

Joined Cases T-213/01 and T-214/01

Österreichische Postsparkasse AG and Bank für Arbeit und Wirtschaft AG

v

Commission of the European Communities

(Action for annulment — Competition — Regulation No 17 — Regulation (EC) No 2842/98 — Decision 2001/462/EC/ECSC — Hearing officer — Act producing legal effects — Admissibility — Legitimate interest — Status as applicant or complainant — Final customer who purchases goods or services — Access to statements of objections — Confidential information — Sufficient interest)

Judgment of the Court of First Instance (Fifth Chamber), 7 June 2006 II - 1609

Summary of the Judgment

1. *Actions for annulment — Interest in bringing proceedings*
(Arts 230, fourth para., EC and 233 EC)
2. *Actions for annulment — Actionable measures — Measures producing binding legal effects*
(Art. 230, fourth para., EC)

3. *Actions for annulment — Actionable measures*
(Art. 230, fourth para., EC; Council Regulations Nos 17, Art. 3(2), and 2842/98, Art. 7; Commission Decision 2001/462, Art. 9, second para.)
4. *Competition — Administrative procedure — Recognition of the status of the complainant*
(Council Regulations Nos 17 and 2842/98)
5. *Competition — Administrative procedure — Examination of complaints*
(Arts 81 EC and 82 EC; Council Regulation No 17, Art. 3(2))
6. *Competition — Administrative procedure — Rights of complainants*
(Arts 81 EC and 82 EC; Council Regulations Nos 17, Art. 10(3) and (6), and 2842/98, Arts 7 and 8; Commission Decision 2001/462, Art. 12(4))
7. *Competition — Administrative procedure — Rights of complainants*
(Council Regulation No 2842/98, Art. 7)
8. *Competition — Administrative procedure — Access to the file*
(Commission notice 97/C 23/03)

1. An action for annulment brought by a natural or legal person is admissible only in so far as that person has an interest in the contested measure being annulled. Such an interest exists only if the annulment of the measure is of itself capable of having legal consequences.

In that regard, under Article 233 EC, the institution whose act has been declared void is required to take the necessary measures to comply with the judgment. Those measures do not relate to the elimination of the act from the Com-

munity legal order, because the very annulment by the Court has that effect. They are concerned in particular with eradicating the consequences of the act in question which are affected by the illegalities found to have been committed. The annulment of an act which has already been carried out is still capable of having legal consequences. The act could have produced legal effects during the period when it was in force and those effects are not necessarily eradicated by its annulment. Similarly, the annulment of an act can allow future repetition of the illegality affecting the act to be avoided. For those reasons, a judgment annulling an act is the basis upon which the institution concerned may be led to restore the applicant sufficiently to his original

position or avoid the adoption of an identical act.

It follows that, in proceedings for infringement of the competition rules, the fact that a statement of objections was transmitted to a complainant third party after the commencement of an annulment action seeking to challenge the lawfulness of the decision on the basis of which such transmission took place does not render that action devoid of purpose. The annulment of the contested decision is of itself capable of having legal consequences for the situation of the undertakings involved in the proceedings, in particular by preventing a repetition by the Commission of such a practice and by rendering unlawful the use of the statement of objections improperly communicated to that third party.

(see paras 53-55)

2. Only measures which produce binding legal effects such as to affect the interests of an applicant, by bringing about a distinct change in his legal position may be the subject of an action for annulment under Article 230 EC.

In principle, a provisional measure intended to pave the way for the final decision is not therefore a challengeable act. However, acts adopted in the course of the preparatory proceedings which were themselves the culmination of a special procedure distinct from that intended to permit the Commission to take a decision on the substance of the case and which produce binding legal effects such as to affect the interests of an applicant, by bringing about a distinct change in his legal position, also constitute acts open to review.

Thus, the Commission's decision notifying an undertaking involved in infringement proceedings that the information transmitted by that undertaking does not qualify for the confidential treatment guaranteed by Community law and may therefore be communicated to another complainant has legal effect in relation to the undertaking in question, bringing about a distinct change in its legal position, inasmuch as it withholds from the latter the protection provided by Community law and is definitive in nature and is independent of the final decision establishing an infringement of the rules on competition.

Furthermore, the opportunity which the undertaking has to bring an action against a final decision establishing that the rules of competition have been

infringed is not of such a nature as to provide it with an adequate degree of protection of its rights in the matter. On the one hand, it is possible that the administrative procedure will not result in a decision finding that an infringement has been committed. On the other hand, if an action is brought against that decision, it will not in any event provide the applicant with the means of preventing the irreversible consequences which would result from improper disclosure of certain of its documents.

An action for annulment may therefore be brought against such a decision.

(see paras 64-66)

3. A decision of a hearing officer, taken on the basis of the second paragraph of Article 9 of Decision 2001/462 on the terms of reference of hearing officers in certain competition proceedings, authorising the transmission of the non-confidential version of the statement of objections relating to an undertaking involved in proceedings for infringement of the competition rules to a third party complainant constitutes the culmination of a special procedure distinct from the general procedure under Article 81 EC, laying down the Commission's definitive position on the question of the transmission of the non-confidential version of the statements of objections to that third party complainant. Such a decision necessarily requires the third party complainant first to be

recognised as having the status of an applicant claiming a legitimate interest within the meaning of Article 3(2) of Regulation No 17 since it is from that status that the right of that third party to the statement of objections transmitted to it stems from Article 7 of Regulation No 2842/98 on the hearing of parties in certain proceedings under Articles [81 EC] and [82 EC].

As a result, the undertaking concerned by the proceedings may challenge in its action both the hearing officer's decision to transmit the non-confidential version of the statements of objections to the complainant third party and the key element forming the basis for that decision, namely recognition by the Commission of that third party's legitimate interest in accordance with Article 3(2) of Regulation No 17. Failing that, that undertaking would not be able to prevent the objections raised against it by the Commission from being communicated to a third party which has made an application or a complaint and which does not have the legitimate interest required by the Community rules or — in the event that such transmission has already taken place — to request that the use of the information in question by that third party be declared unlawful.

(see paras 71, 72, 78)

4. Regulation No 17 and Regulation No 2842/98 on the hearing of parties in certain proceedings under Articles [81 EC] and [82 EC] do not require, for the purposes of recognition of status as an applicant or a complainant, the application or complaint in question to form the basis for the Commission opening an infringement proceeding, and in particular the preceding investigation phase. Natural or legal persons claiming a legitimate interest in seeking a declaration from the Commission that there is an infringement of the rules on competition may therefore make an application or complaint for that purpose even once the preliminary investigation phase of the infringement proceeding has been opened upon the Commission's own initiative or upon application. Otherwise, persons having such a legitimate interest would be prevented, in the course of the proceeding, from exercising the procedural rights associated with status as an applicant or complainant.

The abovementioned regulations have established a scale according to which the degree of participation in infringement proceedings by legal or natural persons other than undertakings against which the Commission has raised objections is determined by the intensity of the harm caused to their interests. They draw a distinction in that regard between, first, an 'applicant or complainant who has shown a legitimate interest', to whom the Commission must provide a copy of the non-confidential version of the objections, where it raises objections relating to an issue in respect of which it has received the application or complaint in question (Article 3(1) and (2) of

Regulation No 17 and Articles 6 to 8 of Regulation No 2842/98); secondly, 'third parties having a sufficient interest' who, if they apply to be heard, have the right to be informed by the Commission in writing of the nature and subject-matter of the procedure and to make known to the Commission their views in writing (Article 19(2) of Regulation No 17 and Article 9(1) and (2) of Regulation No 2842/98); thirdly, 'other third parties', to which the Commission may afford the opportunity of orally expressing their views (Article 9(3) of Regulation No 2842/98).

Any applicant or complainant who has shown a legitimate interest thus has the right to receive a non-confidential version of the statement of objections. As regards third parties having a sufficient interest, it cannot be ruled out that the Commission might, without being required to do so, transmit to them a non-confidential version of the statement of objections so that they are in a proper position effectively to send it their comments on the alleged infringements forming the subject-matter of the proceeding in question. Beyond those two scenarios, provision is not made in Regulation No 17 and Regulation No 2842/98 for the Commission to transmit the statement of objections to legal or natural persons other than undertakings

against which those objections have been raised.

(see paras 91, 106-108)

5. There is nothing to prevent a final customer who purchases goods or services from being able to satisfy the notion of legitimate interest within the meaning of Article 3 of Regulation No 17. A final customer who shows that his economic interests have been harmed or are likely to be harmed as a result of the restriction of competition in question has a legitimate interest within the meaning of Article 3 of Regulation No 17 in making an application or a complaint in order to seek a declaration from the Commission that Articles 81 EC and 82 EC have been infringed.

Recognition of a final customer's status as an applicant or complainant thus depends on the likelihood that the latter will suffer economic damage as a result of the practices in question, and not on that person's participation in each of the product markets which have been investigated by the Commission.

In this respect, the ultimate purpose of the rules that seek to ensure that competition is not distorted in the internal market is to increase the well-

being of consumers. That purpose can be seen in particular from the wording of Article 81 EC. Whilst the prohibition laid down in Article 81(1) EC may be declared inapplicable in the case of cartels which contribute to improving the production or distribution of the goods in question or to promoting technical or economic progress, that possibility, for which provision is made in Article 81(3) EC, is *inter alia* subject to the condition that a fair share of the resulting benefit is allowed for users of those products. Competition law and competition policy therefore have an undeniable impact on the specific economic interests of final customers who purchase goods or services. Recognition that such customers — who show that they have suffered economic damage as a result of an agreement or conduct liable to restrict or distort competition — have a legitimate interest in seeking from the Commission a declaration that Articles 81 EC and 82 EC have been infringed contributes to the attainment of the objectives of competition law.

That finding does not effectively render the notion of legitimate interest meaningless by making it excessively broad or pave the way for an alleged '*actio popularis*'. Acknowledging that a consumer who can show that his economic interests have been harmed as a result of a cartel complained of by him may have a legitimate interest in this regard within the meaning of Article 3(2) of Regulation No 17 is not the same as considering that any natural or legal person has such an interest.

Similarly, objections concerning the increased number of complaints and difficulties with administrative procedures that would stem from recognition of status as an applicant or complainant for final customers cannot be legitimately relied on in order to restrict recognition of a legitimate interest for a final customer who shows that he has been economically harmed by the anti-competitive practice that he complains of.

Since a third-party applicant or complainant must show that he has a legitimate interest in obtaining a declaration that the provisions of Article 81 EC or Article 82 EC have been infringed, the Commission is therefore under an obligation to investigate whether the third party satisfies that condition.

Lastly, where the applicant shows a valid legitimate interest, the Commission cannot be required to investigate the possible existence of other reasons in respect of the applicant.

(see paras 114-118, 124, 131)

6. Regulation No 17 and Regulation No 2842/98 on the hearing of parties in certain proceedings under Articles

[81 EC] and [82 EC] do not lay down a specific time-limit within which a third-party applicant or complainant showing a legitimate interest must exercise its right to receive the objections and to be heard in infringement proceedings. In addition, Decision 2001/462 on the terms of reference of hearing officers in certain competition proceedings allows the applicant or complainant to be heard at any point in the procedure, expressly stating in Article 12(4) that, in view of the need to ensure the right to be heard, the hearing officer may 'afford persons, undertakings, and associations of persons or undertakings the opportunity of submitting further written comments after the oral hearing'. It follows that an applicant or complainant's right to be transmitted the objections and to be heard in the administrative procedure to find an infringement of Articles 81 EC and 82 EC may be exercised while the procedure is in progress.

In addition, Article 10(3) of Regulation No 17 provides that the Advisory Committee on Restrictive Practices and Dominant Positions must be consulted prior to the taking of any decision following upon a procedure to find infringements of Articles 81 EC and 82 EC. Such a consultation represents the final stage of the procedure before the adoption of the decision. Therefore, as long as the Advisory Committee on Restrictive Practices and Dominant Positions has not delivered the opinion provided for in Article 10(6) of Regulation No 17 on the preliminary draft decision transmitted by the Commis-

sion, the applicant or complainant's right to receive the objections and to be heard cannot be regarded as time-barred. Until the advisory committee has delivered its opinion, there is nothing to prevent the Commission examining the comments made by third parties and then modifying its position in the light of those comments.

(see paras 148, 149)

7. The Commission is not required, on the basis of mere suspicions over the possible abusive use of the objections, to restrict the right to the transmission of the statements of objections under Article 7 of Regulation No 2842/98 on the hearing of parties in certain proceedings under Articles [81 EC] and [82 EC]

enjoyed by a third-party applicant who properly shows a legitimate interest.

(see para. 189)

8. The Commission notice on the internal rules of procedure for processing requests for access to the file in cases pursuant to Articles [81 EC] and [82 EC], Articles 65 and 66 of the ECSC Treaty and Council Regulation No 4064/89 is not sufficient to establish an absolute right to confidentiality for documents which form part of the property of an undertaking and are the subject of a non-disclosure request by the latter in respect of third parties.

(see para. 213)