

Case T-32/93

Ladbroke Racing Ltd

v

Commission of the European Communities

(Article 90 of the EEC Treaty — Actions against Community institutions for failure to act — Inadmissibility)

Judgment of the Court of First Instance (Second Chamber), 27 October 1994 II - 1018

Summary of the Judgment

1. *Actions against Community institutions for failure to act — Elimination of the failure after commencement of proceedings — Disappearance of purpose of proceedings — No need for a ruling*
(EEC Treaty, Art. 175)
2. *Actions against Community institutions for failure to act — Natural or legal persons — Omissions which may be challenged — Failure by the Commission to address to a Member State a decision concerning compliance by public undertakings with the rules of competition — Obligation to act — None — Inadmissibility*
(EEC Treaty, Arts 90(3) and 175)
3. *Competition — Public undertakings and undertakings to which Member States grant special or exclusive rights — Commission's powers pursuant to its power of supervision — Power of assessment — Obligation on Commission to act — None*
(EEC Treaty, Art. 90)

1. When, in the context of an action against a Community institution for failure to act, the measure alleged not to have been taken is adopted after the action has been brought but before judgment is given, the application becomes devoid of purpose so that there is no longer any need for a ruling.

2. An undertaking is not entitled to bring an action for declaration of failure to act against the Commission on the ground that, notwithstanding the former's request to it, the Commission failed to use its powers under Article 90(3) of the Treaty.

First, it is a condition of an action for declaration of failure to act as instituted by Article 175 of the Treaty that the institution concerned should be under an obligation, so that the alleged failure to act is contrary to the Treaty. In the light of the Commission's power of assessment in supervising compliance by public undertakings with the rules of competition, that is not the case where that institution fails to address a decision in the matter to a Member State.

Secondly, measures which may be challenged on the basis of Article 90(3) are addressed to Member States so that, being a third party in relation to the measure which the Commission has allegedly failed to take, the undertaking cannot claim to satisfy the requirement that it should be individually concerned unless it is affected by reason of certain attributes

which are peculiar to it or by reason of circumstances in which it is differentiated from all other persons and which by virtue of those factors distinguish it individually just as in the case of the person addressed.

That necessary individualization does not follow, in the absence of specific circumstances, from the mere fact that the undertaking has a presence on the market where a measure may affect the conditions of competition. Nor, in the case of a measure adopted on the basis of Article 90(3), is it realized because that measure was adopted following a request by the undertaking, since such a request cannot be considered to fall within the exercise of procedural powers, which it may hold, since those conferred on operators by Regulations No 17 and 99/63 concern only the implementation of Articles 85 and 86 of the Treaty. Nor can it be based on the undertaking's participation in the investigation which preceded the adoption of the measure, since such participation is not such as to create for its benefit a right of action against an act which, by its nature and effects, does not concern it individually.

Finally, action by the Commission using its powers under Article 90(3), even if such action is taken, need not necessarily take the form of a decision but may also be a directive, which is a legislative measure of general scope addressed to the Member States the adoption of which cannot be required by individuals.

3. In relation to the application of the Community competition rules to public undertakings and undertakings to which Member States grant special or exclusive rights, Article 90(3) of the Treaty confers on the Commission the task of ensuring compliance by the Member States with their obligations concerning the undertakings referred to, and expressly invests it with the power to take action where necessary for that purpose under the conditions and by the legal measures which are there laid down. As may be seen from the above-mentioned provisions and the scheme of Article 90 as a whole, the Commission's power to supervise the Member States responsible for an infringement of the Treaty rules, in particular those relating to competition, necessarily implies that that institution has a wide power of assessment. That power of assessment is all the

wider since, first, Article 90(2) invites the Commission to take account in exercising that power of the demands inherent in the particular tasks of the undertakings concerned and, secondly, the authorities of the Member States may in certain cases have an equally wide power of assessment in regulating certain matters which may fall within the area of operation of those undertakings.

Consequently, the exercise of the power to assess the compatibility of State measures with the Treaty rules, conferred on the Commission by Article 90(3) of the Treaty, is not coupled with an obligation on its part to take action.