JUDGMENT OF THE COURT OF FIRST INSTANCE
(Third Chamber, Extended Composition)
16 September 1998 *

In Case T-28/95,

International Express Carriers Conference (IECC), a professional organisation established under Swiss law, having its headquarters in Geneva (Switzerland), represented by Éric Morgan de Rivery, of the Paris Bar, and Jacques Derenne, of the Brussels and Paris Bars, with an address for service in Luxembourg at the Chambers of Alex Schmitt, 62 Avenue Guillaume,

applicant,

v

Commission of the European Communities, represented initially by Francisco Enrique González-Díaz, of its Legal Service, and Rosemary Caudwell, a national official on secondment to the Commission, and subsequently by Rosemary Caudwell and Fabiola Mascardi, a national official on secondment to the Commission, acting as Agents, assisted by Nicholas Forwood QC, with an address for service in Luxembourg at the office of Carlos Gómez de la Cruz, also of its Legal Service, Wagner Centre, Kirchberg,

defendant,

* Language of the case: English.

APPLICATION for a declaration that, in failing to define its position on the applicant's complaint based on Articles 85 and 86 of the EC Treaty (IV/32.791-Remail), the Commission has failed to act,

THE COURT OF FIRST INSTANCE OF THE EUROPEAN COMMUNITIES (Third Chamber, Extended Composition),

composed of: B. Vesterdorf, President, C. P. Briët, P. Lindh, A. Potocki and J. D. Cooke, Judges,

Registrar: J. Palacio González, Administrator,

having regard to the written procedure and further to the hearing on 13 May 1997,

gives the following

Judgment

Facts and procedure

1 On 13 July 1988 the International Express Carriers Conference ('the IECC') filed a complaint with the Commission under Article 3(2) of Council Regulation No 17 of 6 February 1962 (First Regulation implementing Articles 85 and 86 of the Treaty) (OJ, English Special Edition 1959-1962, p. 87, hereinafter 'Regulation No 17') concerning measures taken by a number of European public postal operators against the practice of remailing.

2 Following an exchange of correspondence, the Commission sent a letter to the IECC on 23 September 1994 pursuant to Article 6 of Commission Regulation No 99/63 of 25 July 1963 on the hearings provided for in Article 19(1) and (2) of Council Regulation No 17 (OJ, English Special Edition 1963-1964, p. 47, hereinafter 'Regulation No 99/63') in which it indicated that it did not intend to uphold that part of the IECC's complaint which concerned Article 85 of the Treaty. It accordingly called on the IECC to submit its observations in that regard.

3 On 23 November 1994 the IECC submitted its observations to the Commission and at the same time called on the Commission to define its position on the complaint as a whole, pursuant to Article 175 of the Treaty.

4 As it took the view that the Commission had failed to define its position in response to its call to act, the IECC brought the present action on 15 February 1995.

5 On 17 February 1995 the Commission sent to the IECC a final decision rejecting the first part of the complaint, concerning Article 85 of the Treaty, and, with respect to the second part of the complaint, concerning Article 86 of the Treaty, a letter under Article 6 of Regulation No 99/63 informing the applicant of the reasons why the Commission could not accede to its request.

6 Following the report of the Judge Rapporteur, the Court of First Instance (Third Chamber, Extended Composition) decided to open the oral procedure. As measures of organisation of procedure, it called on a number of parties to produce documents and to answer questions either in writing or orally at the hearing. The parties acceded to those requests.

7 Pursuant to Article 50 of the Rules of Procedure, Cases T-28/95, T-110/95, T-133/95 and T-204/95, all brought by the same applicant and related in their subject-matter, were joined for the purposes of the oral procedure by order of the President of the Third Chamber, Extended Composition, of 12 March 1997.

8 The parties presented oral argument and replied to the questions put by the Court at the hearing on 13 May 1997.

Forms of order sought by the parties

9 In its application, the applicant claims that the Court should:

— declare that the Commission's failure to define its position within two months of receipt of the formal request under Article 175 of the Treaty, contained in the letter of 23 November 1994, in relation to the complaint of 13 July 1988, as supplemented thereafter, concerning the application of Articles 85 and 86 of the Treaty, is in breach of Article 175 of the Treaty;

— order the Commission to pay the costs even in the event that the Commission should take action which is held by the Court to render the application devoid of purpose.

10 The applicant submits in its reply that the Court should:

— declare that the IECC's application has become devoid of purpose as of 17 February 1995 when the Commission complied with the notice delivered by the IECC to the Commission on 23 November 1994;

— consequently, declare that the case should not proceed to judgment;

— reject entirely the submission made by the Commission in its statement of defence of 5 April 1995;

— order the Commission to bear the costs, pursuant to Article 87(6) of the Rules of Procedure.

11 The Commission claims that the Court should:

— reject the application as unfounded, or alternatively, with respect to Article 86, as having been rendered nugatory as from the date on which the letter pursuant to Article 6 of Regulation No 99/63 was sent;

— order the applicant to pay the costs.

The claim for a declaration of failure to act

12 It is common ground between the parties that, in view of the measures taken by the Commission after the present action was brought, the action has become devoid of purpose.

13 It must therefore be held that there is no longer any need to adjudicate on the forms of order sought by the applicant in relation to the substance of the case.

Costs

14 Under Article 87(6) of the Rules of Procedure, where a case does not proceed to judgment, costs are to be in the discretion of the Court.

15 Regarding the first part of the complaint, relating to Article 85 of the Treaty, the Commission, by letter of 23 September 1994, defined its position within the meaning of Article 175 of the Treaty and called on the IECC to submit its observations in that regard. In its reply of 23 November 1994, the IECC did not confine itself to setting out its observations but also called on the Commission once again to define its position. It is clear that an action for a declaration of failure to act based on a call to act made to the Commission at the time when the complainant replies to a letter under Article 6 of Regulation No 99/63 is premature. The Commission must be given a reasonable period within which to examine the complainant's observations before being required to define its final position on the complaint.

16 With regard to the second part of the complaint, relating to Article 86 of the Treaty, it was not until 17 February 1995, that is to say two days after the proceedings had been brought seeking a declaration that the Commission had failed to act, that the Commission defined its position, within the meaning of Article 175, by sending a letter under Article 6 of Regulation No 99/63.

17 In such circumstances, each party should be ordered to pay its own costs.

On those grounds,

THE COURT OF FIRST INSTANCE
(Third Chamber, Extended Composition)

hereby:

1. Declares that the case need not proceed to judgment;

2. Orders each party to bear its own costs.

Vesterdorf Briët Lindh

Potocki Cooke

Delivered in open court in Luxembourg on 16 September 1998.

H. Jung B. Vesterdorf

Registrar President