

Case T-69/89

Radio Telefis Eireann

v

Commission of the European Communities

(Competition — Abuse of a dominant position — Copyright —
Practices preventing the publication and sale of comprehensive weekly
television guides)

Judgment of the Court of First Instance (Second Chamber), 10 July 1991 II - 489

Summary of the Judgment

- 1. Competition — Administrative procedure — Advisory Committee on Restrictive Practices and Monopolies — Determination of the documents to be submitted to the Advisory Committee — Criteria — Minutes of the hearing of the undertakings not submitted — Consequences*
(Regulation No 17 of the Council, Art. 10(5))
- 2. Competition — Administrative procedure — Advisory Committee on Restrictive Practices and Monopolies — Period for the convening of the Advisory Committee*
(Regulation No 17 of the Council, Art. 10(5))
- 3. Competition — Dominant position — Relevant market — Weekly television programme listings and magazines publishing listings*
(EEC Treaty, Art. 86)

4. *Free movement of goods — Industrial and commercial property — Article 36 of the Treaty — Interpretation taking account of the competition rules*
(EEC Treaty, Arts 2, 3, 36, 85 and 86)
5. *Competition — Dominant position — Copyright — Weekly television programme listings — Exercise of copyright — Abuse — Conditions*
(EEC Treaty, Arts 36 and 86)
6. *Competition — Dominant position — Effect on trade between Member States — Criteria*
(EEC Treaty, Art. 86)
7. *Competition — Administrative procedure — Termination of infringements — Power of the Commission — Orders given to undertakings*
(Regulation No 17 of the Council, Art. 3(1))
8. *International agreements — Agreements between the Member States — Agreements antedating the EEC Treaty — Article 234 of the Treaty — Object — Scope — Justification for restrictions on intra-Community trade — Not permissible*
(EEC Treaty, Art. 234)

1. The substance of the obligations imposed on the Commission by Article 10(5) of Regulation No 17 to provide the Advisory Committee on Restrictive Practices and Monopolies with a summary of the case together with an indication of the most important documents and a preliminary draft decision in respect of each case to be examined, and the question whether or not those obligations constitute essential requirements, must be determined in each case in the light of the purpose of providing the documents, which is to enable the Committee to carry out its advisory task in full knowledge of the facts. The Committee must be informed of the main points of fact and law in the proceedings relating to the implemen-

tation of Articles 85 and 86 of the Treaty on which it is consulted and it must have, in particular — in accordance with the general principle that the undertakings involved in infringement proceedings are entitled to be heard — entirely objective information on the views and essential arguments of those undertakings expressed in their comments on all the objections raised against them by the Commission once the investigation is completed.

The minutes of the hearing of the undertakings are, in principle, among the most important documents within the meaning of Article 10(5) of Regulation No 17

and must therefore be sent to the Committee when it is convened; however that is not an essential procedural requirement unless, in a specific case, it proves necessary in order to enable the Committee to deliver its opinion in full knowledge of the facts, that is to say without being misled in a material respect by inaccuracies or omissions. That is not the case when the minutes of the hearing do not contain any important new information not contained in the written comments accompanying the notice convening the Advisory Committee made by the undertaking concerned in reply to the statement of objections.

2. The period of 14 days laid down in Article 10(5) of Regulation No 17 for the convening of the Advisory Committee on Restrictive Practices and Monopolies is complied with if the consultation takes place at a joint meeting of the Commission and the Advisory Committee not earlier than the 14th day after dispatch of the notice to the Committee.

That 14-day period constitutes a purely internal procedural rule, failure to comply with which cannot render the Commission's final decision unlawful except in so far as the Committee did not have sufficient time to acquaint itself with the important aspects of the case and to reach a decision in full knowledge of the facts and the delay in convening the Committee could have had harmful consequences for the undertaking concerned.

3. The markets for weekly television programme listings and for the television

magazines in which they are published constitute, for the purposes of Article 86 of the Treaty, sub-markets within the markets for television programme information in general. They offer a product—information on weekly programmes—for which there is a specific demand, both from third parties wishing to publish and market comprehensive television guides and from television viewers.

4. Within the system of the Treaty, Article 36 must, in defining the scope of the protection that article seeks to give to industrial and commercial property rights, be interpreted in the light of the Community's objectives and activities as defined in Articles 2 and 3 of the EEC Treaty and that assessment must take into account, in particular, the requirements arising out of the establishment of a system of free competition within the Community, referred to in Article 3(f), which take the form, *inter alia*, of the prohibitions laid down in Articles 85 and 86 of the Treaty.
5. While in principle the protection of the specific subject-matter of a copyright entitles the copyright holder to reserve the exclusive right to reproduce the protected work and that is not called in question by the rules of the Treaty and while the exercise of that exclusive right is not in itself an abuse, that does not apply when, in the light of the details of each individual case, it is apparent that that right is exercised in such ways and circumstances as in fact to pursue an aim manifestly contrary to the objectives of Article 86. In that event, the copyright is no longer exercised in a manner which corresponds to its essential function, within the meaning of Article 36 of the

Treaty, which is to protect the moral rights in the work and to ensure a reward for the creative effort, while respecting the aims of, in particular, Article 86.

competition within the Common Market. It is enough, therefore, in order for Article 86 to be applicable, that the abusive conduct should be capable of affecting trade between Member States and it is not necessary to find that there is a real and present effect on inter-State trade.

That is the case where a television broadcasting company uses the copyright in its weekly programme listings under national law to reserve the exclusive right to publish those listings, thus preventing the emergence on the ancillary market of television magazines, where it enjoys a monopoly, of a new product containing the programmes of all the broadcasting stations capable of being received by television viewers, for which there is potential consumer demand.

6. The interpretation and application of the condition regarding effects on trade between Member States, under Article 86 of the Treaty, must be based on the purpose of that condition which is to define, in the context of the law governing competition, the boundary between the areas respectively covered by Community law and the law of the Member States. Thus Community law covers any agreement or any practice which is capable of constituting a threat to freedom of trade between Member States in a manner which might harm the attainment of the objectives of a single market between the Member States, in particular by partitioning the national markets or by affecting the structure of

7. The power conferred on the Commission by Article 3(1) of Regulation No 17 to require the undertakings concerned to bring an infringement to an end implies a right for the Commission to order such undertakings to take or refrain from taking certain action with a view to bringing the infringement to an end. In that light, the obligations imposed upon the undertakings must be defined with regard to requirements relating to re-establishing compliance with the law, taking into account the details of each individual case.

8. Article 234 of the Treaty must be interpreted as meaning that a convention concluded before the entry into force of the Treaty cannot be relied on to justify restrictions on trade between Member States. Article 234 is intended to ensure that the application of the Treaty does not affect either the duty to observe the rights of non-member countries under an agreement previously concluded with a Member State, or the observance by that Member State of its obligations under that agreement and it affects only rights and obligations in force between Member States and non-member countries.