JUDGMENT OF THE COURT OF FIRST INSTANCE (Fifth Chamber)
17 June 2003 *

In Case T-52/00,

Coe Clerici Logistics SpA, established in Trieste (Italy), represented by G. Conte, G.M. Giacomini and E. Minozzi, lawyers, with an address for service in Luxembourg,

applicant,

v

Commission of the European Communities, represented by R. Lyal and L. Pignataro, acting as Agents, with an address for service in Luxembourg,

defendant,

* Language of the case: Italian.

supported by

Autorità Portuale di Ancona, represented by S. Zunarelli, C. Perrella and P. Manzini, lawyers,

intervener,

APPLICATION for annulment of the Commission's letter of 20 December 1999 (D 17482) refusing to act on the applicant's complaint based on Articles 82 EC and 86 EC,

THE COURT OF FIRST INSTANCE
OF THE EUROPEAN COMMUNITIES (Fifth Chamber),

composed of: J.D. Cooke, President, R. García-Valdecasas and P. Lindh, Judges,

Registrar: J. Palacio González, Principal Administrator,

having regard to the written procedure and further to the hearing on 19 September 2002,

gives the following

Judgment

Legal Background

1 As a result of the judgment of the Court of Justice in Case C-179/90 *Merci Convenzionali Porto di Genova* v *Siderurgica Gabrielli* [1991] ECR I-5889, the Italian authorities adopted *inter alia* Law No 84/94 of 28 January 1994 amending the legislation applicable in respect of ports (GURI No 21 of 4 February 1994; hereinafter 'Law No 84/94') and Decree No 585 of the Ministry of Transport and Shipping of 31 March 1995 concerning the regulation referred to in Article 16 of Law No 84/94 (GURI No 47 of 26 February 1996; hereinafter 'Decree No 585/95'), which reformed the legal framework applicable to the Italian port sector.

2 As part of that reform, the activity of the former dock-work companies, which became port authorities under Law No 84/94, was confined to managing the ports and they are now prohibited from supplying, directly or indirectly, dock-work services, which are defined in Article 16(1) of Law No 84/94 as the loading, unloading, transhipment, storage and general movement of goods or material of any kind, performed on the site of the port.

3 Those port authorities have legal personality under public law and are responsible, *inter alia*, for granting quay concessions to dock businesses.

4 In that regard, Article 18(1) of Law No 84/94 provides that concessions over State-owned areas and quays included on the port site may be given for the performance of dock work, with the exception of State-owned buildings used by public administrative authorities for the performance of tasks connected with shipping and port activities. Article 18(2) of Law No 84/94 lays down, in addition, the criteria to be complied with by port authorities so as to ensure that, when concessions are granted, operational areas on the port site are reserved for the performance of dock work by non-concession-holding businesses.

5 Decree No 585/95 provides that the port authority may, by way of derogation from the concessions granted, authorise self-handling operations, that is to say, the possibility for a ship to carry out dock work using its own crew, such authorisation derogating from concessions granted. Under Article 8 of that decree, the port authority may grant authorisation to maritime carriers and shipping undertakings to carry out dock work at the time of arrival or departure of ships having the appropriate mechanical equipment and crew.

6 Circular No 33 of 15 February 1996, issued by the Directorate-General for Maritime and Dock Labour of the Italian Ministry of Transport and Shipping, clarifies the scope of Article 8 of Decree No 585/95 by defining the conditions for carrying out self-handling. It provides that self-handling operations may take place on quays and in areas held under concessions only when there is no, or insufficient, utilisable space allocated for public use and that it is for the port authority to regulate the carrying out of such operations in general and, more specifically, in each instrument of concession, in agreement with the concession holder.

7 With regard to the Port of Ancona, the Autorità Portuale di Ancona (Port Authority of Ancona) granted concessions to three undertakings: Ancona Merci (quays Nos 1, 2, 4, 15, 23 and 25), Silos Granari della Sicilia (quay No 20) and Sai (quay No 21).

8 On 20 March 1998, the president of the Autorità Portuale di Ancona adopted Bye-Law No 6/98 governing the carrying out of self-handling operations in the Port of Ancona. Article 5a, which governs the circumstances in which quays held under concessions may be made available for self-handling operations when the public quays are already allocated or insufficient, was inserted in Bye-Law No 6/98 by Bye-Law No 21/99 of 8 September 1999.

9 Article 5a provides that the Autorità Portuale di Ancona is to request one or more concession-holders to make available quays which they have not planned to use during the period which is the subject of a request for self-handling operations where it is found that there are no or insufficient quays already allocated or still to be allocated for public use. In that regard, loading or unloading operations only are to be authorised without the use of a storage area held under concession. Authorisation to carry out such operations is to be granted in accordance with the detailed rules laid down in Article 3 of Bye-Law No 6/98, specifying which quays are available after obtaining from the concession-holder a declaration of availability, an indication of the berthing quay and agreements on the practical arrangements. In addition, although the concession-holder is obliged not to hinder availability of the quays during the period for which authorisation is granted, he may, at any time, have the self-handling operations suspended if he wishes to make use of mechanical equipment installed on one of his quays. Finally, self-handling operators are to pay to concession-holders a fee in return for the use of the quay. Where the concession-holder considers that he is unable to satisfy the requirements of the Autorità Portuale di Ancona, the latter may, at any time, check whether the quays are unavailable.

Facts

10 The applicant, Coe Clerici Logistics SpA, operates in the bulk dry raw materials shipping sector. Among other things, it transports coal for ENEL SpA, the electricity generating undertaking which is also responsible for the distribution of

electricity in Italy. ENEL has a storage depot for its goods in the Port of Ancona. That depot is linked, by a fixed system of conveyors and hoppers also belonging to ENEL, to quay No 25 in the Port of Ancona, over which the company Ancona Merci has been given a concession.

11 The applicant claims that, in order to adapt itself to that fixed system of conveyors and hoppers belonging to ENEL, it fitted its ships, including the *Capo Noli*, with special equipment.

12 According to the applicant, quay No 25 is the only one suitable for its coal unloading operations for ENEL, it being:

— the only quay equipped with a crane with which goods can be unloaded;

— the only quay with sufficient depth;

— the only quay directly linked to ENEL's depot by means of a fixed system of conveyors and hoppers.

13 In August 1996, the applicant applied to the Autorità Portuale di Ancona for authorisation to carry out self-handling on quay No 25.

14 By a document dated 13 February 1998, the applicant formally called upon the Autorità Portuale di Ancona to express a view on the grant of that authorisation.

15 By letter of 17 February 1998, the president of the Autorità Portuale di Ancona justified the delay in replying by stating that grant of an authorisation required the prior consent of Ancona Merci under Article 9 of its concession.

16 Article 9 of Ancona Merci's concession provides that it is to allow the operators referred to in Article 8 of Decree No 585/95 to work on the quays of which it is the concession-holder if it is found that there are no or insufficient quays or areas intended for public use. That authorisation to carry out self-handling operations on the quays held under concession must be granted in accordance with the terms and conditions laid down by the regulations in force and by the specific regulations to be adopted by the Autorità Portuale di Ancona, in agreement with the concession-holder, in accordance with Ministerial Circular No 33 of 15 February 1996.

17 In its letter of 17 February 1998, the Autorità Portuale di Ancona also stated that a draft regulation had been submitted to Ancona Merci for examination.

18 By letter of 13 March 1998, the Autorità Portuale di Ancona informed the applicant that the rules governing self-handling on quays held under concession were to be reviewed by an *ad hoc* committee and that it had the option of carrying out self-handling operations on the public quays and areas of the Port of Ancona.

19 Since it considered that the provisions adopted by the Autorità Portuale di Ancona interfered with the exercise of its right of self-handling by according

Ancona Merci exclusive rights to carry on its business on the quays over which concessions had been granted, the applicant, on 30 March 1999, complained to the Commission of infringement of Articles 82 EC and 86 EC. The applicant's complaint also alleged the grant of State aid to the Port of Ancona.

20 In that complaint, the applicant referred, *inter alia*, to Article 5a of Bye-Law No 6/98, which restricted its right to self-handle on quays held under concession, and primarily on quay No 25. In conclusion, the applicant asked the Commission to find that:

'The port authority, in the exercise of its exclusive regulatory power, is preventing the free exercise of the right of self-handling by the [the applicant] by allowing Ancona Merci *de facto* to act with the benefit of exclusive rights on quays held under concession, thus engaging in conduct contrary to Articles [82 EC and 86 EC].'

21 By letter of 26 April 1999, the Secretariat-General of the Commission acknowledged receipt of its complaint.

22 By letter of 10 August 1999, the Directorate-General for Transport (DG VII) of the Commission informed the applicant that it intended to investigate the aspects of the complaint relating to State aid and that the Directorate-General for Competition (DG IV) was competent to investigate the aspects relating to infringement of Articles 82 EC and 86 EC.

23 By letter of 20 December 1999 ('the contested act'), the Commission informed the applicant that it was going to take no action on its complaint.

24 In that document, the Commission explains, by way of introduction, that it 'covers only aspects relating to the alleged infringement of Articles 82 EC and 86 EC'. It then asserts that the investigation undertaken by the Commission revealed certain discrepancies compared with what was stated in the complaint, namely:

— quay No 22 seems to be a public quay;

— quays Nos 20 (given under concession to Silos Granari della Sicilia) and 22 (public) seem to be of a depth and length suitable for berthing the applicant's ship;

— the need to use the cranes on quay No 25 is not clearly established since the complaint is based on the refusal to allow the applicant to work with its own crane using its own resources. The Commission therefore considers that the only factor which can justify the usefulness to the applicant of quay No 25 is the presence on that landing stage of the fixed system of conveyors and hoppers.

25 In the contested act, the Commission argues that the presence of that fixed system of conveyors and hoppers is not, however, sufficient to justify the classification of quay No 25 as an essential facility. It states that the conditions laid down by the Court of Justice in Case C-7/97 *Bronner* v *Mediaprint and Others* [1998] ECR I-7791 for establishing an abuse of a dominant position are not satisfied in this case. The applicant had continued to carry out its operations for ENEL for two years despite the refusal which it had received and also had alternative solutions available to it for unloading its customer's coal.

26 In the contested act, the Commission concludes by stating that it is unable to take any action on the complaint. Moreover, since the complaint concerns breach of the competition rules by a Member State, it does not confer on the complainant 'standing' under Council Regulation No 17 of 6 February 1962, First Regulation implementing Articles [81] and [82] of the Treaty (OJ, English Special Edition, 1959-1962, p. 87), as amended and supplemented by Regulation No 59 (OJ, English Special Edition 1959-1962, p. 249), Regulation No 118/63/EEC of 5 November 1963 (OJ, English Special Edition 1963-1964, p. 55) and Regulation (EEC) No 2822/71 of 20 December 1971 (OJ, English Special Edition 1971 (III), p. 1035) and under Commission Regulation No 2842/98 of 22 December 1998 on the hearing of parties in certain proceedings under Articles [81] and [82] of the EC Treaty (OJ 1998 L 354, p. 18). That standing is granted only to complainants who allege breach of the rules on competition by undertakings.

27 By letter of 5 January 2000, the applicant requested the Commission to make clear whether the contested act was in the nature of a decision. The applicant reiterated its request by letter of 9 February 2000.

28 The Commission did not reply in writing to those letters.

Procedure

29 By application lodged at the Registry of the Court of First Instance on 9 March 2000, the applicant brought an action for annulment of the contested act.

30 By a document lodged at the Registry of the Court of First Instance on 19 May 2000, the Commission raised an objection of inadmissibility, on which the applicant submitted its observations on 7 July 2000.

31 By order of 13 December 2000, the Court decided to reserve consideration of the admissibility of the action for the final judgment.

32 By a document lodged at the Registry of the Court of First Instance on 11 January 2002, the Autorità Portuale di Ancona applied to intervene in support of the defendant. The Commission and the applicant submitted their observations in that regard on 29 January and 5 February 2002 respectively.

33 By a document lodged at the Court Registry on 5 February 2002, the applicant applied for confidential treatment of the case-file *vis-à-vis* the Autorità Portuale di Ancona and, if appropriate, for a direction that only the Report for the Hearing relating to this case be communicated to it.

34 By order of the Fifth Chamber of 30 May 2002, the Court of First Instance granted the Autorità Portuale di Ancona leave to intervene at the hearing on the basis of the Report for the Hearing and held that there was no need to rule on the applicant's application for confidential treatment.

35 Upon hearing the report of the Judge-Rapporteur, the Court of First Instance (Fifth Chamber) decided to open the oral procedure and requested the defendant to produce certain documents prior to the hearing. The defendant complied with that request within the time-limit which had been set for it.

36 The parties presented oral argument and replied to the Court's questions at the hearing on 19 September 2002.

Forms of order sought by the parties

37 The applicant claims that the Court should:

— declare the application admissible;

— annul the contested act;

— order the Commission to pay the costs.

38 The Commission contends that the Court should:

— dismiss the application as inadmissible;

— alternatively, dismiss the application as unfounded;

— order the applicant to pay the costs.

39 At the hearing, the Autorità Portuale di Ancona claimed that the Court should:

— dismiss the application as inadmissible;

— alternatively, dismiss the application as unfounded.

Law

Arguments of the parties

Admissibility

40 The Commission pleads inadmissibility of the action on the ground that the applicant requested it, in the complaint, to make use of the powers vested in it under Article 86(3) EC, that is to say, to adopt a decision addressed to the Italian Republic. However, it was only in the proceedings before the Court that the applicant alleged failure by the Commission to investigate the complaint from the point of view of the alleged infringement of Article 82 EC inasmuch as Ancona Merci had wrongfully refused to supply a service and had charged excessive prices for the provision of services which are only partly replaceable. In its complaint, however, the applicant alleged only infringement of Article 82 EC in conjunction with Article 86 EC. That factual situation is confirmed, it submits, by the general wording of the complaint and by its conclusion.

41 It further argues that the contested act is not in the nature of a decision and that the applicant is therefore not entitled to bring proceedings for its annulment. In the contested act the Commission merely informs the applicant of its intention not to initiate proceedings against a Member State under Article 86(3) EC and points out that the applicant does not enjoy the rights conferred by Regulations No 17 and No 2842/98.

42 The Commission draws attention to the similarity between the procedures provided for in Articles 86(3) EC and 226 EC and points out that the Court has in fact confirmed the parallelism between those two procedures in its judgment in Case T-32/93 *Ladbroke* v *Commission* [1994] ECR II-1015, paragraph 37.

43 Moreover, it is settled case-law that 'legal and natural persons who request the Commission to act under Article [86](3) [EC] do not have the right to bring an action against a decision of the Commission refusing to use powers conferred upon it under Article [86](3) [EC]' (order of the Court of First Instance in Case T-84/94 *Bilanzbuchhalter* v *Commission* [1995] ECR II-101, paragraphs 31 and 32; Case T-575/93 *Koelman* v *Commission* [1996] ECR II-1, paragraph 71; Case T-111/96 *ITT Promedia* v *Commission* [1998] ECR II-2937, paragraph 97, and Case T-266/97 *Vlaamse Televisie Maatschappij* v *Commission* [1999] ECR II-2329, paragraph 75).

44 The Court of Justice confirmed the order in *Bilanzbuchhalter* v *Commission* in its judgment in Case C-107/95 P *Bundesverband der Bilanzbuchhalter* v *Commission* [1997] ECR I-947, paragraphs 27 and 28.

45 In that regard, the Commission acknowledges that in the latter judgment the Court of Justice held that exceptional situations may exist in which an individual has standing to bring proceedings against a refusal by the Commission to adopt a decision based on Article 86(1) and (3) EC (paragraph 25). Although the Court

did not specify the nature of those circumstances, the Commission is of the opinion that they are probably unforeseeable situations (Joined Cases C-302/99 P and C-308/99 P *Commission and France* v *TF1* [2001] ECR I-5603), which do not arise in this case. Moreover, contrary to what is required by the Court in its judgment in Case T-17/96 *TF1* v *Commission* [1999] ECR II-1757, Ancona Merci cannot be regarded as one of the applicant's competitors, as Ancona Merci is not a transport undertaking but a quay concession-holder whose business consists mainly in loading and unloading ships.

46 The Commission then observes that the applicant's complaint of 30 March 1999 seems to have the objective of obliging the Commission to adopt a position, under Article 86 EC, on a given State measure, in this case Autorità Portuale di Ancona Bye-Law No 6/98 and, more specifically, Article 5a thereof. However, that complaint aims to call into question the form of organisation chosen by the Italian legislature for dock work. That form of organisation is aimed at ensuring a balance between the interests of the shipping companies and those of the concession-holder by allowing the latter to have exclusive use of certain quays, albeit with a few restrictions for the benefit of maritime undertakings likely to carry out self-handling. Any decision by the Commission to initiate a procedure under Article 86(3) EC against the Autorità Portuale di Ancona would have the effect of compelling the Italian State to amend Law No 84/94 and would have repercussions for all the Italian ports. The Court of Justice assessed a similar situation in its judgment in *Bundesverband der Bilanzbuchhalter* v *Commission* (cited above, paragraphs 26 and 28) and ruled out the possibility of an individual bringing an action against the Commission's refusal to adopt a decision under Article 86(3) EC in such a case.

47 Finally, the Commission submits that the applicant's reliance on the order of the Court of First Instance in Case T-59/00 *Compagnia Portuale Pietro Chiesa* v *Commission* [2001] ECR II-1019 is irrelevant as the contested act in that case was a provisional measure which did not definitively lay down the position of the Commission.

48 The applicant contends, first, that its complaint related not only to infringement of Article 82 EC in conjunction with Article 86 EC but also to the abuse of a dominant position by Ancona Merci, the holder of the concession for quay No 25. That quay is the only one which, because of its technical characteristics and equipment, enables it to unload ENEL's coal. That abuse of a dominant position results from the power entrusted to Ancona Merci by the Autorità Portuale di Ancona to decide which undertakings are authorised to carry out dock work on an exclusive basis on its quay.

49 However, the fact that provisions that are administrative and not legislative in nature are bound to result in the abuse of a dominant position in question does not affect the characterisation of conduct complained of under Article 82 EC by a private undertaking and leads to the finding of an infringement of Article 82 EC in conjunction with Article 86 EC. In that regard, the applicant points out that Article 86 EC strengthens the protection guaranteed by Article 82 EC by not excluding from its scope abuse by an undertaking which is facilitated by a provision of public law, and by permitting extension of the scope of Article 82 EC to include persons participating in the exercise of public authority.

50 The applicant further observes that the Commission never described the procedure which it initiated as a procedure under Article 86 EC and that, on the contrary, it stated in its letter of 10 August 1999 that DG IV was conducting an investigation into infringement of Articles 82 EC and 86 EC.

51 Secondly, in regard to the Commission's arguments relating to its standing to bring an action, the applicant objects that the case-law acknowledges that, in exceptional circumstances, natural or legal persons have standing to bring actions in the context of the procedure provided for under Article 86(3) EC. Only an individual who brings an action against the refusal of the Commission to adopt a decision under Article 86(3) EC indirectly compelling a Member State to adopt legislation of general application can definitely be deprived of his standing to

bring proceedings (see judgment in *Bundesverband der Bilanzbuchhalter* v *Commission*, paragraph 28).

52 The applicant refers to the order in *Compagnia Portuale Pietro Chiesa* v *Commission*, paragraphs 41 and 42. It also refers to the Opinion of Advocate General La Pergola in *Bundesverband der Bilanzbuchhalter*, cited above, in which he considers that Article 86(3) EC, unlike Article 226 EC, forms part of the framework of provisions specifically designed to protect competition and to govern the conduct of undertakings in the market.

53 The applicant submits that it follows from the judgment in *Bundesverband der Bilanzbuchhalter* v *Commission*, and from the Opinion of Advocate General La Pergola in that case, that the judicial protection of individuals cannot be jeopardised where the provision adopted by the Commission is not connected with the protection of a public interest or with the regulation of interinstitutional relations. Natural or legal persons cannot therefore compel a Member State to adopt, amend or repeal a rule of general application.

54 However, the applicant submits that, contrary to the view put forward by the Commission, the action taken by it under Article 86(3) EC in no way affects the legal rules governing quay concessions in the Italian ports but only the administrative provisions contrary to Community law that were adopted by the Autorità Portuale di Ancona for the benefit of concession-holders in the Port of Ancona and, primarily, of Ancona Merci, which affect the situation of undertakings with which it is in direct competition.

55 At the hearing, the applicant asserted that, under the principle identified in Case T-54/99 *max.mobil* v *Commission* [2002] ECR II-313, the contested act must be

regarded as a decision rejecting a complaint, the lawfulness of which it is entitled, as complainant, to contest.

Substance

56 The applicant puts forward a number of pleas in law in support of its action. They are grouped together around two issues relating, in essence, on the one hand, to the refusal to grant it the procedural rights provided for by Regulation No 2842/98 and, on the other hand, to the rejection by the Commission of the classification of quay No 25 as an 'essential facility'.

— The refusal to apply Regulation No 2842/98 in favour of the applicant

57 The applicant alleges that the Commission infringed its right to a fair hearing by not disclosing to it the observations submitted by the parties involved in the administrative procedure. The applicant therefore submits that the Commission infringed Articles 6 to 8 of Regulation No 2842/98.

58 It also maintains that, apart from the fact that the regulation should have been applied to it even in the case of an infringement of Articles 82 EC and 86 EC, at least one of the parties against which its complaint is directed being an undertaking, the Commission's decision not to apply Regulation No 2842/98 in its favour is attributable to the Commission's disregard for the fact that it alleged, in its complaint, an infringement by Ancona Merci of Article 82 EC.

59 In that regard, Ancona Merci abused its dominant position by making the carrying out of self-handling on quay No 25 subject to conditions and by charging excessive prices for the provision of cargo unloading services.

60 The applicant further claims that the Commission committed an abuse of process by adopting the contested act, first, without complying with the 'timetable for the procedure concerning infringements of Article 82 EC', as described in the judgment in Case T-127/98 *UPS Europe* v *Commission* [1999] ECR II-2633 and, second, on the basis of a partial investigation and in breach of the obligations laid down in Article 6 of Regulation No 2842/98.

61 The Commission contends, in essence, that the applicant's complaint was based solely on infringement of Article 82 EC in conjunction with Article 86 EC by the Autorità Portuale di Ancona and not on a separate infringement by Ancona Merci of Article 82 EC. In that context, the applicant's arguments relating to the application of Regulation No 2842/98 are irrelevant.

— The refusal to classify quay No 25 as an 'essential facility'

62 The applicant asserts that the Commission stated, in the contested act, that there had been no abuse of a dominant position by Ancona Merci because quay No 25 did not constitute an essential facility within the meaning of the *Bronner* judgment, cited above.

63 However, the Commission failed to take into account certain facts when adopting the contested act. Those are, first, the circumstance that quays Nos 20 and 22 of

the Port of Ancona are designed exclusively for unloading grain, a type of cargo incompatible with coal. Second, the length and depth of those quays preclude their use as alternatives to quay No 25 because they do not have a fixed system of conveyors and hoppers similar to those of quay No 25 and do not permit the handling of cargo under environmentally compatible and economically viable conditions.

64 Moreover, the alternative envisaged by the Commission for the applicant to carry out its dock work on a self-handling basis, whereby it would conclude commercial agreements with Ancona Merci, fails to take account of the fact that ENEL alone is entitled to conclude such agreements.

65 The applicant submits, moreover, that it had no choice but to have ENEL's coal unloaded by Ancona Merci onto quay No 25 using the fixed system of conveyors and hoppers, although the prices charged by Ancona Merci are considerably higher than its own. The Commission should therefore have found that Ancona Merci is refusing access for third parties to the essential infrastructure constituted by quay No 25 in order to offer services at higher costs, thereby committing an abuse of a dominant position.

66 In that regard, the applicant submits that the Commission misinterpreted the concept of 'essential facility' and refers to the judgment in *Bronner*. In order to conclude that there has been a refusal of right of access to an essential facility, it is necessary that there be a structure substantially equivalent in its results, that it be effectively usable without causing excessive economic disadvantage, and that there be no obstacles of a technical, regulatory or economic nature such as to render duplication of the facility impossible or exceptionally difficult.

67 However, in this case there is no practicable substitute for the use of quay No 25 in view of the financial costs which the applicant has already borne in order to fit

its ship, the *Capo Noli*, with an automatic unloading system compatible with ENEL's facility on quay No 25, or which it is currently bearing in order to unload the coal onto other quays and ensure its transport by lorry to ENEL's depot. The environmental impact of this latter solution also precludes its being regarded as a satisfactory alternative.

68 Quay No 25 must therefore be classified as an essential facility and the Commission's decision not to act on the complaint — without having carried out a proper investigation and, therefore, without having given an adequate 'statement of reasons' — benefits an undertaking that is abusing its dominant position by preventing cargo unloading operations from being carried out on the basis of advanced technologies and at controlled costs and by performing them itself at higher costs.

69 The Commission challenges the admissibility of the applicant's argument that it did not adequately examine the complaint alleging abuse of a dominant position by Ancona Merci and did not investigate excessive prices charged by it. It also disputes the validity of the other arguments relied on in support of this group of pleas.

Findings of the Court

70 The parties disagree, first, on the question whether the contested act constitutes in part a rejection of the applicant's complaint as regards an independent infringement of Article 82 EC by Ancona Merci. Secondly, the parties disagree on whether the applicant is entitled to bring an action for annulment of the contested act to the extent that the Commission decided not to take any action on the applicant's complaint in so far it relates to infringement of Article 82 EC in conjunction with Article 86 EC by the Autorità Portuale di Ancona.

71 With regard to the first of those questions, it must first be observed that, although the Commission did not express a view on an alleged independent infringement of Article 82 EC, such a failure to do so cannot be held unlawful in the context of a review of legality under Article 230 EC. Consequently, the applicant may not plead a manifest error of assessment in the application of Article 82 EC and an associated failure to investigate, or claim the benefit of Regulation No 2842/98, unless the rejection of its complaint relates separately to Article 82 EC.

72 In that regard, the contested act states that the refusal of the applicant's request to unload coal on a self-handling basis onto quay No 25 of the Port of Ancona constitutes, in the applicant's view, 'an infringement of Article 86 EC in conjunction with Article 82 EC'.

73 The contested act then states that the Commission's investigation enabled it to establish certain factual discrepancies in relation to the claims in the applicant's complaint and that quay No 25 of the Port of Ancona is not an 'essential facility' within the meaning of the *Bronner* judgment.

74 In the conclusion of the contested act, the Commission states that:

'In the light of the above, we find no need to act on the [applicant's] complaint. Moreover, [the Commission] wishes... to point out that since the [complaint] concerns an alleged infringement of the Treaty rules on competition by a Member State, it does not confer on [the applicant] the "standing" which follows from Council Regulation No 17 and Commission Regulation No 2842/98. That "standing" is recognised only in relation to an applicant who pleads breach of those rules by undertakings.'

75 It is therefore clear from the wording of the contested act that the Commission, having taken the view that the complaint did not relate to an alleged infringement by Ancona Merci of Article 82 EC, did not express any view on conduct which might be contrary to that article.

76 Moreover, it must be pointed out that the Commission's interpretation of the complaint as relating only to infringement of Article 82 EC in conjunction with Article 86 EC by the Autorità Portuale di Ancona was already apparent from the letters which the Commission sent to the applicant during the administrative procedure.

77 Thus, it is clear from the letter of 26 April 1999 sent to the applicant, acknowledging receipt of the complaint, that the Commission had interpreted the complaint as relating only to the conduct of the public authority concerned.

78 Contrary to what is maintained by the applicant, the same may be inferred from the letter sent to it by the Commission on 10 August 1999, which states, in particular, as follows:

'... according to this complaint, the Port Authority has allegedly infringed Article 82 [EC] and Article 86 [EC] by using its exclusive regulatory power to obstruct the carrying out by Coe Clerici Logistics SpA of self-handling operations...'.

79 At that stage of the administrative procedure and in the light of those letters, it was open to the applicant, if it disagreed as to the scope of the complaint, to draw the Commission's attention to the fact that it also intended to allege in that complaint, in addition to infringement of Article 82 EC in conjunction with Article 86 EC by the Autorità Portuale di Ancona, an independent infringement of Article 82 EC by Ancona Merci.

80 In any event, if, on reading the contested act, the applicant considered that the Commission had failed to give a decision on an alleged infringement of Article 82 EC by Ancona Merci, the onus was then on it to request the Commission to express a view on that aspect of the complaint and, if necessary, to bring an action under the second paragraph of Article 232 EC for a declaration by the Community judicature that the Commission had failed to act.

81 Consequently, since the Commission did not make any assessment of the alleged independent infringement by Ancona Merci of Article 82 EC, the action, in so far as it relies on that article on its own, is devoid of purpose. It follows that there is no need to rule on an error of assessment by the Commission in relation to Article 82 EC on its own, on a failure to investigate that aspect, on infringement of the applicant's procedural rights under Regulation No 2842/98 or on an abuse of process.

82 With regard to the second of those questions, the admissibility of the action must be examined in so far as it relates to the Commission's decision not to act on the applicant's complaint of infringement of Article 82 EC in conjunction with Article 86 EC.

83 It is clear from the applicant's complaint and from its written submissions, as clarified at the hearing, that it disputes the compatibility with Community law of Article 5a of Bye-Law No 6/98 of the Autorità Portuale di Ancona (see paragraph 9 above) in so far as it makes access by the applicant to quay No 25, the concession held by Ancona Merci, subject to conditions, thereby permitting a restriction on the applicant's freedom to exercise the right of self-handling. The Autorità Portuale di Ancona thereby acted contrary to Articles 82 EC and 86 EC.

84 The applicant's complaint constitutes, in that regard, a request made to the Commission to use the powers which it has under Article 86(3) EC. In that context, the contested act constitutes a refusal by the Commission to address a decision or directive to Member States pursuant to Article 86(3) EC.

85 It is settled case-law that Article 86(3) EC requires the Commission to ensure that Member States comply with their obligations as regards the undertakings referred to in Article 86(1) EC and expressly empowers it to take action, where necessary, for that purpose by way of directives or decisions. The Commission is empowered to determine that a given State measure is incompatible with the rules of the Treaty and to indicate what measures the State to which a decision is addressed must adopt in order to comply with its obligations under Community law (*Bundesverband der Bilanzbuchhalter* v *Commission*, cited above, paragraph 23).

86 As is apparent from Article 86(3) EC and from Article 86 as a whole, the supervisory power which the Commission enjoys *vis-à-vis* Member States responsible for infringing the rules of the Treaty, in particular those relating to competition, necessarily implies the exercise of a wide discretion by the Commission as regards, in particular, the action which it considers necessary to be taken (*Bundesverband der Bilanzbuchhalter* v *Commission*, paragraph 27, and *Vlaamse Televisie Maatschappij* v *Commission*, paragraph 75).

87 Consequently, the exercise of the Commission's power to assess the compatibility of State measures with the Treaty rules, which is conferred by Article 86(3) EC, is not coupled with an obligation on the part of the Commission to take action (order in *Bilanzbuchhalter* v *Commission*, paragraph 31, and judgments in *Ladbroke* v *Commission*, paragraphs 36 to 38, and *Koelman* v *Commission*, paragraph 71).

88 It follows that legal or natural persons who request the Commission to take action under Article 86(3) EC do not, in principle, have the right to bring an action against a Commission decision not to use the powers which it has under that article (order in *Bilanzbuchhalter* v *Commission*, paragraph 31, and judgment in *Koelman* v *Commission*, paragraph 71).

89 However, it has been held that it cannot be ruled out that an individual may find himself in an exceptional situation conferring on him standing to bring proceedings against a refusal by the Commission to adopt a decision in the context of its supervisory functions under Article 86(1) and (3) EC (*Bundesverband der Bilanzbuchhalter* v *Commission*, paragraph 25, and, with regard to an action for failure to act, see, to that effect, *TF1* v *Commission*, paragraphs 51 and 57).

90 However, in this case, the applicant has not pleaded any exceptional circumstance which would enable its action against the Commission's refusal to act to be regarded as admissible. The only circumstance cited by the applicant, namely that it competes with Ancona Merci, could not, even if proved, constitute an exceptional situation such as to confer on the applicant standing to bring proceedings against the Commission's refusal to act in regard to the measures adopted by the Autorità Portuale di Ancona in order to regulate the grant of authorisations to maritime carriers to carry out self-handling on quays held under concessions.

91 Consequently, the applicant is not entitled to bring an action for annulment of the contested act in so far as the Commission decides in it not to use the powers conferred on it by Article 86(3) EC.

92 However, at the hearing, the applicant claimed that its action, in so far as it relates to infringement by the Autorità Portuale di Ancona of Articles 82 EC and 86 EC, should be declared admissible pursuant to the principle established in *max.mobil* v *Commission*. The Commission contends that the principle in question, under which an individual is entitled to bring an action for annulment against its decision not to use the powers conferred on it by Article 86(3) EC, constituted a reversal of precedent and that the judgment of the Court of First Instance in question was the subject of an appeal now pending before the Court of Justice.

93 In that regard, if the contested act, in so far as it concerns infringement of Article 82 EC in conjunction with Article 86 EC, must be classified as a decision rejecting a complaint as referred to in *max.mobil* v *Commission*, the applicant should, as complainant and addressee of that decision, be regarded as entitled to bring the present action (*max.mobil* v *Commission*, paragraph 73).

94 In such a case, it has been held that, in view of the broad discretion enjoyed by the Commission in the application of Article 86(3) EC, the review carried out by the Court of First Instance must be limited to verification of the Commission's fulfilment of its duty to undertake a diligent and impartial examination of the complaint alleging infringement of Article 86(1) EC (see, to that effect, *max.mobil* v *Commission*, paragraphs 58 and 73, and order of 27 May 2002 in Case T-18/01 *Goldstein* v *Commission* [2002], not published in the ECR, paragraph 35).

95 In the present case, the applicant alleges that the Commission adopted the contested act without taking into consideration certain facts or on the basis of incorrect facts. At the hearing, the applicant asserted that this shows that the Commission did not undertake a diligent and impartial examination of the complaint.

96 However, it cannot be held that the Commission failed in this case in its duty to undertake a diligent and impartial examination of the applicant's complaint.

97 It is apparent from the contested act that the Commission identified the central objection among the arguments set forth in the complaint of infringement by the Autorità Portuale di Ancona of Articles 82 EC and 86 EC by taking into consideration the main relevant matters relied on by the applicant in that complaint. That is clear from the fact that the Commission indicated, in the

contested act, that the investigation which it had carried out had enabled it to establish certain discrepancies in relation to the facts which the applicant had set out in its complaint.

98 Those facts were relied on by the applicant in order to demonstrate that there is no alternative to the use of quay No 25 in order to unload, by self-handling, the coal which it transports on behalf of ENEL. The applicant infers from this that the quay in question therefore constitutes an 'essential facility' within the meaning of the *Bronner* judgment, which lays down the conditions under which access to a facility must be regarded as essential to the exercise by the undertaking in question of its activity.

99 In that regard, the reasoning followed by the Commission in the contested act seeks to show that, as the facts alleged by the applicant in support of its argument are unproven, quay No 25 cannot be classified as an essential facility. The Commission therefore concludes, as it maintained at the hearing, that application of the regulations adopted by the Autorità Portuale di Ancona, and more specifically of Article 5a of Bye-Law No 6/98, cannot have had the effect of impeding access by the applicant to an essential facility. Consequently, without expressing a view on liability for the conduct in question, the Commission considered that it did not have to use the powers conferred on it by Article 86(3) EC against the Autorità Portuale di Ancona.

100 It is important to note that in its action the applicant has either not disputed the correctness of the facts as stated by the Commission in the contested act, offered supporting evidence which does not establish the truth of its allegations, or merely relied on matters which it had not mentioned in its complaint.

101 Thus, with regard to quay No 22, the applicant did not dispute the Commission's assertion in the contested act that it is a public quay. As to the applicant's

allegation that quays Nos 20 and 22 are intended exclusively for loading and unloading grain and not coal, it is important to note that that factual situation is not apparent from the triennial operational plan annexed by the applicant to its application, which merely indicates that those quays are suitable for handling cereals.

102 Furthermore, the applicant did not dispute the Commission's assertion in the contested act, and confirmed by the Autorità Portuale di Ancona at the hearing, that those quays are deep enough and long enough to allow the applicant's ship, the *Capo Noli*, to berth.

103 As regards the complaint alleging failure by the Commission to consider the argument that the contract which the applicant has concluded with ENEL prevents it from concluding, with quay concession-holders, commercial agreements relating to the performance of its dock work, the Court notes that there is no clause in that contract, which is annexed to the application, to substantiate that argument, as indeed the applicant acknowledged at the hearing. It must be pointed out in that regard that none of the clauses in that contract relates to the conditions for unloading coal for ENEL.

104 The applicant also challenges the Commission's interpretation of the concept of 'essential facility' and submits that quay No 25 of the Port of Ancona must be classified as such under the principle in *Bronner*. However, it is sufficient in that regard to observe that that argument cannot be a matter for review by the Community judicature of the Commission's compliance with its duty to examine the complaint diligently and impartially.

105 It follows that the present action, in so far as it seeks the annulment of a Commission decision not to initiate the procedure under Article 86 EC, must be dismissed as inadmissible and, in any event, as unfounded in law.

106 It follows from all the foregoing that the application must be dismissed in its entirety.

Costs

107 Under Article 87(2) of the Rules of Procedure, 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 applicant has been unsuccessful and the Commission has applied for costs, the applicant must be ordered to pay the costs.

108 As the Autorità Portuale di Ancona has not applied for costs, it must bear its own costs.

On those grounds,

THE COURT OF FIRST INSTANCE (Fifth Chamber)

hereby:

1. Dismisses the application;

2. Orders the applicant to bear its own costs and to pay those incurred by the Commission;

3. Orders the Autorità Portuale di Ancona to bear its own costs.

Cooke García-Valdecasas Lindh

Delivered in open court in Luxembourg on 17 June 2003.

H. Jung R. García-Valdecasas

Registrar President