

Case T-339/04

France Télécom SA

v

Commission of the European Communities

(Competition — Decision ordering an inspection — Cooperation in good faith with national courts — Cooperation in good faith with national competition authorities — Article 20(4) of Regulation (EC) No 1/2003 — Commission Notice on cooperation within the network of competition authorities — Statement of reasons — Proportionality)

Judgment of the Court of First Instance (Fourth Chamber), 8 March 2007 . . . II - 526

Summary of the Judgment

1. *Competition — Administrative procedure — Commission's powers of inspection — Duty of cooperation in good faith with national authorities — Decision ordering an inspection — Judicial review — Scope*

(Arts 10 EC, 81 EC and 82 EC; Council Regulation No 1/2003, Art. 20(4), (7) and (8))

2. *Competition — Administrative procedure — Commission's powers of inspection — Decision ordering an inspection — Obligation to state reasons — Scope*
(Council Regulation No 1/2003, Art. 20(4))
3. *Competition — Distribution of powers between the Commission and the national competition authorities — Commission Notice on cooperation within the network of competition authorities — Right of the Commission to decide to proceed with an inspection in a case pending before a national competition authority*
(Art. 5 EC; Protocol on the application of the principles of subsidiarity and proportionality, annexed to the EC Treaty; Council Regulation No 1/2003, Art. 11(6); Commission Notice 2004/C 101/03)
4. *Competition — Administrative procedure — Commission's powers of inspection — Use of an inspection decision — Discretion of the Commission — Limits*
(Council Regulation No 1/2003, Art. 20)

1. Regarding the inspections which the Commission may conduct in order to ensure that undertakings comply with the Community competition rules, Article 20 of Regulation No 1/2003 establishes a clear distinction between the decisions adopted by the Commission under Article 20(4), on the one hand, and an application to the national judicial authority for assistance under Article 20(7), on the other.

assisted by the Court of Justice in the context of a reference for preliminary ruling, and subject to any national remedies, to determine whether the information sent by the Commission in the context of that application enables it to carry out its supervisory function under Article 20(8) of the Regulation, and so properly to determine the application presented to it.

Although the Community Courts alone have jurisdiction to review the legality of a decision adopted by the Commission under Article 20(4) of the Regulation, it is, conversely, solely for the national court whose authorisation to employ coercive measures is sought under Article 20(7) of the Regulation, possibly

A national judicial authority to which application is made under Article 20(7) of the Regulation has, under Article 20(8) and the case-law, a right to require

further details from the Commission, *inter alia*, of the grounds on which the Commission suspects an infringement of Articles 81 EC and 82 EC, the gravity of the suspected infringement and the nature of the involvement of the undertaking concerned. A review by the Court of First Instance, which could theoretically give rise to a finding that the information provided by the Commission to the authority was insufficient, would require the Court of First Instance to re-evaluate the assessment already made by that authority of the adequacy of the information. Such a review cannot be accepted because the assessment made by the national judicial authority is subject to review only under such internal remedies as may be available in respect of the decisions of that authority.

The arguments raised by the relevant undertaking in support of an action directed against the Commission's decision ordering an inspection must therefore be rejected as inoperative since, in so far as they allege that, contrary to the Commission's obligation to cooperate in good faith with the national authorities pursuant to Article 10 EC, that decision did not contain sufficient information to enable the national court, seised with a

request for coercive measures, to give an informed ruling.

(see paras 47, 50-53)

2. The decision by which the Commission, in the exercise of the powers conferred on it by Regulation No 1/2003 to ensure that undertakings comply with the Community competition rules, and on the basis of Article 20 of that regulation, orders an inspection must, under Article 20(4) of that regulation and the case-law, include a statement of reasons containing a certain number of essential elements so as to show that the investigation to be carried out on the premises of the undertakings concerned is justified and to enable those undertakings to assess the scope of their duty to cooperate while at the same time safeguarding the rights of the defence. Thus, it must state the subject matter and the purpose of the inspection, setting out the essential characteristics of the supposed infringement, identifying the market thought to be affected, the nature of the suspected infringements, explanations as to the relevant undertaking's degree of involvement in the infringement, what is being sought and the matters to which the inspection is to relate, the powers conferred on the Community investigators, the date on which the inspection is to start, the penalties provided for in

Articles 23 and 24 of Regulation No 1/2003, and the possibility of bringing an action opposing the inspection before the Court of First Instance. The Commission is also required to state in a properly substantiated manner that it has in its file information and evidence providing reasonable grounds for suspecting infringements of the competition rules by the relevant undertaking.

The adequacy of the statement of reasons for such a decision must be assessed in the light of the context in which it was adopted.

(see paras 56-60, 105)

3. Although Regulation No 1/2003 establishes a system of cooperation between the Commission and the national competition authorities, it maintains the principal role of the Commission in the investigation of possible infringements. Article 11(6) of Regulation No 1/2003 provides that, subject only to consulting the national authority concerned, the Commission retains the option of initiating proceedings with a view to adopting a decision even where a national authority is already dealing with the case. Therefore the Regulation must, a fortiori, be interpreted as not precluding the Commission from being able to decide to carry out an inspection in such cases pursuant to Article 20; a

decision ordering an inspection is a step that is merely preliminary to dealing with the substance of the case, and does not have the effect of formally initiating proceedings within the meaning of Article 11(6) of Regulation No 1/2003.

Nor is there any such prohibition arising from the Commission Notice on cooperation within the network of competition authorities, which does not moreover create individual rights for undertakings involved in anti-competitive practices to have the case dealt with by a particular authority; nor from the Joint Statement of the Council and the Commission on the functioning of the network of competition authorities, which is political in nature and does not create legal rights or obligations; nor from the principle of subsidiarity laid down in the second paragraph of Article 5 EC and elaborated on in the Protocol on the application of the principles of subsidiarity and proportionality, annexed to the EC Treaty, as that principle does not call into question the powers conferred on the Commission by the EC Treaty, which include the power to apply the competition rules, and in particular the right to carry out inspections to assess any suspected infringements.

(see paras 79-83, 85, 88, 89)

4. Observance of the principle of proportionality presumes that, when the Commission decides, on the basis of Article 20 of Regulation No 1/2003 on the implementation of the rules on competition laid down in Articles 81 [EC] and 82 [EC], to proceed with an inspection, the measures envisaged do not constitute, in relation to the aims thereby pursued, a disproportionate and intolerable interference. However, the choice to be made by the Commission between an investigation by straightforward authorisation and an investigation ordered by a decision does not depend on matters such as the particular seriousness of the situation, extreme urgency or the need for absolute discretion, but rather on the need for an appropriate inquiry, having regard to the special features of the case. Therefore where an investigation decision is solely intended to enable the Commission to gather the information

needed to assess whether the Treaty has been infringed, such a decision is not contrary to the principle of proportionality.

It is in principle for the Commission to decide whether a particular item of information is necessary to enable it to bring to light an infringement of the competition rules, and even if it already has some indicia, or indeed proof, of the existence of an infringement, the Commission may legitimately take the view that it is necessary to order further investigations enabling it to better define the scope of the infringement or to determine its duration.

(see paras 118, 119)