

JUDGMENT OF THE COURT (Grand Chamber)

11 July 2006^{*}

In Case C-205/03 P,

APPEAL under Article 56 of the Statute of the Court of Justice lodged on 13 May 2003,

Federación Española de Empresas de Tecnología Sanitaria (FENIN), formerly Federación Nacional de Empresas de Instrumentación Científica, Médica, Técnica y Dental, established in Madrid (Spain), represented by J.-R. García-Gallardo Gil-Fournier and D. Domínguez Pérez, abogados,

appellant,

the other party to the proceedings being:

Commission of the European Communities, represented by W. Wils and F. Castillo de la Torre, acting as Agents, and J. Rivas de Andrés and J. Gutiérrez Gisbert, abogados, with an address for service in Luxembourg,

defendant at first instance,

* Language of the case: Spanish.

supported by:

United Kingdom of Great Britain and Northern Ireland, represented by M. Bethell, acting as Agent, and G. Barling QC, with an address for service in Luxembourg,

Kingdom of Spain, represented by N. Díaz Abad, L. Fraguas Gadea and F. Díez Moreno, acting as Agents, with an address for service in Luxembourg,

interveners in the appeal,

THE COURT (Grand Chamber),

composed of V. Skouris, President, P. Jann, C.W.A. Timmermans and A. Rosas, Presidents of Chambers, J.-P. Puissechet, R. Schintgen, N. Colneric, S. von Bahr (Rapporteur), J. Klučka, U. Löhmus and E. Levits, Judges,

Advocate General: M. Poiares Maduro,

Registrar: M. Ferreira, Principal Administrator,

having regard to the written procedure and further to the hearing on 13 September 2005,

after hearing the Opinion of the Advocate General at the sitting on 10 November 2005,

gives the following

Judgment

- 1 By its appeal, the Federación Española de Empresas de Tecnología Sanitaria ('FENIN') seeks to have set aside the judgment of the Court of First Instance of the European Communities of 4 March 2003 in Case T-319/99 *FENIN v Commission* [2003] ECR II-357 ('the judgment under appeal') dismissing its action for annulment of the Commission's decision of 26 August 1999 dismissing the complaint it had lodged against 26 public bodies, including three ministries, which run the national health system (Sistema Nacional de Salud) ('the SNS') on the ground that those bodies ('the SNS management bodies') are not undertakings for the purposes of the application of Article 82 EC ('the contested decision').

Factual background

- 2 The facts, as they appear in the judgment under appeal, may be summarised as follows.
- 3 FENIN is an association of the majority of the undertakings which market medical goods and equipment, particularly medical instruments, used in Spanish hospitals. The members of that association sell those goods, inter alia, to the SNS management bodies. The sales of medical goods and equipment to the SNS management bodies represent more than 80% of the turnover for the undertakings who are members of FENIN.

- 4 On 12 December 1997, FENIN submitted a complaint to the Commission of the European Communities alleging systematic delays in payment by the SNS management bodies, which constitute, in its view, an abuse of a dominant position within the meaning of Article 82 EC. It stated that those bodies took an average of 300 days to pay their debts to its members, even though they settled their debts to other suppliers within a far more reasonable period of time. That discrimination is attributable to the fact that the members of FENIN cannot exert any commercial pressure on those bodies because they have a dominant position in the Spanish market for medical goods and equipment.
- 5 By the contested decision, the Commission dismissed that complaint on the ground that, first, the SNS management bodies do not act as undertakings where they participate in the management of the public health service and, second, their capacity as purchasers cannot be dissociated from the use which is made of the medical goods and equipment following their purchase. Consequently, the Commission submits that those bodies do not act as undertakings within the meaning of Community competition law when they purchase medical goods and equipment, and that Articles 81 EC and 82 EC are not applicable to them.

The proceedings before the Court of First Instance and the judgment under appeal

- 6 By application lodged at the Registry of the Court of First Instance on 10 November 1999, FENIN brought an action for annulment of the contested decision.
- 7 In support of its action, FENIN put forward three pleas: (i) infringement of its rights of defence by the Commission, (ii) error in law or manifest error of assessment in the

application of Articles 82 EC and 86 EC, and (iii) an inadequate statement of reasons and lack of transparency in the contested decision.

- 8 The Court of First Instance first dismissed the second plea, relating to the application of Articles 82 EC and 86 EC, holding, in paragraph 40 of the judgment under appeal, that the SNS management bodies do not act as undertakings when purchasing from the members of FENIN the medical goods and equipment which they require in order to provide free services to SNS members. The Court of First Instance held that that conclusion follows from the situation described in paragraph 39 of the judgment under appeal, that the SNS operates according to the principle of solidarity in that it is funded from social security contributions and other State funding and provides services free of charge to its members on the basis of universal cover, and that the SNS management bodies do not, therefore, act as undertakings in their activity of managing the health system.
- 9 The Court of First Instance stated, in paragraphs 41 to 44 of the judgment under appeal, that the argument that Spanish public hospitals do, at least on occasion, provide care for which patients not covered by the SNS, such as foreign visitors, are charged had not been made to the Commission and was mentioned before the Court for the first time only in the reply. It held, therefore, that that argument could not be taken into consideration for the purposes of reviewing the legality of the contested decision.
- 10 Next, as regards the first plea, alleging infringement of the rights of defence, the Court of First Instance dismissed it after holding, in paragraphs 49 and 50 of the judgment under appeal, that the Commission was entitled to dismiss the complaint referred to it on the ground that the SNS management bodies do not act as undertakings within the meaning of Article 82 EC. The Court held that there was therefore no need for the Commission to consider the other aspects of the complaint.

- 11 Finally, as regards the third plea, alleging an inadequate statement of reasons and lack of transparency in the contested decision, it is clear from paragraphs 58 and 59 of the judgment under appeal that, in the view of the Court of First Instance, the Commission set out the legal considerations fundamental to the logic of that decision. Having recalled that the Commission was not obliged to adopt a position on all the arguments put forward in support of the complaint, the Court of First Instance held that that decision was not vitiated by an inadequate statement of reasons. As far as concerns the allegation that the decision lacked transparency, the Court of First Instance held, in paragraph 63 of the judgment under appeal, that the Commission discharged the only obligation upon it in this case, namely to allow FENIN to submit written observations on the position initially adopted by the Commission.
- 12 Since the three pleas relied on by FENIN in support of its action were thus dismissed, the action was dismissed in its entirety by the Court of First Instance.

The appeal

Forms of order sought by the parties and the plea for annulment

- 13 FENIN claims that the Court should:

- set aside the judgment under appeal; and

- order the Commission to pay the costs of both these proceedings and those before the Court of First Instance.

- 14 The Commission contends that the Court should:
- declare the appeal partly inadmissible;
 - dismiss the remainder of the appeal; and
 - order FENIN to pay the costs.
- 15 The United Kingdom of Great Britain and Northern Ireland and the Kingdom of Spain, which were given leave to intervene in support of the form of order sought by the Commission by order of the President of the Court of Justice of 17 October 2003, contend that the appeal should be dismissed on the ground that it is partly inadmissible and partly unfounded, and that FENIN should be ordered to pay the costs.
- 16 FENIN puts forward a single plea in support of its appeal, alleging that the Court of First Instance misinterpreted the definition of ‘undertaking’ for the purposes of the EC Treaty rules on competition. That plea has two parts.
- 17 By the first part, FENIN submits that the Court of First Instance wrongly omitted to consider whether purchasing activity is in itself an economic activity which may be dissociated from the service subsequently provided and, therefore, that the SNS management bodies must be subject to the competition rules.

- 18 By the second part, on which it relies in the alternative, FENIN maintains that the Court of First Instance should have considered whether purchasing activity is economic in nature and, therefore, whether it is subject to the competition rules, on the ground that the subsequent activity, namely the provision of medical treatment, is itself economic in nature.

The appeal

Admissibility

- 19 The Commission raises a plea of inadmissibility which refers only to the second part of the plea relied on by FENIN.
- 20 The Commission submits, first of all, that the allegation on which the second part of the plea is based, which was submitted for the first time at the appeal stage, is out of time. Next, it submits that FENIN has always acknowledged that the activities of the SNS management bodies are of a purely social nature. Finally, the Commission takes the view that the second part of the plea gives rise to a question of assessment of the facts, which cannot be put before the Court during its examination of the appeal.
- 21 It must be held, as the Commission rightly observed, that the economic nature of the activity of provision of medical treatment by the SNS management bodies, the connection between the purchase of goods and equipment and their subsequent use,

and the consequences which flow from that for the nature of that purchasing activity were put forward by FENIN for the first time at the appeal stage.

- 22 It follows that the second part of the single plea relied on by FENIN must be dismissed as inadmissible.

The merits

— Arguments of the parties

- 23 In support of the first part of its plea, FENIN argues that the Court of First Instance adopted a definition of economic activity which is too narrow, holding that that activity necessarily consists of the offer of goods or services on a given market and excluding all purchasing activity from that definition. FENIN submits that the approach of the Court of First Instance would enable many bodies to avoid the competition rules of the Treaty, even though competition is affected by the conduct of such bodies.
- 24 The Commission submits that it precisely the act of placing goods or services on a given market which characterises the concept of economic activity and not purchasing activity as such. Accordingly, there is no need to dissociate the purchase from the use to which the purchased goods are put.

— Findings of the Court

- 25 The Court of First Instance rightly held, in paragraph 35 of the judgment under appeal, that in Community competition law the definition of an ‘undertaking’ covers any entity engaged in an economic activity, regardless of the legal status of that entity and the way in which it is financed (Case C-41/90 *Höfner and Elser* [1991] ECR I-1979, paragraph 21, and Joined Cases C-264/01, C-306/01, C-354/01 and C-355/01 *AOK-Bundesverband and Others* [2004] ECR I-2493, paragraph 46). In accordance with the case-law of the Court of Justice, the Court of First Instance also stated, in paragraph 36 of the judgment under appeal, that it is the activity consisting in offering goods and services on a given market that is the characteristic feature of an economic activity (Case C-35/96 *Commission v Italy* [1998] ECR I-3851, paragraph 36).
- 26 The Court of First Instance rightly deduced, in paragraph 36 of the judgment under appeal, that there is no need to dissociate the activity of purchasing goods from the subsequent use to which they are put in order to determine the nature of that purchasing activity, and that the nature of the purchasing activity must be determined according to whether or not the subsequent use of the purchased goods amounts to an economic activity.
- 27 It follows that the first part of the single plea raised by FENIN in support of its appeal, that the purchasing activity of the SNS management bodies constitutes an economic activity in itself, dissociable from the service subsequently provided and which, as such, should have been examined separately by the Court of First Instance, must be dismissed as unfounded.
- 28 Having regard to the foregoing considerations, the appeal must be dismissed as partly inadmissible and partly unfounded.

Costs

- 29 Under the first subparagraph of Article 69(2) of the Rules of Procedure, which applies to appeal proceedings pursuant to Article 118 of those rules, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. As the Commission has applied for costs against FENIN and the latter has been unsuccessful, it must be ordered to pay the costs of these proceedings. Under the first subparagraph of Article 69(4) of the Rules of Procedure, the Member States and institutions which have intervened in the proceedings are to bear their own costs.

On those grounds, the Court (Grand Chamber) hereby:

1. **Dismisses the appeal;**

2. **Orders the Federación Española de Empresas de Tecnología Sanitaria (FENIN) to pay the costs of these proceedings;**

3. **Orders the United Kingdom of Great Britain and Northern Ireland and the Kingdom of Spain to bear their own costs.**

[Signatures]