

Joined Cases 76, 77 and 91/89 R

Radio Telefis Eireann and Others

v

Commission of the European Communities

(Competition — Abuse of dominant position — Practices preventing the publishing and sale of comprehensive weekly television guides)

Order of the President of the Court, 11 May 1989 1141

Summary of the Order

Application for interim measures — Suspension of operation — Conditions for grant — Serious and irreparable damage

(EEC Treaty, Art. 185; Rules of Procedure, Art. 83(2))

ORDER OF THE PRESIDENT OF THE COURT

11 May 1989 *

In Joined Cases 76, 77 and 91/89 R

Radio Telefis Eireann, a statutory authority, whose office is in Dublin, represented by Willy Alexander and Harry Ferment, of the Hague Bar, instructed by Gerald F. McLaughlin, Director of Legal Affairs of Radio Telefis Eireann, and by Eugene F. Collins & Son, solicitors, Dublin, with an address for service in Luxembourg at

* Language of the case: English.

the Chambers of Ernest A. L. Arendt, 4 avenue Marie-Thérèse (Case 76/89 R),

The British Broadcasting Corporation

and

BBC Enterprises Limited, whose offices are in London, represented by Christopher Bellamy QC, Jeremy Lever QC and Rupert Andersen, of the Bar of England and Wales, instructed by Robin Griffith, solicitor, of Clifford Chance, London, with an address for service in Luxembourg at the Chambers of Loesch and Wolter, 8 rue Zithe (Case 77/89 R),

and

Independent Television Publications Limited, whose registered office is in London, represented by Alan Tyrrell QC, instructed by Michael J. Reynolds of Allen and Overy, Brussels, with an address for service in Luxembourg at the Chambers of Loesch and Wolter, 8 rue Zithe (Case 91/89 R),

applicants,

v

Commission of the European Communities, represented by Jacques Bourgeois, a member of its Legal Department, acting as Agent, assisted by Ian Forrester QC, of the Scottish Bar, with an address for service in Luxembourg at the office of Georges Kremlis, a member of the Commission's Legal Department, Wagner Centre, Kirchberg,

defendant,

supported by

Magill TV Guide Limited, whose registered office is in Dublin, represented by John D. Cooke, Senior Counsel, of the Irish Bar, instructed by Gore and Grimes, solicitors, Dublin, with an address for service in Luxembourg at the Chambers of Louis Schiltz, 83 boulevard Grande-Duchesse Charlotte,

intervener,

APPLICATION for the suspension of the operation of the Commission decision of 21 December 1988 relating to a proceeding under Article 86 of the EEC Treaty (IV/31.851, Magill TV Guide/ITP, BBC and RTE) (Official Journal 1989, L 78, p. 43),

T. KOOPMANS, PRESIDENT OF CHAMBER,

acting for the President of the Court pursuant to the second paragraph of Article 85 and Article 11 of the Rules of Procedure,

makes the following

Order

- 1 By applications lodged at the Court Registry on 10 March 1989 in Cases 76/89 R and 77/89 R and on 17 March 1989 in Case 91/89 R respectively, Radio Telefis Eireann (hereinafter referred to as 'RTE'), the British Broadcasting Corporation and BBC Enterprises Limited (hereinafter referred to as the 'BBC'), and Independent Television Publications Limited (hereinafter referred to as 'ITP') applied for the suspension of the operation of the Commission decision of 21 December 1988 relating to a proceeding under Article 86 of the EEC Treaty (IV/31.851, Magill TV Guide/ITP, BBC and RTE). On the same dates the applicants lodged applications pursuant to the second paragraph of Article 173 of the EEC Treaty for the annulment of that decision, which has since been published in the Official Journal of 21 March 1989 (Official Journal 1989, L 78, p. 43).
- 2 The three cases concern the same subject-matter and are so closely connected that they should be joined for the purposes of the interim order.
- 3 By applications lodged at the Court Registry on 24 and 28 April 1989, Magill TV Guide Limited (hereinafter referred to as 'Magill') requested leave to intervene in the proceedings for interim measures in the three cases in support of the Commission's conclusions. Since it lodged with the Commission a complaint against RTE, the BBC and ITP which led to the contested decision, Magill has an interest in the result of the case. Its request must therefore be granted in so far as the proceedings for interim measures are concerned.

- 4 The Commission submitted written observations on 12 April 1989. The oral submissions of the applicants and the Commission were heard on 28 April 1989.
- 5 Before considering whether the application for interim measures is well founded, it is appropriate to summarize the background to the dispute.
- 6 Most television viewers in Ireland and Northern Ireland can receive at least six television channels: RTE 1 and RTE 2, broadcast by RTE which enjoys a statutory monopoly for the provision of a national broadcasting service in Ireland, BBC 1 and BBC 2, broadcast by the BBC, and ITV and Channel 4, broadcast by the television companies franchised by the Independent Broadcasting Authority (hereinafter referred to as the 'IBA') to supply independent television programmes. In the United Kingdom a duopoly exists between the BBC and the IBA for the provision of the national television services. Furthermore, through the various cable operators, many viewers in Ireland are able to receive a number of satellite channels.
- 7 In the framework of their television broadcasting activities, the BBC, RTE and, in the case of the IBA, the ITP, whose shareholders are the television companies franchised by the IBA, prepare programme schedules indicating the channel, the dates and times of the transmissions and the titles of the programmes. Ownership of the copyright in the programme listings for BBC1 and BBC 2 is vested in the BBC, that for ITV and Channel 4 is vested in ITP, and that for RTE 1 and RTE 2 is vested in the RTE.
- 8 ITP, the BBC and RTE each publish weekly television guides containing their respective individual programme listings for the week in question. The programme listings of the ITP are given in the *TV Times*, those of the BBC in the *Radio Times* and those of the RTE in the *RTE Guide*. In addition, the daily and weekly newspapers receive advance weekly listings free on request from ITP, the BBC and RTE. However, the publication of the listings by newspapers is subject to certain conditions. In principle daily newspapers are permitted to publish listings for a period of 24 hours, or 48 hours at weekends. Weeklies are allowed to publish only 'highlights' of the programmes to be broadcast during the following week. Any publication of a comprehensive weekly television guide containing all the

programme listings for a period of seven days has proved to be impossible in Ireland and, apparently, also in the United Kingdom because of the refusal of ITP, the BBC and RTE to grant the requisite licences.

9 In May and June 1986 Magill, a publishing company in Dublin, published a weekly television guide giving details of all programmes broadcast on ITV, Channel 4, BBC and RTE. Following injunctions obtained in proceedings brought by ITP, the BBC and RTE before the Irish courts, Magill stopped publication of the guide. On 4 April 1986 Magill lodged a complaint with the Commission claiming in particular that ITP, the BBC and RTE were abusing their dominant position on the market by refusing to grant licences for the publication of the weekly programme listings.

10 Article 1 of the contested Commission decision states that the policies and practices of ITP, the BBC and RTE in relation to their respective individual advance weekly programme listings, regarding programmes which may be received in Ireland and Northern Ireland, constitute infringements of Article 86 of the EEC Treaty in so far as they prevent the publication and sale of comprehensive weekly television guides in Ireland and Northern Ireland. Article 2 is as follows:

‘ITP, the BBC and RTE shall bring the infringements as mentioned in Article 1 to an end forthwith by supplying each other and third parties on request and on a non-discriminatory basis with their individual advance weekly programme listings and by permitting reproduction of those listings by such parties. This requirement does not extend to information in addition to the listings themselves, as defined in this decision. If they choose to supply and permit reproduction of the listings by means of licences, any royalties requested by ITP, the BBC and RTE should be reasonable. Moreover, ITP, the BBC and RTE may include in any licences granted to third parties such terms as are considered necessary to ensure comprehensive high-quality coverage of all their programmes, including those of minority and/or regional appeal, and those of cultural, historical and educational significance. The parties are therefore required, within two months from the date of notification of this decision, to submit proposals for approval by the Commission of the terms upon which they consider third parties should be permitted to publish the advance weekly programme listings which are the subject of this decision.’

- 11 ITP is seeking the suspension of the operation of Article 2, at least in so far as it requires ITP to supply third parties on request and on a non-discriminatory basis with its advance weekly programme listings and permit reproduction of those programme listings by the BBC, RTE and third parties. The BBC is seeking the suspension of the operation of Articles 1 and 2 of the decision. RTE seeks the suspension of the operation of Article 2 in so far as it requires RTE to permit the reproduction of its weekly programme listings by the BBC, ITP and third parties and to seek approval by the Commission of the terms on which third parties should be permitted to publish the listings in question.
- 12 Under Article 185 of the EEC Treaty, actions brought before the Court of Justice do not have suspensory effect. The Court may, however, pursuant to that provision in conjunction with Article 83(2) of the Rules of Procedure, order that the operation of the contested acts be suspended. As the Court has consistently held, measures of this nature cannot be considered unless the factual and legal grounds relied upon to obtain them establish a *prima-facie* case for granting them. In addition, there must be urgency in the sense that it is necessary for the measures to take effect before the decision of the Court on the substance of the case in order to avoid serious and irreparable damage to the parties seeking them. Finally, they must be provisional in the sense that they do not prejudge the decision on the substance of the case.
- 13 At the stage of the interim proceedings, it is necessary to proceed on the assumption that the three applicants are the owners of the copyright of their respective weekly programme schedules, that under the applicable legislation that copyright entails the exclusive right to publish those schedules and that, under those same provisions, the applicants are not obliged to grant licences to third parties or to permit third parties to publish that information.
- 14 By holding that the three applicants had used their dominant position on the market for television guides giving weekly listings in order to prevent the introduction onto that market of a new product, namely a comprehensive or multi-channel weekly television guide covering the various broadcasting organizations and thus use the copyright as an instrument of an abuse, the Commission has adopted a decision which raises delicate questions as to the exact scope of Article 86 of the Treaty and of the Commission's powers under Regulation No 17 (Official Journal, English Special Edition 1959-62, p. 87). It is for the Court to examine those questions when giving judgment on the substance of the case.

- 15 In those circumstances, the judge hearing the application for interim measures must first examine whether the possible annulment of the contested decision by the Court would make it possible to reverse the situation that would be brought about by the immediate implementation of that decision and conversely whether the suspension of the operation of the decision would be such as to prevent the decision from being fully effective in the event of the main applications being dismissed. In this instance, the latter does not appear to raise such serious problems as the former since the suspension of the operation of the decision would lead to the maintenance for a limited period of the status quo which has existed for many years. It is therefore appropriate to examine in particular the former, namely the effects that would ensue from the immediate implementation of the contested decision.
- 16 In that respect the applicants maintain that the obligation imposed on them by Article 2 of the contested decision to supply third parties with their weekly programme listings 'forthwith' would, if its operation were not suspended, lead to the creation of a new market situation which could not be rectified if the decision were annulled by the Court. Publishers, newspapers and consumers would have become accustomed to having comprehensive programme schedules available and this would have long-term effects on supply and demand.
- 17 The Commission lays particular emphasis on the second part of Article 2; if the undertakings concerned choose to permit publication of the information by means of licences, they merely have to submit their proposals to the Commission for the approval of any conditions imposed on the third parties concerned. The three applicants have in fact submitted their proposals to the Commission and those proposals are now being studied. After the Commission has given its initial reaction, it will allow the applicants to make their comments which it will examine before taking its final decision on the proposals. Consequently no serious or irreparable damage could result from the implementation of Article 2 before the Commission takes its final decision on the applicants' proposals.
- 18 Having regard to those different viewpoints, it should be recognized that full implementation of Article 2, which entails the obligation for the applicants to make the information protected by copyright available to third parties 'forthwith', might lead to new developments on the market that would subsequently be very difficult, if not impossible, to reverse. In that sense the applicants might suffer serious and irreparable damage if the decision were annulled by the Court.

- 19 That does not, however, necessitate a total suspension of the operation of Article 2. An exchange of views is under way between the applicants and the Commission regarding the conditions under which licences should be granted to third parties. It would not be contrary to any interest of the applicants for those discussions to continue with a view to the possibility that their applications will ultimately be dismissed.
- 20 In view of the foregoing, it is appropriate to order the suspension of the operation of Article 2 of the contested decision in so far as it obliges the applicants to bring the infringement found by the Commission to an end forthwith by supplying each other and third parties on request and on a non-discriminatory basis with their individual advance weekly programme listings and by permitting reproduction of those listings by such parties. For the rest, the applications for interim measures must be dismissed.

On those grounds,

T. KOOPMANS, PRESIDENT OF CHAMBER,

acting for the President of the Court pursuant to the second paragraph of Article 85 and Article 11 of the Rules of Procedure,

by way of interim decision,

hereby orders as follows:

- (1) Cases 76/89 R, 77/89 R and 91/89 R are joined for the purposes of this order.
- (2) Magill TV Guide Limited is given leave to intervene in Joined Cases 76, 77 and 91/89 R in support of the defendant's conclusions.

- (3) The operation of Article 2 of the Commission decision of 21 December 1988 relating to a proceeding under Article 86 of the EEC Treaty (IV/31.851, Magill TV Guide/ITP, BBC and RTE) is suspended in so far as it obliges the applicants to bring the infringement found by the Commission to an end forthwith by supplying each other and third parties on request and on a non-discriminatory basis with their individual advance weekly programme listings and by permitting reproduction of those listings by such parties.
- (4) For the rest, the applications for interim measures are dismissed.
- (5) Costs are reserved.

Luxembourg, 11 May 1989.

J.-G. Giraud

Registrar

T. Koopmans

President of Chamber
acting for the President