JUDGMENT OF THE COURT OF FIRST INSTANCE (Fifth Chamber)
15 October 2002 *

In Case T-233/00,

Scanbox Entertainment A/S, established in Farum (Denmark), represented by T. Steffensen, lawyer,

applicant,

v

Commission of the European Communities, represented by N. Rasmussen and H. Støvlbæk, acting as Agents, with an address for service in Luxembourg,

defendant,

APPLICATION for the annulment of the Commission's decision of 30 June 2000 refusing to recognise the applicant's eligibility for the programme encouraging the development and distribution of European audiovisual works (Media II — Development and distribution) (1996-2000),

* Language of the case: Danish.

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: D. Christensen, Administrator,

having regard to the written procedure and further to the hearing on 14 March 2002,

gives the following

Judgment

Legal background

1 On 10 July 1995 the Council adopted Decision 95/563/EC on the implementation of a programme encouraging the development and distribution of European audiovisual works (Media II — Development and distribution) (1996-2000) (OJ 1995 L 321, p. 25).

2 Article 2(2) of Decision 95/563 sets out, *inter alia*, the aims of the MEDIA II programme as regards distribution as follows:

'— to strengthen the European distribution sector in the field of cinema and video by favouring the networking of European distributors and encouraging them to invest in the production of European cinema films,

— to favour wider transnational distribution of European films by way of stimulation measures concerning their distribution and their exhibition in cinemas, and to encourage the networking of operators...'.

3 The Commission is responsible for implementing that programme, the arrangements for which are laid down in the Annex to Decision 95/563. Point 1.2.1(b) of the Annex provides for the implementation of a system of subsidy for European distributors proportionate to cinema attendance for European films outside their national territory.

4 In implementing the provisions of that point, the Commission issued a Call for Proposals 8/2000, entitled 'Support for the Transnational Distribution of European Films and the Networking of European Distributors — "The Automatic Scheme"' (hereinafter 'the automatic scheme'). That document contains the guidelines for the submission of proposals to obtain financial support ('the Guidelines').

5 The automatic scheme has two separate phases. The first phase aims to determine the eligibility of distributors for the Community subsidies in question, while the second phase concerns the granting of those subsidies.

6 The first phase seeks to determine the amount of a potential fund that would be available to each distributor submitting a proposal. That amount is calculated on the basis of the distributor's results for the year 1999. Those results are defined by the number of paid admissions to recent European films achieved outside their country of origin ('non-national European films'), up to a limit of 700 000 admissions per film. After having the data certified by the national competent authority, the Commission determines the amount of the potential fund by multiplying the number of admissions thus certified by a fixed amount of between 0.40 and 0.70 euros, according to a formula set out at page 6 of the Guidelines, and informs the distributor.

7 The second phase involves grant of the funding itself. A distributor who has a 'potential fund' at the end of the first phase must request the Commission to pay the amount in the form of a subsidy for 'reinvestment'. That subsidy is granted for the following projects, to be carried out during the year 2000:

— the production of new non-national European films;

— minimum guarantee cover for the distribution of recent non-national European films;

— cover for the distribution costs of recent non-national European films.

8 Each project for which the distributor applies for a subsidy must be authorised by the Commission.

Facts, procedure and forms of order sought by the parties

9 The applicant, Scanbox Entertainment A/S (formerly Scanbox Danmark A/S), distributes films in Denmark, Sweden and Norway though local subsidiaries. It is the holder of the exclusive distribution rights for 'Elizabeth I', 'Little Voice' and 'The Ninth Gate' in those three countries.

10 Svensk Filmindustri AB ('SF') is a Swedish film distribution and production company which belongs to a group of companies operating cinemas in Sweden and Norway. SF distributed the above three films in its network of cinemas in Sweden and then collected the operating receipts under a contract concluded with the applicant.

11 On 27 October 1999 SF and the applicant terminated their contract.

12 In the context of the Call for Proposals 8/2000, the applicant's subsidiary, Scanbox Sweden AB, and SF each submitted a claim for a potential fund for the distribution of the films 'Elizabeth I', 'Little Voice' and 'The Ninth Gate' in Sweden.

13 By letter of 16 June 2000, the advisor to the applicant and its Swedish and Norwegian subsidiaries informed the Commission of grounds on which its client, and not SF, should be regarded as 'the distributor' of the films in question in Sweden and should, on that basis, have its application for a potential fund accepted.

14 On 30 June 2000 the Commission informed the applicant that it had rejected its claim and had accepted that submitted by SF. The relevant reasons for that decision ('the contested decision') are drafted as follows:

'The automatic support scheme has been conceived as a support for those legal entities which carry out activities of theatrical distribution in a given territory. This funding scheme uses the vector of "entries" made (tickets sold) by each distributor to calculate the potential fund, available for reinvestment in the distribution of new films. Under no circumstances can this fund be considered as an income related to a particular film or licensor[,] regardless of the title-holder.

The performance of European distributors (measured on the basis of tickets sold in a given territory) is only a means through which potential [C]ommunity funding is calculated. The fact that AB Svensk Filmindustri has entirely or only partially borne the distribution costs for those films which have generated a potential fund is therefore irrelevant. The relevant factors are the following: AB Svensk Filmindustri has directly distributed the film in Sweden, has negotiated the release date for the films and has carried out the activities defined in Clause 2.3. of the guidelines, which qualify theatrical distribution.

The Commission's interpretation on this specific point is also shared by the Swedish Authorities (Filmägarnas Kontrollbyrå AB) in charge of verifying the entries (tickets sold) for the Swedish territory in 1999. According to Filmägarnas,

"Scanbox Sweden AB has not distributed the titles that are presented. These titles are distributed by AB Svensk Filmindustri". We are enclosing, herewith, copy of this document for your information.

In light of the above, we are sorry to inform you that the Commission shall consider AB Svensk Filmindustri as the company entitled to generate a potential fund within the framework of Call for Proposals 8/2000 (Automatic scheme) for the following titles: "Elizabeth", "The Ninth Gate" and "Little Voice".'

15 By an application lodged at the Registry of the Court of First Instance on 6 September 2000, the applicant brought the present action.

16 On 13 November 2000 the Commission informed the applicant's Swedish subsidiary of the rejection of its claim for potential support.

17 On hearing the report of the Judge-Rapporteur, the Fifth Chamber of the Court of First Instance decided to open the oral procedure and, by way of measures of organisation of procedure pursuant to Article 64 of the Rules of Procedure, to put questions to the applicant which were answered within the time-limit prescribed.

18 The parties presented oral argument and replied to the questions of the Court of First Instance at the hearing on 14 March 2002.

19 The applicant, after giving a more detailed explanation of its pleadings during the hearing, claims that the Court should:

— annul the contested decision;

— order the Commission to pay the costs.

20 The Commission contends that the Court of First Instance should:

— dismiss the action;

— order the applicant to pay the costs.

Law

Preliminary observations

21 The applicant submits that it fulfils each of the four criteria for eligibility for the automatic scheme laid down in paragraph 2.4 of the Guidelines. Notwithstanding SF's involvement as a sub-distributor, it is the distributor of the three

films in question in Sweden. On that basis, it alone is eligible for the automatic scheme. By refusing to acknowledge its eligibility the Commission has committed a manifest error of assessment and based its decision on materially incorrect facts.

22 The Commission rejects those complaints. First, it submits that in the present case, eligibility for the automatic scheme had to be assessed less in relation to the criteria set out in paragraph 2.4 of the Guidelines than in relation to those in paragraph 3 and the purpose of automatic support. Second, the Commission considers that only SF was eligible for that support.

23 As regards interpretation of the Guidelines, the Court of First Instance would point out that they state that the Call for Proposals 8/2000 is aimed at European companies whose activities contribute to the realisation of the objectives [of the Media II programme], and in particular at European theatrical distribution companies.

24 Paragraph 2.3 of the Guidelines defines 'cinema distribution' as follows:

'Any commercial activity designed to bring to the attention of a wide audience a film on various types of format. Such activity may include aspects of the technical publishing of a film (dubbing and subtitling, copying, dispatching etc.) as well as marketing and promotional activities (production of trailers and publicity material, the purchasing of advertising space, the organisation of promotional events etc.).'

25 Paragraph 2.4 of the Guidelines defines a 'cinema distributor' as follows:

'Any European company which, having bought contractually the distribution rights to a film for a given territory, directly distributes it, negotiates the release dates for public showing and assumes responsibility for the associated distribution costs. (Sub-distributors contracted by distributors do not fall within this category.)'

26 It is clear from that definition that only the distribution companies which satisfy the criteria set out in paragraph 2.4 of the Guidelines are eligible for the automatic scheme. Moreover, it is not disputed that the criteria in paragraph 2.4 of the Guidelines are cumulative.

27 However, the Commission has contested that interpretation, arguing that in the present case it had to be determined, as between the applicant and SF, which had the best 'record of generating an audience for European films', as set out at paragraph 3.1 of the Guidelines. At the hearing, the Commission pointed out that the criteria in paragraph 3 of the Guidelines take precedence over those in paragraph 2.4 which have a more limited aim. Moreover, it stated that if it had confined its examination of applications for potential support exclusively to the criteria in paragraph 2.4 of the Guidelines, neither of the two companies in contention would have been declared eligible. Therefore, the criterion used is in accordance with the aim of the MEDIA II programme, which is to encourage the development and distribution of European films. The Commission states that it evaluated several relevant factors as a whole and took account of the distribution of tasks between the applicant and SF as this was discernible from their contractual arrangements and the documents provided by the Swedish authorities.

28 Those arguments cannot succeed.

29 First, it is clear from the foregoing account that the criteria determining the eligibility of a company for the automatic scheme are those listed in paragraph 2.4 of the Guidelines while Section 3, entitled 'Type of support' has a different purpose. Paragraph 3.1 of the Guidelines, on which the Commission placed particular emphasis, entitled 'Purpose of the support', states that the automatic scheme is '[t]o encourage and support the wider transnational distribution of recent non-national European films by providing funds to operators for further investment in same based upon their record of generating an audience for European films [and to] encourage and develop links between the production and distribution sector leading to an increased competitive position of the non-national European films in the sector by increasing their responsiveness to market forces'. In addition, paragraph 3.1 of the Guidelines describes in a general manner how the programme is to function, which is analysed in more detail in the paragraphs below.

30 Second, the Commission's argument, which amounts to disregarding paragraph 2.4 on the ground that neither of the two companies in question satisfied the criteria which it contains, must be rejected. If it were to be accepted, that argument would allow the Commission complete discretion as regards the grant of Community funds under the automatic scheme. In accordance with the principles of legal certainty and sound administration, the Commission is bound to respect the criteria that it has itself set out in the Guidelines and cannot declare a company which does not satisfy those criteria eligible for the automatic scheme.

31 It follows from the foregoing that the Commission had a duty to ensure that the application for potential funding which was submitted to it by the applicant complied with the criteria set out at paragraph 2.4 of the Guidelines.

32 In the light of the preceding considerations, it is appropriate to examine the complaints which seek to establish that, in the contested decision, the Commission erroneously held that SF and not the applicant was eligible for the automatic scheme.

33 The applicant submits that it fulfils each one of the criteria set out in paragraph 2.4 of the Guidelines, which SF cannot claim to do.

34 The Commission contends that the applicant is not eligible for the automatic scheme because the distribution of tasks between the applicant and SF is such that only the latter can be regarded as a distributor for the purpose of the Guidelines.

35 The Court of First Instance considers it appropriate to examine the criterion relating to the acquisition of distribution rights, before examining the other criteria in paragraph 2.4 of the Guidelines.

The criterion relating to the acquisition of distribution rights

36 The applicant submits that SF is not the holder of the exclusive film distribution rights in question in Sweden. That fact alone precludes the Commission from regarding SF as the distributor eligible for the automatic scheme.

37 The Commission points out that it stated in the contested decision that SF's activities had more in common with the actual work of a film distributor than with that of a sub-distributor, or physical distributor, a category ineligible for automatic support. The fact that the applicant is the holder of the distribution rights is not conclusive.

38 The Court of First Instance notes that, according to paragraph 2.4 of the Guidelines, the definition of distributor is applicable to any European company which, *inter alia*, has bought contractually the distribution rights to a film for a given territory. The Guidelines do not establish any sort of hierarchy or weighting between the four criteria in paragraph 2.4. The importance attached by the Guidelines to the criterion of the acquisition of the distribution rights is confirmed by the fact that the application form for automatic support annexed to the Guidelines requires applicants to demonstrate that they are European companies and hold the distribution rights for the non-national European films for which they are applying for financial support from the Community. Moreover, the importance of the criterion of the acquisition of the distribution rights arises from the characteristics of the business of the distribution of cinematic works to cinemas. The acquisition of the distribution rights is a necessary prerequisite to that activity of which it generally constitutes the main cost in relation to the other distribution expenses (for example those relating to the handling, copying, delivery, subtitling or promotion of the film).

39 In the present case, it is common ground that SF is not the holder of the distribution rights of those films in Sweden. Those rights belong exclusively to the applicant. Therefore, SF does not satisfy the first of the four criteria laid down in paragraph 2.4 of the Guidelines and thus cannot be regarded as a distributor eligible for the automatic scheme.

40 It follows that, in so far as it states that SF is a distributor eligible for the automatic scheme, the contested decision is vitiated by an error of assessment.

The other criteria

41 The applicant submits that SF is only a sub-distributor responsible for the physical distribution locally of the films and whose involvement is consistent with

the aims of the automatic scheme. No provision in the Guidelines allows the Commission to refuse access to the automatic scheme to a distributor solely on the ground that it uses the services of a sub-distributor.

42 The applicant argues that it carries out all the management tasks related to the distribution of films. In particular, it alone takes decisions on the presentation of the films, assumes responsibility for them and takes on the commercial risk and management, carries out marketing and bears all related costs.

43 On the basis of all those factors, the applicant argues that it directly distributes the films, negotiates their release dates and assumes responsibility for the associated distribution costs, so that it satisfies all the criteria laid down in paragraph 2.4 of the Guidelines.

44 The Commission rejects those claims. It points out that it stated in the contested decision that SF's activities had more in common with the actual work of a distributor than with that of a physical distributor since it:

— is responsible for direct distribution

— plans marketing campaigns

— bears the direct costs of marketing and distribution.

45 The Commission states that it weighed up several relevant factors and took account of the distribution of tasks between the applicant and SF as was discernible from their contractual arrangements and the documents provided by the Swedish authorities.

46 The Commission points out that sub-distributors do not qualify for automatic support. A sub-distributor simply provides certain services to the distributor such as the handling of films, transportation to cinemas and the collection of the takings. They are thus responsible for the 'physical' distribution of films.

47 The Guidelines do not fully take account of the special characteristics of cinematic distribution for the geographic market comprising Sweden, Denmark and Norway. The Commission explains that in that market cinema admissions do not generate the major part of the takings. It is generally not profitable to acquire the distribution rights of a film for only one of those countries. That is why, usually, distributors buy 'multiplatform' rights (cinema, television, video etc.) for all of those countries. The holder of such rights, not itself having a distribution network for the whole of that territory, delegates the distribution of the films over the territory to a third party. That is why, in the present case, the applicant, who is established in Denmark, delegated to SF, a Swedish company, the distribution of the films in Norway and Sweden.

48 SF best satisfies the definition of distributor given in paragraph 2.4 of the Guidelines. The applicant does not belong to the target group which can claim automatic support. Amongst the four criteria in paragraph 2.4 of the Guidelines, the criterion according to which the distributor must 'directly distribute [a film]' is inapplicable to the applicant. According to the Commission, SF concluded all

the relevant distribution contracts and itself paid all the invoices. However, in the context of a sub-distributor arrangement, it is customary for invoices to be sent to the holder of the distribution rights. SF assumed some financial risk in respect of the distribution of the films in question.

49 The real work of planning, marketing and distribution was carried out by SF, whose activities went beyond those of a sub-distributor. The autonomy which SF had in organising the distribution campaign shows that SF is the distributor of the films in question. The Commission maintains that the applicant approved the marketing and distribution plans put forward by SF, but that all the decisions were taken by SF, the applicant merely approving SF's proposals.

50 In the Commission's opinion, the fact that the applicant reimbursed the distribution expenses incurred by SF is of no importance. It arises from a standard term which appears in all distribution contracts. On the contrary, it tends to confirm that SF is not a mere physical distributor.

51 First, as regards the criterion relating to responsibility for the distribution costs, the Court of First Instance observes that, under the terms of its contract with SF, the applicant bore the distribution costs of the films in question in Sweden. It is clear from the terms of the contract between the applicant and SF ('Cinema Film Distribution Sweden Agreement'), as amended by the addendum of 22 September 1998, that the expenses associated with the distribution of films in Sweden are initially to be advanced by SF, who will then deduct them from the film rental payments to the applicant. Under Article 3 of the contract, if film rental income does not cover those costs, it is provided that SF will be reimbursed by Scanbox Sweden directly or by way of set-off against excess film rental income from other films distributed by it. The other services carried out by SF (commercial policy,

launching, film reservation, billing, reporting, statistics, copies), referred to in Article 4 of the distribution contract, are to be remunerated by the applicant by way of a commission of 15.5% on the amount of the film rental payment. At the hearing, the applicant claimed, without being contradicted by the Commission, that, under those contractual arrangements, it bore all the distribution costs since SF passed on to it all the expenses incurred.

52 As for the Commission's argument that responsibility for the costs results from a standard term in all distribution contracts, it is sufficient to note that, quite apart from not being supported by any evidence, that does not call into question the fact that the applicant has effectively borne the distribution costs. Therefore it must be rejected.

53 At the hearing the Commission also contended that the fact that the applicant ultimately bore the distribution costs is not conclusive, since SF advanced the distribution expenses.

54 The Court of First Instance considers, however, that, in so far as the expenses advanced by SF were subsequently reimbursed by the applicant, from the financial perspective, the applicant bore those expenses alone.

55 It therefore appears that the applicant 'assumed responsibility for the distribution costs' of the films in question for the purposes of paragraph 2.4 of the Guidelines. In the contested decision, the statement that the fact that SF has entirely or only partially borne the distribution costs is irrelevant is therefore vitiated by an error of assessment.

56 Second, as regards the criterion relating to the direct distribution of films, the Court of First Instance notes that it is common ground that SF carried out the physical distribution of the films in question in Sweden. It is important to point out that paragraph 2.4 of the Guidelines does not give any details as to the meaning of 'directly distributes'. On the other hand, that provision states that sub-distributors (or physical distributors) do not fall into the category of distributors.

57 In that regard, the Commission contends that SF's activities go beyond those which are in general entrusted to a physical distributor. SF carries out promotional activities which are connected to the activities that the MEDIA II programme aims to encourage. The Commission concludes that the purpose of the Guidelines rather than their wording requires the recognition of SF as the distributor of the films in question.

58 The Court of First Instance dismisses the Commission's objections.

59 First, whatever degree of autonomy SF may have, the fact remains that the applicant bears the commercial risk connected to the distribution of the films. It has been stated above that SF does not bear any of the distribution expenses. Ultimately, the applicant receives only the residual amount of the takings after deduction of the sums owing to SF. In order for the applicant to realise a profit, the residual amount will still have to exceed the acquisition cost of the film distribution rights. However, the latter represent the main expense associated with the distribution operation and thus indicate the extent of the commercial risk assumed by the applicant. According to the information sent by the applicant in answer to the questions put by the Court of First Instance and other documents in the file, the cost to the applicant of acquiring the distribution rights exceeded by 60% the total expenses and commission received by SF.

60 Second, the applicant's activity is in accordance with the purpose of the automatic scheme, which is to encourage the distribution of European films outside their country of origin. The automatic support is intended for distributors rather than programming cinema operators.

61 The Commission's criticisms relating to the unusual character of the distribution operation in question do not cast any doubt on those points. Although it is possible that the cooperation formula contractually fixed between those companies differs from that to which the Commission's services are accustomed, nevertheless the examples of relationships between the distributor and sub-distributor put before the Court of First Instance by the Commission (annex G to the Defence) concern only the relationship between distributors and sub-distributors within one and the same Member State. In the present case the contractual relationship between the applicant and SF is essentially determined by the fact that those companies are based in two Member States. The applicant does not have cinemas in Sweden and therefore seeks to associate itself with the services of a cinema operator in that Member State. It is thus an example of 'the transnational distribution of European films' the strengthening of which is an aim of the MEDIA II programme.

62 Therefore, it must be considered that, notwithstanding the tasks carried out by SF, the applicant 'directly distributes' the films in question within the meaning of paragraph 2.4 of the Guidelines, with SF acting only as a sub-distributor.

63 It follows that the statement in the contested decision that SF directly distributed the films in Sweden is vitiated by an error of assessment.

64 Third, with respect to the criterion relating to the negotiation of release dates in cinemas, the applicant challenges the statement in the contested decision that SF negotiated the release date for the films and carried out the distribution activities

set out in paragraph 2.3 of the Guidelines. It claims that SF's proposed release dates were submitted for its approval. Thus SF does not have any autonomous or exclusive power in that regard.

65 The Commission contends, essentially, that the applicant's right of veto in respect of proposals put forward by SF regarding the marketing of the films and their release dates cannot be interpreted as proof that the applicant played an active role in the distribution of the films.

66 The Court of First Instance notes that Article 2.4 of the Guidelines does not require release dates to be determined directly or exclusively by the distributor: it suffices if the distributor 'negotiates' those dates.

67 In the present case, the terms of the contract between the applicant and SF do not specify who, as between the applicant and SF, determined the release dates. However, it is clear from the file that, when SF submitted a 'marketing plan' for the applicant's approval, it included information on the release date. Thus it appears that SF submitted for the applicant's approval the release date in the context of the marketing plan. It is precisely because the applicant is not established in Sweden that it relies on the opinion of a local sub-distributor to fix the release dates. The applicant, established in Denmark, certainly does not have the same knowledge of the Swedish market as SF, to whom it entrusts the task of proposing a release date appropriate to the type of film in question and taking account of competing events. That is why, for example, SF proposed that release of the film 'The Ninth Gate' should coincide with the visit of its director to the Stockholm Film Festival. In those circumstances, it must be accepted that the applicant negotiated the release dates with SF, within the meaning of paragraph 2.4 of the Guidelines.

68 Consequently, in so far as it states that SF 'negotiated the release date for the films', the contested decision is vitiated by an error of assessment.

69 In the light of the foregoing, it must be concluded that the contested decision is vitiated by several errors of assessment concerning application of the criteria for eligibility of a cinema distribution company for automatic support which were defined by the Guidelines. The Commission rejected the applicant's request for potential funding on the ground that only SF could be regarded as the eligible distributor, without having established to the requisite legal standard that SF rather than the applicant satisfied the criteria set out in point 2.4 of the Guidelines.

70 Therefore the plea in law alleging errors of assessment must be accepted and the decision annulled, there being no need to examine the other pleas in law and complaints relied on by the applicant.

Costs

71 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. Since the Commission has been unsuccessful and the applicant asked at the hearing for an order for costs against the Commission, the Commission must be ordered to bear its own costs and to pay those incurred by the applicant.

On those grounds,

THE COURT OF FIRST INSTANCE (Fifth Chamber)

hereby:

1. **Annuls the decision of the Commission of 30 June 2000, refusing to acknowledge the eligibility of the applicant for the Programme encouraging the development and distribution of European audiovisual works (MEDIA II — Development and distribution) (1996-2000);**

2. **Orders the Commission to pay the costs.**

Cooke García-Valdecasas Lindh

Delivered in open court in Luxembourg on 15 October 2002.

H. Jung R. García-Valdecasas

Registrar President