JUDGMENT OF THE COURT (Second Chamber)
16 April 1991 *

In Case C-354/89,

Schiocchet, a company governed by French law, whose registered office is at 54560 Beuvillers, France, represented by Messrs Charrière, Champetier and Spitzer, of the Paris Bar, with an address for service in Luxembourg at the Chambers of Aloyse May, 31 Grand-Rue,

applicant,

v

Commission of the European Communities, represented by Ricardo Gosalbo-Bono, a member of its Legal Department, and Geneviève Pons, a French civil servant on mobility secondment to the Commission's Legal Department, acting as Agents, with an address for service in Luxembourg at the office of Guido Berardis, a member of the Commission's Legal Department, Wagner Centre, Kirchberg,

defendant,

APPLICATION for a declaration that Commission Decision 89/524/EEC of 7 September 1989 on a dispute between Luxembourg and France on the establishment of a special regular passenger service between these two States (Official Journal L 272, p. 18) is void,

THE COURT (Second Chamber),

composed of: T. F. O'Higgins, President of the Chamber, G. F. Mancini and F. A. Schockweiler, Judges,

Advocate General: F. G. Jacobs,
Registrar: V. Di Bucci, Administrator,

* Language of the case: French.

having regard to the Report for the Hearing,

after hearing oral argument from the parties at the hearing on 5 February 1991, at which Schiocchet S.à r. l. was represented by Maître Gilles Bouneou, of the Luxembourg Bar,

after hearing the Opinion of the Advocate General at the sitting on 7 March 1991,

gives the following

Judgment

1 By an application lodged at the Court Registry on 20 November 1989, Schiocchet S. à r. l., (hereinafter referred to as 'Schiocchet'), a company governed by French law whose registered office is at Beuvillers (France), brought an action under the second paragraph of Article 173 of the EEC Treaty for the annulment of Commission Decision 89/524/EEC of 7 September 1989 on a dispute between Luxembourg and France on the establishment of a special regular passenger service between these two States (Official Journal 1989 L 272, p. 18).

2 Emile Frisch S.à r. l. (hereinafter referred to as 'Frisch'), a company governed by Luxembourg law having its registered office in Luxembourg, applied to the Luxembourg authorities on 9 January 1986 for authorization to introduce a special regular coach service from Thil and a number of other localities in Lorraine (France) to the Villeroy et Boch porcelain factory in Luxembourg (hereinafter referred to as 'Villeroy et Boch'). In accordance with Article 13 of Regulation (EEC) No 517/72 of the Council of 28 February 1972 on the introduction of common rules for regular and special regular services by coach and bus between Member States (Official Journal, English Special Edition 1972 (I), p. 143), decisions on applications to introduce a special regular service are to be taken by agreement between the Member States in whose territories passengers are to be taken up or set down.

3 Since the authorities in the Member States affected by Frisch's application were unable to reach agreement on the decision to be given, Luxembourg referred the matter to the Commission. The latter adopted the contested decision 89/524, Article 1 of which provides as follows:

'The competent authority of the Grand Duchy of Luxembourg shall authorize Autocars Emile Frisch S. à r. l. to introduce a special regular service between Thil in France and Luxembourg for the Villeroy and Boch workforce starting from Thil at 4.20 a.m. and 12.20 p.m. and from the Villeroy and Boch factory at 2.00 p.m. and 10.00 p.m. and serving the following localities:

Thil — Hussigny — Tiercelet — Aumetz — Beuviller — Audun-le-Roman — Serrouville — Errouville — Crusnes — Cantebonne — Villerupt — Audun-le-Tiche — Esch/Alzette — Schifflange — Villeroy and Boch factory.

This service is exclusively for the workforce of Villeroy and Boch, established in Luxembourg at 330, rue de Rollingergrund, L-1018 Luxembourg.'

4 Article 8 of Regulation No 517/72, cited above, provides as follows:

'1. Examination of an application to introduce a regular service or a special regular service shall be for the purpose of establishing that the traffic to which the application relates is not already catered for in a satisfactory manner, both as to quality and as to quantity, by existing passenger transport services.

2. The following, in particular, shall be taken into consideration during the examination referred to in paragraph 1:

(a) the current and foreseeable transport needs which the applicant is planning to meet;

(b) in the case of regular services, the state of the passenger transport market in the areas in question.

3. During the examination referred to in paragraph 1, consideration may be given to whether an equivalent transport service could be organized by undertakings already operating in the areas concerned.'

5 In support of its application, Schiocchet relies on three submissions whereby it alleges, first, irregularities on the part of Frisch, secondly that the special regular service proposed by Frisch does not meet the requirements set out in Article 8 of Regulation No 517/72 and, finally, that the contested decision serves to confer a monopoly on Frisch.

6 Reference is made to the Report for the Hearing for a fuller account of the facts of the case, the course of the procedure and the submissions and arguments of the parties, which are mentioned or discussed hereinafter only in so far as is necessary for the reasoning of the Court.

The submission concerning alleged irregularities on the part of Frisch

7 Schiocchet first of all contends that from 1970 until at least 1976 Frisch operated a number of routes between Luxembourg and the border area in France without the authorizations required under Regulation No 517/72. Secondly, Frisch unilaterally changed the route and timetable of the special regular service in question, in breach of the variation procedure set out in Article 4(2) of the regulation, with the result that the service in question no longer complied with the conditions to which its operation had been made subject by the contested decision. Schiocchet points out in this regard that Frisch leaves Thil at 4.30 a.m. and at 12.30 p.m. and departs from Villeroy et Boch at 2.15 p.m. and at 10.15 p.m. Furthermore, Frisch no longer calls at all of the 15 stops listed in the contested decision.

8 With regard to the events which occurred before 1982, it should be noted that the Commission is quite correct in pointing out that its Decision 82/595/EEC of 10 August 1982 settling the dispute between the Grand Duchy of Luxembourg and the French Republic over the renewal of authorizations for certain special regular services (Official Journal L 244, p. 32) regularized Frisch's position in any event.

9 As regards the argument concerning unilateral changes to the route and timetable of the service in question, the Commission believes that those changes did not undermine the purpose of the service authorized by the contested decision and that they consequently did not amount to variations within the meaning of Regulation No 517/72, so that it was not necessary to follow the procedure set out in Article 4(2) of that regulation.

10 In this regard it is to be noted first of all that the purpose of the special regular service proposed by Frisch is to transport to the factory and back to the localities listed in the contested decision only Villeroy et Boch workers manning the 6.00 a.m. and 2.00 p.m. shifts and that for those workers the service in question is a suitable means of transport because it fits in well with their requirements.

11 Next, the minimal changes which Frisch made to the route and timetable of the special regular service in question did not alter its purpose and are not therefore subject to the prior authority referred to in Article 4(2) of Regulation No 517/72. This submission is therefore unfounded.

The submission alleging a breach of Article 8 of Regulation No 517/72

12 Schiocchet maintains that the special regular service operated by Frisch overlaps in part with routes already operated by Schiocchet which serve a number of the localities mentioned in the contested decision. Moreover, the special regular service in question does not suit a number of frontier workers who turned to alternative services in respect of which Schiocchet had, prior to Frisch, applied for authorization to extend a number of services which it already operated.

13 In this regard, it is to be noted first of all that the examination pursuant to Article 8 of Regulation No 517/72 of an application to introduce a special regular service involves the analysis of a complex economic situation. Account has thus to be taken, both as to quality and as to quantity, of existing services, current and foreseeable transport needs and, in appropriate cases, the possibilities for undertakings already operating in the areas concerned to organize an equivalent service.

14 It follows that when the Commission has to adopt a decision under Article 14 of Regulation No 517/72 it enjoys a wide margin of appraisal in deciding whether conditions exist which justify the authorization granted to a Member State to allow the introduction of a regular service or a special regular service. Given such a power of appraisal, the Court must restrict itself to examining whether its exercise was vitiated by a manifest error or a misuse of power or whether the Commission clearly exceeded the limits of that power.

15 It is thus sufficient to note that in the preamble to the contested decision the Commission states that the new service fulfils a proven need both quantitatively and qualitatively in the area since it will provide a service at convenient times for some 50 workers who at present do not have public transport to the Villeroy et Boch factory to arrive for and return from the 6.00 a.m. and 2.00 p.m. shifts; that the service will call at certain places which at present have no public transport at that time; that the timetable proposed by Frisch is more convenient and the service takes less time than that of the regular service envisaged by Schiocchet for the 6.00 a.m. shift; and that Schiocchet does not envisage any service to cater for workers on the 2.00 p.m. shift at the Villeroy et Boch factory.

16 In view of these considerations, it must be concluded that the Commission did not exceed the limits of its power of appraisal when it adopted the contested decision. It follows that the submission based on the conditions of application laid down in Article 8 of Regulation No 517/72 must be rejected.

The submission that the contested decision frees Frisch from all competition

17 Schiocchet, in support of this submission, claims substantially that the contested decision eliminates all competition with Frisch and will in future oust Schiocchet from the market in bus services in the area in question. Frisch thus enjoys a monopoly on a special regular service, part of the route of which is already covered by Schiocchet and the remainder of which is merely a natural extension of the operation for which Schiocchet had previously applied for authorization.

18 The Commission considers that the examination of an application to introduce a special regular service is different from one relating to a regular service and does not relate to the situation of the market in passenger transport within the areas concerned. Furthermore, the service already provided by Schiocchet in that area is intended for the general public, including passengers who do not work at the Villeroy et Boch factory, and operates according to timetables which do not suit workers on the 6.00 a.m. and 2.00 p.m. shifts. In its view, the special regular service provided by Frisch is therefore not in competition with that already operated by Schiocchet.

19 It is to be noted that under Article 8(2)(b) of Regulation No 517/72 the state of the passenger transport market in the areas in question must, in the case of regular services, be taken into consideration during the examination of an application to introduce a service.

20 It suffices to point out in this regard that the service in question operated by Frisch is a special regular service within the meaning of Article 1(3) of Regulation No 117/66/EEC of the Council of 28 July 1966 on the introduction of common rules for the international carriage of passengers by coach and bus (Official Journal, English Special Edition 1965-1966, p. 177). For that reason, and in accordance with Article 8(2)(b) of Regulation No 517/72, the Commission was not required, when examining the application to introduce that service, to take into consideration the state of the passenger transport market in the areas in question.

21 Furthermore, as the Advocate General points out in paragraph 15 of his Opinion, the special regular service operated by Frisch differs substantially from that offered by Schiocchet as regards both the timetable and the persons for whom it is designed. Consequently, it cannot be accepted that the contested decision will oust Schiocchet from the market in bus transport in the areas in question.

22 In view of those considerations, the third submission is unfounded.

23 It follows that, since none of the submissions is well founded, the application made by Schiocchet must be dismissed.

Costs

24 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs. Since Schiocchet has failed in its submissions, it must be ordered to pay the costs.

On those grounds,

THE COURT (Second Chamber)

hereby:

(1) Dismisses the application;

(2) Orders Schiocchet to pay the costs.

O'Higgins Mancini Schockweiler

Delivered in open court in Luxembourg on 16 April 1991.

J.-G. Giraud
Registrar

T. F. O'Higgins
President of the Second Chamber