ORDER OF THE COURT OF FIRST INSTANCE (Fifth Chamber)
20 March 2001 *

In Case T-59/00,

Compagnia Portuale Pietro Chiesa Soc. coop. rl, having its registered office in Genoa (Italy), represented by G. Conte, G.M. Giacomini and B. Della Barile, 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.

APPLICATION for the annulment of the Commission's alleged decision of 22 December 1999 rejecting the applicant's complaint that the Italian Republic, the Port Authority of Genoa and Compagnia Unica Lavoratori Merci Varie should be found to have infringed Article 82 EC and Article 86(1) EC,

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

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

Registrar: H. Jung,

makes the following

Order

Facts

1 The applicant, Compagnia Portuale Pietro Chiesa Soc. coop. rl, is a cooperative constituted under Italian law; its object is to supply port services within the port of Genoa. The supply of port services covers in particular the performance of port operations and the supply of port labour.

2 Following the entry into force of Law No 84/94 of 28 January 1994 adapting the legislation applicable to ports (GURI No 21 of 4 February 1994, hereinafter 'Law No 84/94'), the applicant sought authorisation from the Port Authority of Genoa (hereinafter the 'Port Authority') to perform the port operations and services specified in the Law and also basic labour services.

3 By decree of the Port Authority, of 29 April 1995, the applicant was authorised to supply port services confined to the bulk-freight sector, for the franchised port undertakings. That authorisation expired on 31 December 1995.

4 Since 13 November 1995, the applicant has several times requested the Port Authority to extend its authorisation, in order to operate across the full range of freight types handled within the port. No such authorisation was ever issued to it, and the applicant has since then been carrying out its port activities without authorisation.

5 Compagnia Unica Lavoratori Merci Varie (which on 19 April 1997 became Compagnia Unica Soc. coop. rl, hereinafter 'CULMV') also supplies port services within the port of Genoa.

6 By act of the Port Authority, of 5 January 1995, CULMV was given authorisation until 31 December 1995 to perform port operations except for bulk-freight traffic, and the franchise on a terminal in the port of Genoa. Since 31 December 1995, CULMV has been carrying out its activities without authorisation.

7 On 10 November 1998, the applicant submitted a complaint to the Commission against the Italian Republic, the Port Authority and CULMV, alleging infringement of Article 82 EC and Article 86(1) EC.

8 In that complaint, the applicant objected to the monopoly held by CULMV over the market for supply of port services in the port of Genoa, stating that that situation resulted, first, from the monopoly position held by CULMV before the adoption of Law No 84/94 and, secondly, from the conduct of the Port Authority which, by failing to give a decision on the applications for authorisation submitted by the applicant, was helping to perpetuate CULMV's monopoly. That situation was aggravated by the fact that CULMV was the only operator authorised to offer temporary labour. Its *de facto* monopoly in the port of Genoa led CULMV to abuse its dominant position within the meaning of Article 82 EC, in the manner described in the judgment of the Court in Case C-179/90 *Merci Convenzionali Porto de Genova* [1991] ECR I-5889.

9 The applicant alleged in the complaint that CULMV's monopoly was made possible, first, by the national rules in force regarding the supply of port labour and, secondly, by the conduct of the Port Authority when granting authorisations to perform port operations and, in that connection, complains of an infringement of Article 82 EC in conjunction with Article 86 EC.

10 By letter of 4 November 1999, the applicant called upon the Commission, pursuant to Article 232 EC, to adopt a final decision regarding the Italian Republic and CULMV. In that connection, it alleged that the Commission's inertia was reinforcing CULMV's competitive advantage resulting from its monopoly and was hindering the exercise of the applicant's activities.

11 The Commission replied by letter of 22 December 1999 (hereinafter the 'contested act').

Procedure and forms of order sought by the parties

12 The present case was brought by application lodged at the Court Registry on 17 March 2000.

13 By a separate document lodged at the Court Registry on 29 May 2000, the Commission lodged an objection of inadmissibility, in accordance with Article 114 of the Rules of Procedure of the Court of First Instance.

14 On 6 July 2000, the applicant lodged at the Court Registry its written observations in response to the objection.

15 The applicant claims that the Court should:

— dismiss the objection of inadmissibility;

— annul the contested act;

— order the defendant to pay the costs.

16 The defendant contends that the Court should:

— dismiss the action as inadmissible;

— order the applicant to pay the costs.

17 Under Article 114 of the Rules of Procedure, if either party so requests, the Court of First Instance may give a decision on admissibility without going to the substance of the case. In accordance with Article 114(3), the remainder of the proceedings are to be oral unless it is decided otherwise. In this instance, the Court considers that it has sufficient information from its examination of the papers in the case to give a decision on the application without opening the oral procedure.

Admissibility of the action

Arguments of the parties

18 The Commission points out that the applicant has submitted that admissibility of its action is subject to the contested act constituting a final decision and that,

were the Commission to communicate its intention of pursuing its investigation, the present action should be regarded as abandoned.

19 The Commission maintains that the action is inadmissible on the ground that, first, the contested act is not open to challenge under Article 230 EC. It does not produce legal effects binding upon, and capable of affecting the interests of, the applicant (see Case 60/81 *IBM* v *Commission* [1981] ECR 2639, paragraph 9).

20 The Commission also contends that the action is inadmissible because the applicant has no legal interest in bringing proceedings. The applicant alleged that the Commission had failed to take adequate investigative measures regarding CULMV's alleged autonomous infringement of Article 82 EC only once the action was brought.

21 At all events, even if the contested act were to be described as a final decision or if, at a later stage of the procedure, the Commission were to notify the applicant that it was refusing to adopt any decision under Article 86(3) EC, such decisions are not open to challenge. In that respect, the Commission considers that the applicant cannot claim to be in an exceptional situation where an individual has standing to bring proceedings against the Commission's refusal to adopt a decision on the basis of Article 86(1) and (3) EC (see Case C-107/95 P *Bundesverband der Bilanzbuchhalter* v *Commission* [1997] ECR I-947).

22 The applicant counters firstly, as regards the nature of the contested act, by saying that the Commission defines it expressly as an interim act only in its objection of inadmissibility and that that argument must be rejected for a number of reasons.

23 To begin with, the damage claimed by the applicant relates to a situation in the past, and the amendment of the port legislation to which the Commission refers in the contested act would have no beneficial effect, since that amendment would relate to authorisations or refusals of authorisation adopted after the legislation came into effect.

24 Next, the damage claimed by the applicant is dependent upon measures taken by the administrative authority that facilitate CULMV's abuse of its dominant position, rather than upon the content of the port legislation in force when the authorisations sought are not issued.

25 Lastly, the future amendment of the port legislation to which the Commission refers in the contested act is an uncertain condition and cannot therefore serve as a valid reason for adoption of a measure of an interim nature. The applicant states that the very recent ratification of the Law amending Law No 84/94 does not resolve the problems relating to the rules on port operations and to the award of services supplementary and accessory to those operations within Italian ports. In fact, the amending law essentially confers responsibility for the determination of port services on the port authorities or, if they have not been set up, on the maritime authorities, under specific regulations to be adopted in accordance with the binding criteria established by decree which the Minister for Transport and Shipping must adopt not more than 120 days after the law comes into force. That Law therefore fails to establish a system to regulate the market for port services and operations affording adequate guarantees in terms of compliance with freedom of access to those activities on transparent and non-discriminatory conditions. The applicant claims that the new rules do not appear to guarantee competition among port operators although it is stated therein that the supply of temporary labour to perform port services and operations is incompatible with the performance of port operations.

26 The applicant claims that the contested act can therefore only be a final measure whereby the Commission intended to dismiss the applicant's complaint regarding

CULMV's infringement of Article 82 EC, that infringement being facilitated by the measures contrary to Article 86 EC that have been adopted by the Port Authority.

27 Secondly, the applicant counters the Commission's arguments regarding its lack of standing to bring proceedings against the Commission's refusal to adopt a decision under Article 86(3) EC, by pointing out that the existence of such standing is acknowledged in the Community case-law, as cited by the Commission, where the measures in question directly and individually concern the situation of the natural or legal person. Such measures are those which do not govern institutional relations or protect any public interest.

28 Similarly, the applicant states that the measures adopted by the Port Authority are not legislative acts of general application, and the action it has brought does not therefore require the Member State to adopt, amend or revoke any legislative act of general application.

29 It also argues that the Commission's refusal to adopt a decision regarding a situation which is prejudicial to the right of an operator to enter the market is a measure which concerns that operator directly and individually.

30 Lastly, the applicant submits that its legal interest in bringing proceedings stems from the system and purpose of Article 86 EC, which are entirely similar to those of the provisions relating to State aid, so that any natural or legal person has a legal interest in bringing proceedings against a Commission measure taken under the discretionary powers conferred on it under Article 86(3) EC.

Findings of the Court

31 The Commission argues that an action for annulment brought by the applicant against the contested act is inadmissible, first, on the ground that that act is not an act open to challenge under Article 230 EC and, secondly, on the ground that the applicant has no legal interest in bringing proceedings against it. In that connection the Commission states that, in its complaint, the applicant did not allege any autonomous infringement of Article 82 EC by CULMV and that, as regards the Italian State's infringement of Article 82 EC in conjunction with Article 86 EC, it is not required to act in response to a request by an individual under Article 86(3) EC.

32 Before considering whether an action for annulment lies against the contested act, it is important to concern ourselves with the tenor of the complaint, in order to determine whether the applicant alleged that there was an autonomous infringement of Article 82 EC by CULMV.

33 In its complaint, the applicant considers that CULMV's dominant position was made possible on the one hand by the national legislation in force and, on the other hand, by the conduct of the Port Authority.

34 However, it is apparent from point (b), 'Abuse of dominant position held by CULMV', in the fifth paragraph of the complaint, headed '*De facto* monopoly held by CULMV in the port of Genoa', that the applicant identified autonomous action taken by CULMV which, it claims, constitutes abuse of a dominant position.

35 The applicant states in that complaint, in particular, that the *de facto* monopoly which CULMV has at present in the port services sector, has led it to abuse its

dominant position as referred to in Article 82 EC, in the manner described in the judgment in *Merci Convenzionali Porto de Genova*. The applicant adds that CULMV is in a position to impose prices and working conditions on users, to decide which company structure to adopt for producing services, preferring a labour-intensive system to modern technologies, and to supply its services to the various contracting undertakings on dissimilar conditions.

36 The applicant then cites a specific case in which CULMV offered services at a price 25% below its own with the sole purpose of appropriating the only client to which the applicant supplies its services at present, thus strengthening still further CULMV's position on the market. In its complaint the applicant goes on to describe CULMV's conduct as contrary to Community principles on competition and states that, in a similar case, the Commission considered that such conduct constituted an abuse (Commission Decision 88/138/EEC of 22 December 1987 relating to a proceeding under Article 86 of the EEC Treaty (IV/30.787 and 31.488 — *Eurofix-Bauco* v *Hilti*), OJ 1988 L 65, p. 19, section 81).

37 Moreover it must be noted that the Commission itself interpreted the applicant's complaint as referring to an alleged infringement of Article 82 EC by CULMV. Thus, by way of introduction, the contested act reads:

'This complaint was registered at the services of the Directorate-General for Competition on 16 November 1998 (about a year ago). This complaint was made against the Italian State and the [Port Authority] for alleged infringement of Article 82 EC and Article 86 EC, and against CULMV for alleged infringement of Article 82 EC.'

38 The Commission continues and states as follows:

'[Following] a preliminary analysis, it appeared that all of the practices challenged originated from administrative decisions by the [Port Authority] and/or Law No 84/94 as amended. The Commission has therefore not taken any action against CULMV on the basis of the Council Regulation [No 17] but has opened a file against Italy concerning a possible infringement of Article 86 [EC] in conjunction with Article 82 EC. [The applicant has] never challenged that preliminary analysis.'

39 It follows, contrary to the Commission's claim in its objection of inadmissibility, that the applicant's complaint did allege that there was an autonomous infringement of Article 82 EC by CULMV.

40 It is in this context that the Court must determine whether an action for annulment can be brought against the contested act under Article 230 EC and, accordingly, it must examine its substance.

41 According to settled case-law, any measure the legal effects of which are binding on, and capable of affecting the interests of, the applicant by bringing about a distinct change in his legal position is an act or decision against which an action for annulment may be brought under Article 230 EC. More specifically, in the case of acts or decisions adopted by a procedure involving several stages, in particular where they are the culmination of an internal procedure, an act is open to review only if it is a measure definitively laying down the position of the institution on the conclusion of that procedure, and not a provisional measure intended to pave the way for that final decision (see Case 60/81 *IBM* v *Commission*, paragraphs 9 and 10, and Case T-64/89 *Automec* v *Commission* [1990] ECR II-367, paragraph 42).

42 It should also be pointed out that an institution empowered to find that there has been an infringement and to inflict a sanction in respect of it and to which private persons may make complaint, as is the case with the Commission in the field of competition, necessarily adopts a measure producing legal effects when it terminates an investigation initiated upon a complaint by such a person. In that regard, a decision to close the file on a complaint cannot be described as preliminary or preparatory since it is the final step in the procedure and cannot be followed by any other decision amenable to annulment proceedings (see Case C-39/93 P *SFEI and Others* v *Commission* [1994] ECR I-2681, paragraphs 27 and 28).

43 In this case, primarily concerning the alleged infringement by the Italian State of Article 82 EC in conjunction with Article 86 EC, it is clear from the contested act that the Commission has initiated a procedure against that State.

44 It must be observed that the contested act cannot in any way be regarded as terminating that procedure: in it, the Commission is merely informing the applicant of the state of progress in the procedure initiated against the Italian State and giving its preliminary observations regarding its investigation.

45 In that connection, the Commission states in the contested act that it 'is not yet able to adopt a final position either for or against [the applicant], since the Italian authorities' response to the request for information has not yet arrived'.

46 Indeed, the Commission has attached to its objection of inadmissibility a letter of 15 June 1999 addressed to the Italian State and asking it to supply additional information regarding CULMV and the applicant. In the absence of any response

from the Italian State, the Commission then repeated its request, in letters of 23 November 1999 and 7 April 2000; these also are attached to the objection.

47 Regarding the applicant's arguments relating, first, to the past and present consequences of the alleged infringements of the competition rules and, secondly, to the uncertain benefit to itself of the amendment to Law No 84/94, it should be noted that these are immaterial to whether that act is final or not. First, the Commission has never denied that there might be such infringements and, secondly, the fact that the Commission is awaiting the planned legislative amendments would tend to show that it has not completed its consideration of this point.

48 Accordingly, there is no need to rule on the applicant's standing to bring proceedings against a Commission decision adopted under Article 86(3) EC and it must be held that the contested act constitutes a provisional measure in respect of the procedure relating to infringement of Article 82 EC in conjunction with Article 86 EC.

49 In the second place, regarding CULMV's alleged infringement of Article 82 EC, it is apparent from the contested act that, from a preliminary analysis, the Commission considered that the practices complained of had their origin in the administrative decisions of the Port Authority and/or in Law No 84/94, and decided to initiate a procedure not against CULMV but against the Italian State.

50 In that connection, since Article 82 EC relates only to anti-competitive conduct engaged in by undertakings on their own initiative, it is acceptable that the assessment of such conduct should require a prior evaluation of the national legislation applicable. However, that prior evaluation of the effect which the legislation may have on the conduct of undertakings relates only to whether that legislation does not preclude undertakings engaging in autonomous conduct

which prevents, restricts or distorts competition (see Joined Cases C-359/95 P and C-379/95 P *Commission and France* v *Ladbroke Racing* [1997] ECR I-6265, paragraphs 32 to 35).

51 It must be pointed out that, in the light of the initial evidence in its possession, the Commission considered that there had been no autonomous infringement of Article 82 EC by CULMV. The fact that, at that stage, the Commission considered that there might be an infringement of Article 82 EC in conjunction with Article 86 EC, justifies the focusing of its examination on the regulatory and legislative environment in question. However, that does not mean that the Commission will not initiate proceedings against CULMV if it finds, upon completion of that examination, that, notwithstanding the existence of the national rules, the undertaking is not precluded from engaging in autonomous conduct.

52 Therefore, since the contested act does not finally establish the Commission's position as to the possible initiation of a proceeding against CULMV, to that extent it is not an act open to challenge in an action for annulment.

53 From the above considerations, it follows that the contested act is not a final act and, accordingly, the action must be dismissed as inadmissible.

Costs

54 Under Article 87(2) of the Rules of Procedure of the Court of First Instance, the unsuccessful party is to be ordered to pay the costs if they have been applied for in

the successful party's pleadings. Since the applicant has been unsuccessful, it must, in accordance with the form of order sought by the Commission, be ordered to bear its own costs and pay those incurred by the Commission.

On those grounds,

THE COURT OF FIRST INSTANCE (Fifth Chamber)

hereby orders:

1. **The application is dismissed as inadmissible.**

2. **The applicant shall bear its own costs and pay those incurred by the Commission.**

Luxembourg, 20 March 2001.

H. Jung — Registrar

P. Lindh — President