 47 (or the former Article 37) of the FIFA rules with respect to those transmissions.

4. The applicant annexed to its letter copies of the letters to the Argentinian association.

## Procedure and forms of order sought by the parties

6 Those were the circumstances in which, by application lodged at the Registry of the Court of First Instance on 10 June 1992, the applicant brought the present action.

7 After the action had been brought, the Commission confirmed, by letter sent to the applicant on 24 June 1992, that the answers given by the applicant in its letter of 15 April 1992 were sufficient to supply the information requested in its decision and that, consequently, the applicant had fully complied with the decision.

8 The written procedure before the Court of First Instance followed the usual course. The Commission did not, however, lodge a rejoinder. By a document lodged on 17 July 1992, the Commission raised an objection of inadmissibility. By order of the Court of First Instance (First Chamber) of 28 October 1992, the decision on that objection was reserved until final judgment. Upon hearing the report of the Judge-Rapporteur, the Court of First Instance (First Chamber) decided to open the oral procedure without any preparatory inquiry. On application by the applicant, the hearing fixed for 13 October 1993 was adjourned.

9 The oral procedure took place on 12 July 1994. The representatives of the parties made their oral submissions and gave their replies to the questions put by the Court.

10 The applicant claims that the Court should:

(i) dismiss the objection of inadmissibility raised by the Commission;

(ii) annul the decision addressed to it by the Commission on 31 March 1992;

(iii) take such further or different steps as justice may require;

(iv) order the Commission to pay the costs.

The Commission contends that the Court should:

(i) reject the application as inadmissible;

(ii) in the alternative, dismiss it as unfounded;

(iii) order the applicant to pay the costs.

## Admissibility

11 In support of its objection of inadmissibility, the Commission essentially maintains that, in the particular circumstances of the case, the applicant no longer has an interest in pursuing the action, since it complied with the contested decision before bringing its action, without ever challenging the Commission's right to request the information in question. Consequently, no purpose can now be served by annulling that decision. Moreover, the applicant suffered no substantive prejudice as a result of the decision; it did not challenge it before replying, although it was informed, in Article 3, of the appeal procedures open to it.

12 The applicant considers that, if an act is illegal, it remains illegal whether or not it is complied with. It is apparent from the fourth paragraph of Article 173 of the EC Treaty that it clearly has an interest in contesting a decision which is specifically addressed to it and which threatens it with periodic penalties where such a measure was not necessary. Given that the Commission's power to take decisions has been used in an abusive manner, the applicant considers that it has a legitimate interest in ensuring that such an abuse should not recur. The applicant further stated at the hearing that the contested decision came at a time when negotiations on televised broadcasting of football matches had been entered into at European level, and were still proceeding, between the Commission and the national football associations; in bringing its action, the applicant was seeking, therefore, to protect itself against the real risk that it might find itself confronted, in the framework of those negotiations, with further unjustified decisions of the same kind as that with which the present action is concerned.

13 Considering those circumstances, the Court finds, first, that the purely procedural complaints made by the applicant in relation to the decision are essentially that by going from the first stage of its investigation, involving a 'mere' request for information, to the second stage, in which that request was made by way of a decision, the Commission acted excessively and prematurely. As is apparent from Articles 11(5), 15(1)(b) and 16(1)(c) of Regulation No 17, however, an undertaking or association of undertakings faced with such a decision runs a higher risk of sanctions

than one confronted with a 'mere' request for information: it may be fined if it fails to provide the information requested 'within the time-limit fixed' and required to pay periodic penalty payments so as to compel it to supply 'complete and correct' information. Consequently, the sole fact that the Commission requests information by way of a decision is liable to affect the legal situation of the party concerned, which, even though it may be disposed in principle to reply to the questions addressed to it, cannot be deprived of a legitimate interest in preventing the Commission from moving prematurely to the decision stage without first satisfying the criteria laid down by Article 11(5) of Regulation No 17.

14 That legal interest in bringing proceedings still exists even where the decision ordering information to be supplied has already been complied with by its addressee at the time when the action for annulment is brought, since that action has no suspensory effect. Furthermore, annulment *per se* of such a decision may have legal consequences, in particular by obliging the Commission to take the measures needed to comply with the Court's judgment and by preventing the Commission from repeating such a practice (see the judgments of the Court of Justice in Case 53/85 *AKZO Chemie* v *Commission* [1986] 1965, paragraph 21, and Case 207/86 *Apesco* v *Commission* [1988] ECR 2151, paragraph 16). That is particularly so in the present case, given that, as the parties observed at the hearing, the negotiations at European level between the Commission and the national football associations on the televised broadcasting of football matches are still going on. So the applicant must expect to find itself faced with further requests from the Commission for information at any time. It therefore still has a legitimate interest in having the Community judicature make clear the legal conditions under which the Commission has power to act by way of decision in the matter.

15 It follows that the objection of inadmissibility raised by the Commission must be dismissed.

## Substance

16 The applicant advances five pleas in support of its application: breach of the obligation to state reasons laid down by Article 190 of the EC Treaty, breach of the principles of proportionality, good administration and good faith, and disregard of fundamental rights.

*The plea that the contested decision was not sufficiently reasoned*

Arguments of the parties

17 The applicant maintains that, contrary to Article 190 of the Treaty, the Commission failed to give an adequate statement of the reasons for the contested decision when it was particularly important in this case that it should fulfil its obligation in this regard. The Commission has omitted essential factual information. In particular, the decision makes no mention whatever of the letter of 11 March 1992, in which the applicant asked the Commission whether it had received its initial reply. The absence of any reference to that letter in the reasons given for the decision make it appear as though the applicant had embarked on a policy of intentional non-compliance designed to frustrate the Commission's investigations. Lastly, contrary to what is stated in point 8 of the decision, the applicant did not 'refuse', in its letter of 14 January 1992, to supply the information requested: it replied to some of the questions and offered to discuss the whole matter.

18 The Commission states that it set out, in points 1 to 4, 6 and 8 of the contested decision, the main reasons which led it to adopt it. By referring to the original complaint, the decision was inviting a comparison between the questions asked in the letter of 5 December 1991 and the answers given in the letter of 14 January 1992. That comparison shows that the Commission had every reason to treat the letter of 14 January 1992 as a refusal to provide the information requested in complete form.

## Findings of the Court

19 It is settled case-law that the purpose of the obligation to give reasons for an individual decision is to enable the Community judicature to review the legality of the decision and to provide the party concerned with an adequate indication as to whether the decision is well founded or whether it may be vitiated by some defect enabling its validity to be challenged; the scope of that obligation depends on the nature of the act in question and on the context in which it was adopted (see, for example, the judgment of the Court of Justice in Case C-181/90 *Consorgan* v *Commission* [1992] ECR I-3557, paragraph 14).

20 In the present case, the contested decision was adopted following an exchange of correspondence between the parties. It repeats verbatim the request for information which formed the subject-matter of that correspondence. It cannot therefore be argued that the decision contained any surprises for the applicant and that a particularly detailed statement of reasons was consequently necessary.

21 Next, as regards the grounds relied on by the Commission in the contested decision, it should be noted that, after summarizing the circumstances leading to the dispatch of its letter of 5 December 1991, in which it requested the applicant to supply the information in question, the Commission pointed out, in point 3, that the reply dated 14 January 1992 'failed to provide the information requested in complete form'. The Commission also stated in point 4 that the information requested, in particular the applicant's correspondence with the Argentinian Football Association, was necessary to assess the applicant's conduct in the light of Articles 85(1) and 86 of the EC Treaty. The parties agree that that correspondence was not produced in response to the 'mere' request for information addressed to the applicant by the abovementioned letter of 5 December 1991. In those circumstances, the Commission was not obliged to provide a more detailed explanation of the incomplete nature of the information provided.

22 It should be added that the applicant apparently understood the purpose of the contested decision since it provided, within the period of two weeks which it was allowed, a response which the Commission considered to be complete and satisfactory.

23 Finally, the applicant's complaint that the Commission failed to mention in the contested decision either its offer to discuss the matter or its request for confirmation of receipt of its first letter must be regarded as being of no consequence. That omission did not prevent the applicant from apprehending the import of the contested decision or from raising the grounds of challenging that decision open to it and does not hinder review by the Court. The Commission was not obliged, therefore, to discuss those matters in its statement of reasons for the decision.

24 Consequently, the Court considers that the contested decision is to be regarded as sufficiently reasoned for the purposes of Article 190 of the Treaty and that the plea of inadequate reasoning must be dismissed.

*The plea of breach of the principle of proportionality*

Arguments of the parties

25 The applicant essentially bases this plea on the assertion that in the factual circumstances of this case the Commission acted disproportionately and excessively in relation to the applicant's conduct by threatening it, in a formal decision, with the imposition of penalties when it could have achieved its objective by simply asking it, if necessary by telephone, to supplement the answers already given in its letter of 14 January 1992. As the Court of Justice held in its judgment in Case 8/55

*Fédération Charbonnière de Belgique* v *High Authority* [1954 to 1956] ECR 245, respect for the principle of proportionality is particularly important in cases which involve the imposition of penalties.

26 The applicant observes that the decisive issue in this case is whether an individual who attempts to reply to a request for information but who allegedly fails to answer satisfactorily can be threatened with financial penalties. The applicant is prepared to concede that this should be so in the case of a wilful and obstructive refusal to cooperate. However, it should not be possible to take such a measure where an individual has tried to satisfy a request for information, has offered to meet the competent officials in order to discuss the matter, has sent a follow-up letter to the Commission and has, in response, been met with silence.

27 The Commission states in reply that it is clear even from the most superficial comparison of the questions in its letter of 5 December 1991 and the answers given in the applicant's letter of 14 January 1992 that the applicant more or less ignored the second and third questions and, as to the other questions, gave the Commission to understand that the 'Argentinian matter' was not its business, whilst the offer to discuss generalities did not relate to the specific questions put to the applicant. The Commission concludes from this that it was justified in considering that its initial request for information had been refused. Faced with such a refusal, and given that Article 11 of Regulation No 17 only creates a two-stage procedure, it therefore acted lawfully and proportionately in going on to the second stage, involving a request for information by way of a decision, without more ado.

28 At the hearing the Commission made the further point that it had certain responsibilities towards TESN, which had submitted a complaint and which could have brought proceedings for failure to act. The applicant expressly acknowledged that the time-limits fixed by the Commission in the letter of 5 December 1991 and in Article 1 of the contested decision were adequate to enable a response to be given to the questions asked.

Findings of the Court

29 First, the plea advanced by the applicant does not concern the inherent legality of the request for information addressed to it, since the applicant does not challenge the Commission's power to put to it the four questions concerned. Its sole complaint is that the Commission acted prematurely and excessively in adopting the decision threatening it with periodic penalties instead of continuing to exchange informal correspondence with it.

30 Next, as regards the question whether in adopting the contested decision in the circumstances of this case the Commission correctly applied Article 11 of Regulation No 17, it should be remembered that, according to the case-law of the Court of Justice, that article lays down, for the exercise by the Commission of its power to request the information it considers necessary, a two-stage procedure, the second stage of which, involving the adoption by the Commission of a decision specifying the information required, may only be initiated if the first stage, in which a request for information is sent, has been tried without success (Case 136/79 *National Panasonic* v *Commission* [1980] ECR 2033, paragraph 10).

31 As regards the ways in which the Commission should 'try' the first stage of the preliminary investigation procedure, the Court of Justice has held that Regulation No 17 confers on the Commission wide powers of investigation and imposes on the individuals concerned the obligation to cooperate actively in the investigative measures, which means that they must make available to the Commission all information relating to the subject-matter of the investigation (Case 374/87 *Orkem* v *Commission* [1989] ECR 3283, paragraphs 22 and 27). Consequently, the applicant's argument that the contested decision could only have been justified if it had manifestly obstructed the Commission in carrying out its task must be rejected. Given that the individuals concerned have such an obligation to cooperate actively in the initial investigation procedure, a passive reaction may in itself justify the adoption of a formal decision under Article 11(5) of Regulation No 17.

32 It is in the light of those considerations that the responses which the applicant gave in its letter of 14 January 1992 to the request for information of 5 December 1991 must therefore be considered. The Court observes in that regard that the applicant stated, in response to the first question, that it did not have to have any legal basis to justify writing to the Argentinian Football Association and, in response to the second question, that it did not have the information requested; instead of replying to the third question, it offered to give general oral explanations; and it did not provide at all the correspondence between the applicant and the Argentinian Football Association requested by the fourth question. In the Court's view, those responses cannot be regarded as active cooperation on the part of the applicant.

33 Furthermore, the applicant stated that 'we honestly think that as to the Argentinian matter, the Commission need not be troubled about an exchange of correspondence between two fraternal associations ...'. Considered objectively, that remark constitutes a polite but explicit refusal to cooperate with the Commission in the matter. In those particular circumstances, the Commission was under no obligation either to pursue lengthy informal correspondence or to engage in oral discussions with the applicant, which had provided only part of the information requested. It was entitled to proceed to the second stage of the preliminary investigation procedure, involving a request for information by way of a decision, and that step cannot be regarded as excessive.

34 It follows from all the foregoing considerations that the Commission correctly applied Article 11 of Regulation No 17 and that the plea of breach of the principle of proportionality must therefore be dismissed.

*The plea of breach of the principle of good administration*

Arguments of the parties

35 The applicant, which refers to the judgments of the Court of Justice in Case 179/82 *Lucchini* v *Commission* [1983] ECR 3083 and Joined Cases 96 to 102, 104, 105, 108 and 110/82 *IAZ and Others* v *Commission* [1983] ECR 3369, maintains that it could not have known that its letter of 14 January 1992 did not meet the Commission's request. Without any reaction from the Commission, which did not even reply to its letter of 11 March 1992, the contested decision should not have been adopted.

36 The Commission contests the relevance of the case-law cited by the applicant.

Findings of the Court

37 As is clear from the findings set out above, the applicant's letter of 14 January 1992 did not contain all the information which the Commission considered necessary for its investigation. By stating that the Commission 'need not be troubled' about the correspondence requested, the applicant should have expected that the Commission might find such a response inadequate. The mere request, made in the letter of 11 March 1992, for confirmation that the first letter of 14 January 1992 had been received does not affect this conclusion of the Court. Consequently, the applicant should have expected adoption of a decision under Article 11(5) of Regulation No 17. There was therefore no breach of the principle of good administration.

*The plea of breach of the principle of good faith and disregard of fundamental rights*

38 The applicant maintains that the Commission failed to respect the principle of good faith by acting in an arbitrary way. The Court has already found that the applicant did not actively cooperate with the Commission during the first stage of the investigation procedure. Consequently, the applicant has not shown that good faith, capable of being breached by the Commission, existed. The same considerations apply to the plea of disregard of fundamental rights, in support of which the applicant claims that, by denying it a fair opportunity to respond to its 'mere' request for information, the Commission gave the first stage of the initial investigation procedure no realistic chance of success.

39 Consequently, those pleas, which in any event would appear to be simply repetitious, cannot be upheld either.

40 It follows that the action must be dismissed in its entirety.

**Costs**

41 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. Since the applicant has been unsuccessful, it must be ordered to pay the costs, as applied for by the Commission.

On those grounds,

THE COURT OF FIRST INSTANCE (First Chamber)

hereby:

**1. Dismisses the action;**

**2. Orders the applicant to pay the costs.**

Schintgen García-Valdecasas Kirschner

Vesterdorf Lenaerts

Delivered in open court in Luxembourg on 9 November 1994.

H. Jung
Registrar

R. Schintgen
President