Case T-155/04

SELEX Sistemi Integrati SpA

v

Commission of the European Communities

(Competition — Abuse of a dominant position — Concept of an 'undertaking' — Complaint — Rejection)

Judgment of the Court of First Instance (Second Chamber), 12 December 2006 II - 4803

Summary of the Judgment

1. *Procedure — Intervention — Plea which has not been raised by the applicant*
   (Statute of the Court of Justice, Arts 40, fourth para., and 53, first para.; Rules of Procedure of the Court of First Instance, Art. 116(3))

2. *Actions for annulment — Subject-matter — Decision based on several pillars of reasoning, each sufficient to justify the operative part — Annulment of such a decision — Conditions*
   (Art. 230 EC)

3. *Competition — Community rules — Undertaking — Concept (Arts 81 EC and 82 EC)*

4. *Competition — Community rules — Undertaking — Concept (Arts 81 EC and 82 EC)*

5. *Competition — Community rules — Undertaking — Concept (Arts 81 EC and 82 EC)*

6. *Competition — Community rules — Undertaking — Concept (Arts 81 EC and 82 EC)*

7. *Competition — Dominant position — Abuse — Concept (Art. 82 EC)*

8. *Acts of the institutions — Statement of reasons — Obligation — Scope (Art. 253 EC)*

1. Whilst the fourth paragraph of Article 40 of the Statute of the Court of Justice, applicable to the procedure before the Court of First Instance by virtue of the first paragraph of Article 53 of that statute, and Article 116(3) of the Rules of Procedure of the Court of First Instance do not preclude the intervener from advancing arguments which are new or which differ from those of the party he supports, lest his intervention be limited to restating the arguments advanced in the application, it cannot be held that those provisions permit him to alter or distort the context of the dispute defined in the application by raising new pleas in law.

(see para. 42)

2. Where the operative part of a Commission decision is based on several pillars of reasoning, each of which would in itself be sufficient to justify that operative part, that decision should, in principle, be annulled only if each of those pillars is vitiated by an illegality. An error or other illegality which affects only one of the pillars of reasoning cannot be sufficient to justify annulment of the decision at issue because that error could not have had a decisive effect on the operative part adopted by the Commission.

(see para. 47)

3. The concept of an 'undertaking', in the context of Community competition law, covers any entity engaged in an economic activity, regardless of its legal status and the way in which it is financed, and any activity consisting in offering goods and services on a given market is an economic activity.

In that connection, as regards a public authority, and having regard to the fact that the Treaty provisions on competition are applicable to the activities of an entity which can be severed from those in which it engages in the exercise of its powers as a public authority, the various activities of such an entity must be considered individually and the treatment of some of them as powers of a public authority does not mean that it must be concluded that the other activities are not economic. Accordingly, it must therefore be assessed whether, in relation to each of the activities of a public authority, first, it is separable from its activities falling within its public remit, and, secondly, it is an economic activity.

(see paras 50, 54, 55)

4. In relation to the standardisation activities of the European Organisation for the Safety of Air Navigation (Eurocontrol), the distinction must first be made between, on the one hand, the preparation or production of standards, a task which is undertaken by the Agency of Eurocontrol as the executive organ, and, on the other, their adoption by the Council of Eurocontrol. Whereas the latter task is clearly a legislative activity, and is therefore an activity which falls within the public tasks of Eurocontrol, the preparation or production of technical standards may, on the other hand, be separated from its tasks of managing air space and developing air safety, since the need to adopt standards at an international level does not necessarily mean that the body which sets those standards must also be the same as that which subsequently adopts them.

However, Eurocontrol's activity of producing standards cannot be deemed to be an economic activity, given the lack of a market for such services. The only purchasers of such services can be States in their capacity as air traffic control authorities. However, they chose to develop those standards themselves in the context of international cooperation through Eurocontrol. Eurocontrol cannot be considered to offer goods and services to its Member States since, in the field of standardisation, that body, for its Member States, is therefore only a

forum for concerted action which those States established in order to coordinate the technical standards of their uniform air traffic management systems.

In addition, the fact that the standardisation activity carried out by Eurocontrol is not an economic activity implies that the acquisition by that body of goods necessary for that activity is not an economic activity; what determines the nature of the purchasing activity is whether or not the subsequent use of the goods amounts to an economic activity.

(see paras 59-61, 65)

5. The research and development activities financed by Eurocontrol are not economic activities and the competition rules of the Treaties are therefore not applicable to them. It is apparent that Eurocontrol's acquisition of prototypes in the context of those activities of research and development and the related management of intellectual property rights are not capable of making that activity of the organisation an economic one, since the acquisition does not involve the offer of goods and services on a given market. In addition, the acquisition of prototypes is indeed only an activity which is subsidiary to their development. The latter is not carried out by Eurocontrol itself, but by undertakings in the relevant sector to which the organisation grants public subsidy incentives with a view to promoting research and development. In order to ensure that the results of the research which it subsidises is made available to the sector concerned, even if the subsidy contracts provide for Eurocontrol to acquire ownership of the prototype and the intellectual property rights resulting from the research which it financed, the acquisition of those rights by the organisation is therefore not an end in itself and does not allow it to exploit those rights for commercial purposes. The acquisition is merely one element in the legal relationship between the body granting the subsidy and the undertaking receiving it.

In that context, in the context of the management of intellectual property rights established by Eurocontrol, the intellectual property rights which it owns in the results of the research and development activities referred to above are made available to interested undertakings at no cost. Admittedly, when assessing whether a given activity is an economic activity, the absence of remuneration is only one indication among several others and cannot by itself exclude the possibility that the activity in question is economic in nature. However, in the present case, the fact that the licences for the property rights acquired by Eurocontrol in the context of the development of the prototypes are granted at no cost adds to the fact that this activity is ancillary to the promotion

of technical development, forming part of the aims of Eurocontrol's public service tasks and not being pursued in its own interest, separable from those aims, which excludes the possibility that the activity in question is economic in nature.

area could also very well offer their services, which constitutes a further indication that the activity in question may be described as a business activity.

(see paras 73, 75-77, 82)

The fact that assistance services to public administrations are not at the current time offered by private undertakings does not prevent their being described as an economic activity, since it is possible for them to be carried out by private entities.

6. In the exercise of its activities of assisting the national administrations, Eurocontrol is an undertaking within the meaning of Article 82 EC, given that such assistance is an economic activity. This activity of Eurocontrol is separable from its tasks of air space management and development of air safety. In addition, since Eurocontrol only offers assistance in that field on the request of the national administrations, this activity is therefore in no way an activity which is essential or even indispensable to ensuring the safety of air navigation.

The fact that those services are not remunerated as such may constitute an indication that they do not amount to an economic activity, but this is not in itself decisive, since Eurocontrol benefits from financing by its Member States in the form of contributions, which themselves provide access to assistance services free of charge and on request.

Furthermore, since that activity takes the form of advice given at the time of drafting the contract documents for calls for tender or during the selection procedure of undertakings participating in those calls for tender, this is precisely a case of an offer of services on the market for advice, a market on which private undertakings specialised in this

Similarly, the fact that Eurocontrol's assistance is given in pursuit of a public service objective and is non-profit making may be an indication that it is a non-economic activity, but this does not

prevent an activity consisting in offering services on a given market from being considered to be an economic activity.

(see paras 86-92)

7. An 'abuse' is an objective concept referring to the conduct of an undertaking in a dominant position which is such as to influence the structure of a market where, as a result of the very presence of the undertaking in question, the degree of competition is already weakened and which, through recourse to methods different from those governing normal competition in products or services on the basis of the transactions of commercial operators, has the effect of hindering the maintenance of the degree of competition still existing in the market or the growth of that competition.

(see para. 107)

8. In stating the reasons for the decision rejecting a complaint alleging breach of the competition rules, the Commission is not obliged to adopt a position on all the arguments relied on by the parties concerned in support of their request. It is sufficient if it sets out the facts and legal considerations having decisive importance in the context of the decision.

(see para. 118)