

Other parties to the proceedings: Bundesverband Internationaler Express- und Kurierdienste eV, UPS Europe NV/SA, Deutsche Post AG, Federal Republic of Germany

Form of order sought

- set aside the judgment under appeal in its entirety;
- declare, pursuant to Article 61 of the Statute of the Court of Justice, that the applicant has failed to prove that the decision infringes Article 87(1) EC, and accordingly dismiss the application. In the alternative, the Commission asks for the case to be referred back to the Court of First Instance;
- order the applicant to pay the costs.

Pleas in law and main arguments

The respondent to the appeal is Deutsche Post AG (DPAG), a large undertaking internationally active in the field of postal services, which received substantial compensation payments from State resources. In a separate decision under Article 82 EC from 2002, which has not been contested, the Commission found that DPAG had abused its dominant position in the market by means of prices on the parcels market that did not cover costs. Since DPAG had made losses everywhere in the period in question, that aggressive price policy could only have been financed by the resources the undertaking had received as financial compensation.

The central issue in the present appeal is which method of analysis the Commission was entitled to apply in the particular circumstances of the present case in order to find that there was unlawful aid to DPAG.

According to the method preferred by the Court of First Instance in the judgment under appeal, all the undertaking's costs and receipts in the relevant period in connection with the public interest obligations would have to be examined as to whether the undertaking had received excessive financial compensation from the State. If there were such overcompensation, it could be concluded that those resources had also been used to finance the unfair price policy in the adjacent market of door-to-door parcel services.

According to the method used in the decision, the deficits in the adjacent market caused by the unfair price policy are calculated and it is ascertained whether or not those shortfalls have been compensated with State resources. If such a compensation is found and there is no other source of finance (in the form of the undertaking's own resources), the conclusion is that State resources have been made use of to finance the unfair price policy in the adjacent market of door-to-door parcel services.

The Commission regards the method used in its decision as correct. By means of that method, on the basis of a logical

chain of reasoning which includes the assumption that money must after all come from somewhere, the existence of unlawful State aid may be deduced. Neither the chain of reasoning nor the underlying facts are challenged in the judgment under appeal. The Court of First Instance nevertheless takes the view in the judgment under appeal, without further explanation, that only the former method is possible.

The Commission puts forward the following grounds of appeal. There is an infringement of Articles 87(1) EC and 86(2) EC, in so far as those provisions were incorrectly interpreted in the judgment under appeal as excluding a method, not otherwise challenged in the judgment under appeal, which makes it possible to conclude, on the basis of logical and watertight reasoning, that State aid incompatible with the common market is present. The Commission further relies on lack of jurisdiction of the Court of First Instance and breach of Article 230 EC, in so far as the Court of First Instance exceeded its powers and went beyond the power of review provided for in Article 230 EC, and on Article 36 of the Statute of the Court of Justice, in so far as the Court of First Instance failed to state reasons for the unlawfulness of the method used in the decision.

Reference for a preliminary ruling from High Court of Justice (Chancery Division) (United Kingdom) made on 17 September 2008 — Football Association Premier League Ltd, NetMed Hellas SA, Multichoice Hellas SA v QC Leisure, David Richardson, AV Station plc, Malcolm Chamberlain, Michael Madden, SR Leisure Ltd, Phillip George Charles Houghton, Derek Owen

(Case C-403/08)

(2008/C 301/34)

Language of the case: English

Referring court

High Court of Justice (Chancery Division)

Parties to the main proceedings

Applicants: Football Association Premier League Ltd, NetMed Hellas SA, Multichoice Hellas SA

Defendants: QC Leisure, David Richardson, AV Station plc, Malcolm Chamberlain, Michael Madden, SR Leisure Ltd, Phillip George Charles Houghton, Derek Owen

Questions referred**A. On the interpretation of Directive 98/84/EC of the European Parliament and of the Council of 20 November 1998 on the legal protection of services based on, or consisting of, conditional access ⁽¹⁾****Q1 Illicit device**

- (a) Where a conditional access device is made by or with the consent of a service provider and sold subject to a limited authorisation to use the device only to gain access to the protected service in particular circumstances, does that device become an 'illicit device' within the meaning of Article 2(e) of Directive 98/84/EC if it is used to give access to that protected service in a place or in a manner or by a person outside the authorisation of the service provider?
- (b) What is the meaning of 'designed or adapted' within Article 2(e) of the Directive?

Q2 Cause of action

When a first service provider transmits programme content in encoded form to a second service provider who broadcasts that content on the basis of conditional access, what factors are to be taken into account in determining whether the interests of the first provider of a protected service are affected, within the meaning of Article 5 of Directive 98/84/EC?

In particular:

Where a first undertaking transmits programme content (comprising visual images, ambient sound and English commentary) in encoded form to a second undertaking which in turn broadcasts to the public the programme content (to which it has added its logo and, on occasion, an additional audio commentary track):

- (a) Does the transmission by the first undertaking constitute a protected service of 'television broadcasting' within the meaning of Article 2(a) of Directive 98/84/EC and Article 1(a) of Directive 89/552/EEC ⁽²⁾?
- (b) Is it necessary for the first undertaking to be a broadcaster within the meaning of Article 1(b) of Directive 89/552/EEC in order to be considered as providing a protected service of 'television broadcasting' within the first indent of Article 2(a) of Directive 98/84/EC?
- (c) Is Article 5 of Directive 98/84/EC to be interpreted as conferring a civil right of action on the first undertaking in respect of illicit devices which give access to the programme as broadcast by the second undertaking, either:

- (i) because such devices are to be regarded as giving access via the broadcast signal to the first undertaking's own service; or
- (ii) because the first undertaking is the provider of a protected service whose interests are affected by an infringing activity (because such devices give unauthorised access to the protected service provided by the second undertaking)?

- (d) Is the answer to (c) affected by whether the first and second service providers use different decryption systems and conditional access devices?

Q3 Commercial purposes

Does 'possession for commercial purposes' in Article 4(a) of the Directive relate only to possession for the purposes of commercial dealings in (for example, sales of) illicit devices,

or does it extend to the possession of a device by an end user in the course of a business of **any** kind?

B. On the interpretation of Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society ⁽³⁾**Q4 Reproduction Right**

Where sequential fragments of a film, musical work or sound recording (in this case frames of digital video and audio) are created (i) within the memory of a decoder or (ii) in the case of a film on a television screen, and the whole work is reproduced if the sequential fragments are considered together but only a limited number of fragments exist at any point in time:

- (a) Is the question of whether those works have been reproduced in whole or in part to be determined by the rules of national copyright law relating to what constitutes an infringing reproduction of a copyright work, or is it a matter of interpretation of Article 2 of Directive 2001/29/EC?
- (b) If it is a matter of interpretation of Article 2 of Directive 2001/29/EC, should the national court consider all of the fragments of each work as a whole, or only the limited number of fragments which exist at any point in time? If the latter, what test should the national court apply to the question of whether the works have been reproduced in part within the meaning of that Article?
- (c) Does the reproduction right in Article 2 extend to the creation of transient images on a television screen?

Q5 Independent economic significance

- (a) Are transient copies of a work created within a satellite television decoder box or on a television screen linked to the decoder box, and whose sole purpose is to enable a use of the work not otherwise restricted by law, to be regarded as having 'independent economic significance' within the meaning of Article 5(1) of Directive 2001/29/EC by reason of the fact that such copies provide the only basis upon which the rights holder can extract remuneration for the use of his rights?
- (b) Is the answer to Question 5(a) affected by (i) whether the transient copies have any inherent value; or (ii) whether the transient copies comprise a small part of a collection of works and/or other subject matter which otherwise may be used without infringement of copyright; or (iii) whether the exclusive licensee of the rights holder in another Member State has already received remuneration for use of the work in that Member State?

Q6 Communication to public by wire or wireless means

- (a) Is a copyright work communicated to the public by wire or wireless means within the meaning of Article 3 of Directive 2001/29/EC where a satellite broadcast is received at a commercial premises (for example a bar) and communicated or shown at those premises via a single television screen and speakers to members of the public present in those premises?
- (b) Is the answer to Question 6(a) affected if:
- (i) the members of the public present constitute a new public not contemplated by the broadcaster (in this case because a domestic decoder card for use in one Member State is used for a commercial audience in another Member State)?
 - (ii) the members of the public are not a paying audience according to national law?
 - (iii) the television broadcast signal is received by an aerial or satellite dish on the roof of or adjacent to the premises where the television is situated?
- (c) If the answer to any part of (b) is yes, what factors should be taken into account in determining whether there is a communication of the work which has originated from a place where members of the audience are not present?

C. On the interpretation of Council Directive 93/83/EEC of 27 September 1993 on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable transmission (4) and of Articles 28 and 30 and 49 of the EC Treaty**Q7 Defence under Directive 93/83**

Is it compatible with Directive 93/83/EEC or with Articles 28 and 30 or 49 of the EC Treaty if national copyright law provides that when transient copies of works included in a satellite broadcast are created inside a satellite decoder box or on a television screen, there is an infringement of copyright under the law of the country of reception of the broadcast? Does it affect the position if the broadcast is decoded using a satellite decoder card which has been issued by the provider of a satellite broadcasting service in another Member State on the condition that the satellite decoder card is only authorised for use in that other Member State?

D. On the interpretation of the Treaty rules on free movement of goods and services under Articles 28 and 30 and 49 EC in the context of the CAD**Q8 Defence under Articles 28 and/or 49 EC**

- (a) If the answer to Q1 is that a conditional access device made by or with the consent of the service provider becomes an 'illicit device' within the meaning of Article 2(e) of Directive 98/84/EC when it is used outside the scope of the authorization of the service provider to give access to a protected service, what is the specific subject matter of the right by reference to its essential function conferred by the Conditional Access Directive?
- (b) Do Articles 28 or 49 of the EC Treaty preclude enforcement of a provision of national law in a first Member State which makes it unlawful to import or sell a satellite decoder card which has been issued by the provider of a satellite broadcasting service in another Member State on the condition that the satellite decoder card is only authorised for use in that other Member State?
- (c) Is the answer affected if the satellite decoder card is authorised only for private and domestic use in that other Member State but used for commercial purposes in the first Member State.

Q9 Whether the protection afforded to the Anthem can be any broader than that afforded to the rest of the broadcast

Do Articles 28 and 30 or 49 of the EC Treaty preclude enforcement of a provision of national copyright law which makes it unlawful to perform or play in public a musical work where that work is included in a protected service which is accessed and played in public by use of a satellite decoder card where that card has been issued by the service provider in another Member State on the condition that the decoder card is only authorised for use in that other Member State? Does it make a difference if the musical work is an unimportant element of the protected service as a whole and the showing or playing in public of the other elements of the service are not prevented by national copyright law?

E. On the interpretation of the Treaty rules on competition under Article 81 EC

Q10 Defence under Art 81EC

Where a programme content provider enters into a series of exclusive licences each for the territory of one or more Member States under which the broadcaster is licensed to broadcast the programme content only within that territory (including by satellite) and a contractual obligation is included in each licence requiring the broadcaster to prevent its satellite decoder cards which enable reception of the licensed programme content from being used outside the licensed territory, what legal test should the national court apply and what circumstances should it take into consideration in deciding whether the contractual restriction contravenes the prohibition imposed by Article 81(1)?

In particular:

- (a) must Article 81(1) be interpreted as applying to that obligation by reason only of it being deemed to have the object of preventing, restricting or distorting competition?
- (b) if so, must it also be shown that the contractual obligation appreciably prevents, restricts or distorts competition in order to come within the prohibition imposed by Article 81(1)?

⁽¹⁾ OJ L 320, p. 54.

⁽²⁾ Council Directive 89/552/EEC of 3 October 1989 on the coordination of certain provisions laid down by Law, Regulation or Administrative Action in Member States concerning the pursuit of television Broadcasting activities (OJ L 298, p. 23).

⁽³⁾ OJ L 167, p. 10.

⁽⁴⁾ OJ L 248, p. 15.

Reference for a preliminary ruling from the Vestre Landsret (Denmark) lodged on 18 September 2008 — Ingeniørforeningen i Danmark, acting for Bertram Holst v Dansk Industri, acting for Babcock & Wilcox Vølund ApS

(Case C-405/08)

(2008/C 301/35)

Language of the case: Danish

Referring court

Vestre Landsret

Parties to the main proceedings

Applicant: Ingeniørforeningen i Danmark, acting for Bertram Holst

Defendant: Dansk Industri, acting for Babcock & Wilcox Vølund ApS

Question referred

1. There is disagreement amongst the parties as to whether Directive 2002/14/EC establishing a general framework for informing and consulting ⁽¹⁾ employees has been correctly implemented in the Cooperation Agreement between DA and LO. In that connection, do Community rules preclude implementation of a directive in such a manner that groups of employees are covered by a collective agreement between parties which do not represent the professional group of the persons concerned and where the collective agreement does not cover the professional group of the persons concerned?
2. If Directive 2002/14/EC has been correctly implemented for BH in the Cooperation Agreement between DA and LO, has Article 7 of the Directive been correctly implemented when it is established that the Cooperation Agreement does not contain a high standard of protection against dismissal for certain professional groups?