

Case T-60/05

Union française de l'express (UFEX) and Others

v

Commission of the European Communities

(Competition — Abuse of dominant position — International express mail market — Decision to dismiss the complaint — Annulment by the Community court of the decision to dismiss the complaint — Re-examination and second dismissal of the complaint — Public undertaking)

Judgment of the Court of First Instance (Second Chamber), 12 September
2007 II - 3404

Summary of the Judgment

1. *Actions for annulment — Interest in bringing proceedings*
(Art. 230, fourth para., EC)
2. *Competition — Administrative procedure — Examination of complaints — Determination of priorities by the Commission*

3. *Competition — Administrative procedure — Examination of complaints — Complaint concerning a State aid measure and abuse of a dominant position*
(Arts 82 EC, 87 EC and 88 EC)
4. *Competition — Administrative procedure — Commission finding that infringement has ceased*
5. *Competition — Dominant position — Abuse — Grant of cross subsidies from an undertaking in a monopoly position in favour of its subsidiary carrying on business in a sector open to competition*
(Art. 82 EC)
6. *Competition — Administrative procedure — Examination of complaints — Complaint falling within the ambit of jurisdiction shared by the Community and the national authorities — Obligation of the Commission to rule by decision on the existence of an infringement — None*
(Art. 82 EC; Commission Regulation No 773/2004; Commission Notice No 2004/C 101/04)
7. *Competition — Administrative procedure — Examination of complaints — Taking into account the Community interest in investigating a case*
(Arts 81 EC and 82 EC)
8. *Actions for annulment — Actionable measures — Refusal of the Commission to pursue the examination of a complaint calling on it to act pursuant to Article 86(3) EC — Excluded*
(Arts 3(g) EC, 10 EC and 86 EC; Council Regulations Nos 17 and 1/2003; Commission Regulations Nos 2842/98 and 773/2004)

1. Applicants' interest in bringing an action for annulment against a Commission decision dismissing their complaint concerning conduct liable to constitute abuse of a dominant position can only be denied in exceptional circumstances, inter alia if it may be established with

certainly that the Commission is unable to adopt a decision finding an infringement by the relevant undertaking in a dominant position. This is the case when it is established that the excessive duration of the entire administrative procedure might affect the ability of the

undertakings involved in the investigation to defend themselves.

(see paras 54-58)

required to take account in each case of the duration and significance of the infringements complained of and of their effect on the competitive situation in the Community. If anti-competitive effects do not persist, the Commission remains obliged to take account of the duration and seriousness of the alleged infringements.

2. With respect to the examination of complaints concerning infringement of the competition rules, when it decides to assign different priorities to the examination of complaints submitted to it, the Commission may not only decide on the order in which they are to be examined but also reject a complaint on the ground that there is an insufficient Community interest in further investigation of the case. Although a complaint against practices alleged to be contrary to the Treaty may be the subject of no further action by the Commission, exercising its discretion in the area, on the ground of lack of Community interest, the Commission cannot in so doing rely solely on the fact that such practices have ceased, without having ascertained that anti-competitive effects have ceased and, if appropriate, that the seriousness of the alleged interferences with competition or the persistence of their consequences has not been such as to give the complaint a Community interest. Thus, if anti-competitive effects persist, the Commission is required to verify whether either the seriousness of the infringements alleged or the fact that their effects were persisting gives the complaint a Community interest, which means that it is

In its examination of the Community interest in pursuing the complaint, the Commission is not required to assess the seriousness, duration and continued effects of the alleged infringement in a specific order.

An error on the part of the Commission, consisting in finding that, in its assessment of the Community interest, it is not required to take account of the seriousness and duration of the alleged infringements, is irrelevant in the light of the lawfulness of the decision dismissing the complaint if that error could not have had a decisive effect on the outcome. This is so when the Commission finds that there is insufficient Community interest in pursuing a complaint, after having merely examined the complainants' arguments on the seriousness and duration of the infringements in the interests of sound administration, so

long as the examination was actually conducted.

regard to a complaint as to abuse of a dominant position, which does not fall within its exclusive competence, a discretionary power to determine priorities and it is not obliged to rule on whether or not there has been any infringement.

(see paras 65, 69, 70, 73, 74, 78)

(see paras 106, 107)

3. With regard to a complaint as to State aid and conduct liable to constitute abuse of a dominant position, the Commission may investigate the two aspects of the complaint separately. Moreover, the fact that the Commission has opened a procedure in relation to State aid and undertaken a more in-depth investigation in that connection does not exclude the possibility of its rejecting the aspect of the complaint concerned with abuse of a dominant position for lack of Community interest according to the criteria applicable to that part of the complaint. Although in the exercise of its exclusive jurisdiction to determine whether aid is incompatible with the common market, the Commission has a duty, at the end of the preliminary stage of the investigation, to decide that the State measure at issue does not constitute 'aid' within the meaning of Article 87(1) EC; or to decide that the measure, although constituting aid, is compatible with the common market; or may decide to initiate the procedure under Article 88(2) EC, it has, on the other hand, with
4. If it has established that there is no economic reason for continuing conduct liable to constitute abuse of a dominant position, the Commission may in principle take the view that the alleged infringement has ceased if there are not sufficient indications to the contrary. This is so where no economic reason can justify an undertaking in a dominant position under-invoicing access to its network to its subsidiary which is carrying on business in a market open to competition if that undertaking is required to offer the same conditions of access to competitors.
5. The mere fact that an exclusive right is granted to an undertaking in order to guarantee that it provides a service of general economic interest does not preclude that undertaking from earning

(see para. 109)

profits from the activities reserved to it or from extending its activities into non-reserved areas. The acquisition of a holding (and by analogy of cross subsidies) could raise problems in the light of the Community competition rules where the funds used by the undertaking holding the monopoly derived from excessive or discriminatory prices or from other unfair practices in its reserved market.

However, it does not follow from the case-law that in itself the grant of cross subsidies constitutes an abuse of a dominant position, irrespective of the policies pursued in the reserved sector and the sector open to competition. Under-invoicing of its services by an undertaking holding a legal monopoly to its subsidiary carrying on business in a market open to competition does not necessarily constitute an impediment for competitors, *inter alia*, if the subsidiary uses those subsidies to yield very large profits or to pay high dividends. The fact that an undertaking takes very large profits has no influence on the customer's choice of provider.

(see paras 113-116)

6. As to the examination of a complaint which falls within jurisdiction which is shared by the Commission and the national authorities, the Commission is not obliged to carry out an investigation or take a final decision on the existence or otherwise of the alleged infringement. A subjective attitude on the part of the authorities or the national courts to the effect that the Commission is better placed to deal with a complaint is not such as to require the Commission to pursue the examination of it as if it fell within its exclusive competence. It is for the applicants, if they are not satisfied with the manner in which their rights have been taken into account by the competition authorities or the national courts, to take the necessary steps with the latter or to examine the national remedies available to them.

Likewise, the fact that there is collaboration by the Commission and a national authority is not of such a nature as to create an exclusive competence on the part of the Commission or to pre-empt the Commission's decision on the existence of a Community interest in the case. Nor is the Commission obliged to give priority to a case where a national court has stayed proceedings pending a decision by the Commission. Moreover, in so far as there is concurrent competence on the part of the Commission and

the national competition authorities, the Community dimension of a market is not such as to oblige the Commission to conclude that an infringement is of a certain seriousness or that there is a Community interest in a given case.

standard in order to adopt a decision establishing the infringement is a matter which may be taken into account in the context of the assessment of the Community interest.

(see paras 178, 179)

(see paras 152, 153, 155, 156, 158)

7. In its assessment of whether there is a Community interest in further investigation of a case, the Commission must take account of the circumstances of the case, and in particular of the legal and factual particulars set out in the complaint referred to it. In particular, it must weigh the significance of the alleged infringement as regards the functioning of the common market against the probability of its being able to establish the existence of the infringement and the extent of the investigative measures necessary in order to fulfil in the best conditions its task of ensuring the observance of Articles 81 EC and 82 EC.

8. It follows from the wording of Article 86(3) EC and from the scheme of that article as a whole that the Commission is not obliged to bring proceedings within the terms of those provisions, as individuals cannot require the Commission to take a position in a specific sense. A decision by the Commission to refuse to act on a complaint requesting it to take action pursuant to Article 86(3) EC is not such as to constitute a measure that is capable of being the subject of an action for annulment.

Therefore, the difficulty of establishing an infringement to the requisite legal

Accordingly, the submission of such a complaint on an inappropriate legal basis or a possible error by the Commission in that regard, such as dealing with the complaint under Regulation No 17 whereas that regulation, as well as Regulations Nos 1/2003, 2842/98 and 773/2004 are not applicable to Article 86 EC, even though the Commission may have considered itself under an obligation to apply them, or the reference, in

the complaint and in the Commission decision, to provisions such as Article 3(g) EC and Article 10 EC, are not such as to confer on a complainant the right to bring an action before the Community courts against a Commission decision falling within the scope of Article 86 (3) EC.

Nor may the fact that the complainant combines a complaint directed against a Member State with a complaint against an undertaking confer on them entitlement to challenge the part of the

Commission decision concerning the complaint directed against the Member State. Likewise, the legal nature of such a decision is not affected by the reasons given by the Commission as to why it does not intend to act on the complaint in the light of Article 86 EC, or by the fact that it does not distinguish between the various aspects of its decision by indicating to the complainants their right of action.

(see paras 189, 191-194)