JUDGMENT OF THE COURT OF FIRST INSTANCE (Second Chamber)
7 March 2002 *

In Case T-95/99,

Satellimages TV 5 SA, established in Paris (France), represented by E. Marissens, lawyer, with an address for service in Luxembourg,

applicant,

supported by

French Republic, represented initially by K. Rispal-Bellanger, and, subsequently, G. de Bergues and F. Million, acting as Agents, with an address for service in Luxembourg,

intervener,

* Language of the case: English.
ECR

Commission of the European Communities, represented by B. Doherty and K. Wiedner, acting as Agents, with an address for service in Luxembourg,

defendant,

supported by

Deutsche Telekom AG, established in Bonn (Germany), represented by F. Roitzsch and K. Quack, lawyers, with an address for service in Luxembourg,

intervener,

APPLICATION for the annulment of the alleged decision by the Commission of 15 February 1999 relating to a complaint by the applicant under Article 86 of the EC Treaty (now Article 82 EC) (IV/36.968 — Satellimages TV 5/Deutsche Telekom),

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

composed of: R.M. Moura Ramos, President, J. Pirrung and A.W.H. Meij, Judges,

Registrar: H. Jung,

having regard to the written procedure and further to the hearing on 11 December 2001,

gives the following

Judgment

Background

1 The applicant is a broadcasting undertaking charged with providing a service in the public interest whose shareholders are public undertakings providing French-language broadcasting services and based in France, Belgium, Switzerland and Canada.

2 By letter of 18 March 1998, the applicant filed a complaint with the Commission, requesting that it declare that by requiring broadcasters to pay a tariff for the transmission of their programmes on the cable that it owns, Deutsche Telekom AG (hereinafter 'Deutsche Telekom') abused its dominant position on the cable

distribution market, thereby infringing Article 86 of the EC Treaty (now Article 82 EC). The applicant submitted, essentially, that the principle of levying tariffs in itself constituted a breach of Article 86 of the EC Treaty, whatever the precise level of the tariff.

3 In that context, the applicant also requested the Commission to take interim measures requiring suspension of the tariff increases for cable distribution imposed by Deutsche Telekom.

4 In parallel, on 15 June 1998, the applicant lodged a complaint with the German post and telecommunications regulator, the Regulierungsbehörde für Telekommunikation und Post concerning the level of tariff increases imposed by Deutsche Telekom in the field of cable distribution.

5 In its observations of 24 April 1998 on the request for interim measures, Deutsche Telekom referred to an interim report drawn up by the Commission on 22 October 1993 in the context of Case IV/34.463 — VPRT/DPB Telekom concerning the complaint filed in September 1990 by the VPRT, a trade association of commercial broadcasters active in Germany (hereinafter 'the VPRT report'). In that case, the VPRT complained, essentially, of Deutsche Telekom's method of levying tariffs, a method which, according to VPRT, discriminated between broadcasters using private satellite services and those using public satellite services. In that report, after carrying out a technical and commercial analysis of the cable distribution market, the Commission proposed a number of measures that would allow Deutsche Telekom to obtain extra financing for its cable distribution, in addition to the revenue from subscription fees paid by cable-connected households.

6 On that subject, the VPRT report states in particular:

'III Measures proposed

The alternatives proposed below with regard to the current pricing policy are meant to point out to [Deutsche] Telekom those criteria that should be used for purposes of orientation by the future pricing policy.

...

2. Options

The attempt to show some alternatives to the current price structure is not meant to anticipate the position of the Commission regarding any possible solution to be imposed on [Deutsche] Telekom and should be considered as a basis for discussion.

[The various options are:]

(1) Shifting the costs to the television viewers

...

(2) Splitting the costs among the programme makers

...

(3) Splitting the costs among the programme makers by satellite system

...

(4) Cost arrangements with satellite operators

...

IV Final comments

Because of the following considerations, no statement of objections will for the time being be sent to [Deutsche] Telekom, and only proposals for reform will be submitted to it. This is considered sufficient for the following reasons:

1. In informal talks, [Deutsche] Telekom has shown that it is prepared to change its pricing policy if the Commission considers it incompatible with the competition rules.

2. As explained above, there are numerous solutions for a pricing procedure compatible with Article 86 and equally acceptable to the Commission.'

7 The applicant obtained a copy of the VPRT report with a letter of the Commission of 17 June 1998.

8 In its written observations concerning the complaint of 18 March 1998, Deutsche Telekom attempted in particular to prove the unprofitability of its cable operation. It also argued that the applicant's complaint should be examined in the light of the VPRT/DPB Telekom case.

9 By letter of 7 July 1998, the applicant withdrew its request to the Commission for interim measures.

10 The applicant submitted fresh written observations to the Commission, concerning its complaint of 18 March 1998, on 9 July 1998.

11 The applicant states that, following its complaint and written observations, it had informal contacts with representatives of the competent unit of the Commission. During those contacts, the representatives indicated that their position as regards the applicant's complaint was not going to differ from the one already expressed by the Commission in the VPRT report. Those representatives could find no reason for which cable operators could not levy tariffs on the satellite broadcasters whose signals they were retransmitting by cable to connected households.

12 Accordingly, and following repeated requests from the applicant to have a written statement of the Commission's position, the Director in charge of the matter sent the applicant the letter of 15 February 1999, which is the subject of the present action ('the contested measure').

13 The contested measure is worded as follows:

'... I refer to your client's complaint of 18 March 1998 alleging that Deutsche Telekom's pricing policy *vis-à-vis* satellite broadcasting companies such as your client for access to its cable distribution services is abusive and contrary to Article 86 of the EC Treaty.

In broad lines, the complaint attacks two separate aspects of Deutsche Telekom's pricing policy, namely (1) the fact that with regard to its cable television network, Deutsche Telekom applies a system of dual levies, requiring payment from broadcasters such as Satellimages/TV5 as well as from the final consumers, i.e. the cable-connected households; (2) the level of the carriage fee charged by Deutsche Telekom to broadcasters, notably the increases thereof. You allege that Deutsche Telekom's behaviour is abusive in both respects.

My collaborators, Ms. Schiff and Mr. Haag, have indicated to you during the course of various telephone conversations that in our preliminary view, the system of dual levies applied by Deutsche Telekom does not in itself constitute an abuse of a dominant position. Both viewers of cable television and satellite broadcasters such as your client whose programmes are transmitted via satellite into the cable network for final distribution to viewers, benefit from a service for which payment may be required: cable-connected households pay inter alia for the service of having television signals carried over the cable network into their

homes where they can be viewed, while broadcasters pay for having their signals fed into Deutsche Telekom's cable network and carried across the cable network into the homes of cable-connected viewers. You have in our preliminary view not presented any arguments which would lead us to consider that Article 86 could be applied against this aspect of Deutsche Telekom's pricing policy.

With respect to the level of the carriage fee charged by Deutsche Telekom to your client, we understand that you are currently seeking a determination by the German national telecommunications regulatory authority. In our view this aspect of the complaint is indeed most appropriately dealt with by the competent national authority.

I should stress that the above comments are provisional and based on the information available to my department at present. They do not constitute a final position of the European Commission and are subject to any further comments you or your client may wish to make....

John Temple Lang,

Director'

Procedure and forms of order sought

14 By application lodged at the Registry of the Court of First Instance on 16 April 1999, the applicant brought the present action.

15 By separate document, registered at the Registry of the Court of First Instance on 8 June 1999, the Commission raised an objection of inadmissibility under Article 114(1) of the Rules of Procedure.

16 By orders of 22 November and 8 December 1999 respectively, the President of the Second Chamber of the Court of First Instance granted the French Republic leave to intervene in support of the applicant and Deutsche Telekom leave to intervene in support of the Commission.

17 By order of 13 March 2000, the Court of First Instance reserved its decision on the objection of inadmissibility for the final judgment.

18 On hearing the report of the Judge-Rapporteur, the Court of First Instance decided to open the oral procedure. By way of measures of organisation of procedure, the Court requested the parties to reply to certain questions at the hearing.

19 The parties presented oral argument and replied to the questions of the Court of First Instance at the hearing on 11 December 2001.

20 The applicant and the French Republic claim that the Court of First Instance should:

— declare the application admissible and well founded;

— consequently, annul the contested measure;

— declare that, under Article 176 of the EC Treaty (now Article 233 EC), the Commission is required to take all measures necessary to comply with the judgment to be delivered;

— order the Commission to pay the costs, including those incurred in relation to the objection of inadmissibility.

21 The Commission and Deutsche Telekom contend that the Court of First Instance should:

— declare the application inadmissible or unfounded;

— order the applicant to pay the costs.

Admissibility

Arguments of the parties

22 The Commission submits, first, that the contested measure is not a reviewable act, not being in the nature of a final act within the meaning of the judgments in Case 60/81 *IBM* v *Commission* [1981] ECR 2639, paragraph 10, and Case T-64/89 *Automec* v *Commission* [1990] ECR II-367, paragraphs 45 to 47.

23 The Commission also denies having prejudged the questions specific to the present case by adopting the VPRT report. Moreover, it denies that the VPRT report could transform the contested measure, whose terms clearly indicate its preparatory nature, into a decision rejecting the complaint. In so far as the action is based on the combined effect of the VPRT report and the contested measure, the Commission submits that it remains inadmissible. The VPRT report itself is not a reviewable act either, being only a non-binding internal document used as a basis for discussion in an effort to reach a settlement with the parties involved in a case raising different legal issues.

24 If, moreover, one were to follow the applicant's argument that the contested measure merely confirmed the VPRT report, the action should have been brought within two months of the receipt of that report. Since the applicant waited about ten months from receipt of the VPRT report before bringing the action, it is out of time and the applicant cannot challenge the letter of 15 February 1999, which is, by definition, merely confirmatory.

25 Deutsche Telekom supports the Commission's position.

26 The applicant, supported by the French Government, maintains, first, that nowhere in the *Automec* judgment, cited above, is it stated that the Commission cannot adopt a reviewable decision unless it has duly complied with the three procedural stages described in that judgment. In support of its argument, the applicant submits, essentially, as does the French Government, that judicial control cannot be made conditional on the completion of formalities which are always liable to be disregarded by the Commission. More particularly, as Advocate General Tesauro stated in paragraph 12 of his Opinion in Case C-282/95 *Guérin* v *Commission* [1997] ECR I-1503, at I-1505, the Commission cannot take advantage of its own breach of Article 6 of Regulation (EC)

No 2842/98 of 22 December 1998 on the hearing of parties in certain proceedings under Articles 85 and 86 of the EC Treaty (OJ 1998 L 354, p. 18).

27 The applicant, supported by the French Government, next notes that, according to settled case-law, only the substance and not the form of a measure must be taken into account in determining whether it affects the legal situation of the person challenging it. In that respect, the applicant puts forward three circumstances specific to the present case, with the aim of showing that the substance of the contested measure constitutes a definitive rejection of its complaint.

28 It submits, first, that the contested measure takes a position, without any reservation, on a definition of cable distribution as comprising two distinct services, one for cable-connected households and the other for broadcasters. The premiss that postulates the coexistence of two services in the act of cable distribution is not presented by the Commission as preliminary but as the objective and definitive postulate upon which it bases a preliminary conclusion that the imposition of a levy on the broadcasters is not in itself abusive. The finding of the existence of a service rendered by Deutsche Telekom automatically entails the possibility of the provider being remunerated for that service.

29 Second, according to the applicant, the contested measure takes a position on the definition of cable distribution in the abstract, so that no further observations of the applicant on the circumstances of the case could bring the Commission to adopt a different point of view from that which it took in the VPRT/DPB Telekom case. The applicant further argues that the Commission would never have given that general and abstract definition unless it was definitive.

30 Third, the applicant contends that, since the principle of imposing a levy on satellite broadcasters was explicitly suggested by the Commission in the VPRT report, it is unimaginable that the Commission could adopt an opposite position in the present case without causing the Community to incur liability. It argues that the passage of time since the adoption of the VPRT report is unimportant in that respect.

31 The applicant and the French Republic therefore conclude that, taking account of the context in which the contested measure was adopted, that measure constitutes, substantively, a decision rejecting the complaint. Consequently, in accordance with the case-law (Case T-37/92 *BEUC and NCC* v *Commission* [1994] ECR II-285, paragraph 34), the Commission should not be allowed to hide behind purely formal expressions in order to avoid review by the Court of First Instance or simply in order to prolong the investigation of a complaint artificially, when the decision to reject it has in reality already been made and cannot possibly be changed.

Findings of the Court of First Instance

32 For the purpose of determining whether the present action is admissible, it should be noted at the outset that according to settled case-law only measures which produce binding legal effects and are capable of affecting the interests of the applicant by bringing about a distinct change in his legal position constitute measures challengeable by an action for annulment under Article 173 of the EC Treaty (now, after amendment, Article 230 EC). In the case of acts or decisions adopted by a procedure involving several stages, in particular where they are the culmination of an internal procedure, it is clear from the same case-law that, in principle, an act is reviewable only if it is a measure definitively establishing the position of the Commission at the conclusion of that procedure, and not a provisional measure intended to pave the way for the final decision (*IBM* v *Commission*, cited above, paragraphs 9 and 10).

33 It is therefore appropriate to examine whether the contested measure shows that the Commission definitively established its position in relation to the complaint submitted to it by the applicant.

34 In that respect, it should be noted that, in the contested measure, the Commission makes it clear that the assessments contained in it are of a provisional nature. The concluding passage of the contested measure could not, in that regard, be expressed in plainer terms, inasmuch as it states that 'the above comments are provisional and based on the information available to [the Commission] at present. They do not constitute a final position of the European Commission and are subject to any further comments you or your client may wish to make'. Contrary to what the applicant states, there is nothing to suggest that those concluding statements do not concern all the assessments made by the Commission in that measure.

35 That passage in the contested measure cannot be regarded as a purely formal clause unrelated to the content of the measure, as claimed by the applicant and the French Republic, citing in that respect the judgment in *BEUC and NCC*. With regard to the main subject of the complaint, the provisional nature of the assessments by the Commission officers is emphasised several times, especially in the passage of the contested measure worded as follows: 'in our preliminary view, the system of dual levies applied by Deutsche Telekom does not in itself constitute an abuse of a dominant position... [the applicant has] in our preliminary view not presented any arguments which would lead us to consider that Article 86 could be applied against this aspect of Deutsche Telekom's pricing policy'.

36 Moreover, as the Commission has rightly argued, the contested measure does not in any way show that the complaint has been rejected or that it has been decided to close the file on it.

37 Finally, the Commission made it clear that its comments were subject to any further observations the applicant might wish to make.

38 In those circumstances, it must be concluded that the contested measure is to be regarded as a preparatory statement of position (see, to that effect, Case C-39/93 P *SFEI and Others* v *Commission* [1994] ECR I-2681, paragraph 30).

39 That conclusion cannot be called into question by the existence of the VPRT report. Without its being necessary to decide whether the VPRT report contains a final decision of the Commission in the context of the VPRT/DPB Telekom case, it should be noted that the existence of that report cannot confer on the contested measure the nature of a final position adopted by the Commission in relation to the complaint lodged by the applicant. Contrary to what the applicant maintains, in the context of any final decision applying Article 86 of the Treaty to the facts which form the subject of the applicant's complaint, the Commission is required to make a fresh analysis of the conditions of competition, which will not necessarily be based on the same considerations as those underlying the VPRT report (see, by analogy, Joined Cases T-125/97 and T-127/97 *Coca-Cola* v *Commission* [2000] ECR II-1733, paragraph 82).

40 It follows for the reasons set out above that, in the contested measure, the Commission did not definitively state its position in relation to the applicant's complaint. The contested measure is designed, *inter alia*, to give the applicant the opportunity of elaborating on its arguments in the light of the initial reaction of

the Commission's officers expressed in that measure. The fact that, as it stated at the hearing, the applicant considers that it set out all its arguments in its letters to the Commission, before the Commission sent the letter containing the contested measure, cannot alter that finding. That fact cannot render the contested measure less provisional than the Commission expressly intended it to be.

41 Since the contested measure is not one which definitively establishes the Commission's position, it does not produce binding legal effects capable of affecting the applicant's interests, and is not therefore a reviewable act for the purposes of Article 173 of the EC Treaty. The present action must therefore be dismissed as inadmissible without there being any need to examine the other arguments on admissibility. In those circumstances, it follows that the substantive issues, as presented in the parties' arguments, cannot be examined.

Costs

42 Under Article 87(2) of the Rules of Procedure, the unsuccessful party must 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.

43 In accordance with Article 87(4) of the Rules of Procedure, the French Republic must be ordered to bear its own costs. Similarly, it appears equitable in the circumstances of this case to order Deutsche Telekom to bear its own costs.

On those grounds,

THE COURT OF FIRST INSTANCE (Second Chamber)

hereby:

1. **Dismisses the application as inadmissible;**

2. **Orders the applicant to bear its own costs and to pay the costs incurred by the Commission;**

3. **Orders the interveners to bear their own costs.**

Moura Ramos Pirrung Meij

Delivered in open court in Luxembourg on 7 March 2002.

H. Jung
Registrar

R.M. Moura Ramos
President