Judgment of the Court of Justice, GEMA, case 125/78 (18 October 1979)

Caption: Excerpt from the GEMA judgment relating to the admissibility of action for failure to act. Action for failure to act is only admissible if the defendant party has been called upon to act and if, after the expiration of a period of two months from such a request, the institution has not defined its position (Article 232, second paragraph, of the EC Treaty, former Article 175). In the GEMA judgment, the Court of Justice considers that the institution concerned has adopted an act which, in constituting a 'defining of position', excludes failure to act.

Source: Reports of Cases before the Court. 1979. [s.l.].

URL: http://www.cvce.eu/obj/judgment_of_the_court_of_justice_gema_case_125_78_18_october_1979-en-0e548e03-866a-4c83-8ffe-1793417469fe.html
Publication date: 22/10/2012

Judgment of the Court of 18 October 19791

GEMA, Gesellschaft für musikalische Aufführungs- und mechanische Vervielfältigungsrechte v Commission of the European Communities

Case 125/78

Summary

1. Competition - Administrative proceedings - Initiation on application by natural or legal person - Commission's duty to arrive at a decision within the meaning of Article 189 of the Treaty - Non-existent - Communication referred to in Article 6 of Regulation No 99/63 - Effects
(Regulation No 17 of the Council, Art. 3 (2) (b); Regulation No 99/63 of the Commission, Art. 6)

2. Action for failure to act - Notice to the institution - Defining position within the meaning of the second paragraph of Article 175 of the Treaty - Concept
(EEC Treaty, Art. 175, second paragraph)

[…]

1. As is shown by the phrase "... shall inform the applicants of its reasons", the communication referred to in Article 6 of Regulation No 99/63 of the Commission only seeks to ensure that an applicant within the meaning of Article 3 (2) (b) of Regulation No 17 of the Council be informed of the reasons which have led the Commission to conclude that on the basis of the information obtained in the course of the inquiry there are insufficient grounds for granting the application. Such a communication implies the discontinuance of the proceedings without, however, preventing the Commission from reopening the file if it considers it advisable, in particular where, within the period allowed by the Commission for that purpose in accordance with the provisions of Article 6, the applicant puts forward fresh elements of law or of fact. The argument that a person putting forward such an application is entitled to obtain from the Commission a decision within the meaning of Article 189 of the Treaty on the existence of the alleged infringement cannot therefore be accepted.

Moreover, even assuming that such a communication may be in the nature of a decision capable of being contested by way of Article 173 of the Treaty, that in no way implies that the applicant within the meaning of Article 3 (2) of Regulation No 17 is entitled to require from the Commission a final decision as regards the existence or non-existence of the alleged infringement. In fact the Commission cannot be obliged to continue the proceedings whatever the circumstances up to the stage of a final decision. A contrary interpretation would remove all meaning from Article 3 of Regulation No 17 which in certain circumstances allows the Commission the opportunity of not adopting a decision to compel the undertakings concerned to put an end to the infringement established.

2. A letter, by which the Commission, in accordance with Article 6 of Regulation No 99/63, replies to a person who has made an application under Article 3 (2) (b) of Regulation No 17, stating reasons, fixing a time-limit for the applicant to submit any comments, and explaining that the information obtained does not permit a finding of the existence of an infringement of Article 85 or 86 of the EEC Treaty, constitutes a defining of its position under the second paragraph of Article 175 of the Treaty.

[…]

In Case 125/78

GEMA, GESELLSCHAFT FÜR MUSIKALISCHE AUFFÜHRUNGS- UND MECHANISCHE VERVIELFÄLTIGUNGSRECHTE, 29 Herzog-Wilhelm-Straße, Munich, represented by Ernest Arendt, of the Luxembourg Bar, with an address for service in Luxembourg at the Chambers of Mr Arendt,

applicant,

v

COMMISSION OF THE EUROPEAN COMMUNITIES, represented by its Legal Adviser, Erich Zimmermann, with an address for service in Luxembourg at the office of its Legal Adviser, Mario Cervino, Jean Monnet Building, Plateau du Kirchberg,

defendant,

supported by

COMPAGNIE LUXEMBOURGEOISE DE TÉLÉDIFFUSION S.A., represented by its Managing Director, Dr Gustave Graas, Villa Louvigny, Parc Municipal, Luxembourg, assisted by Professor Arved Deringer, with an address for service in Luxembourg at the Chambers of Jacques Loesch, Advocate, 2 rue Goethe,

and

RADIO MUSIC INTERNATIONAL S.À.R.L., represented by its Managing Director, Dr Gustave Graas, assisted by Professor Arved Deringer, with an address for service in Luxembourg at the Chambers of the said Jacques Loesch,

interveners,

APPLICATION concerning the failure of the defendant to give effect to the application made by the applicant in pursuance of Article 3 (2) (b) of Regulation No 17 of the Council of 6 February 1962 (First Regulation implementing Articles 85 and 86 of the Treaty), Official Journal, English Special Edition 1959-1962, p. 87),

THE COURT,

composed of: H. Kutscher, President, A. O'Keeffe and A. Touffait, (Presidents of Chambers), J. Mertens de Wilmars, P. Pescatore, Lord Mackenzie Stuart and G. Bosco, Judges,

Advocate General: F. Capotorti
Registrar: A. Van Houtte

gives the following

JUDGMENT

[...]

Decision

1 The dispute in these proceedings arises out of a letter dated 23 July 1971 by which the applicant, GEMA, a German performing right association, submitted a complaint to the Commission in pursuance of Article 3 (2) (b) of Regulation No 17 of 6 February 1962 (Official Journal, English Special Edition 1959-1962, p. 87) the aim of which was to establish the existence of infringements of the rules on competition laid down in Articles 85 and 86 of the EEC Treaty by the Compagnie Luxembourgeoise de Télédiffusion (hereinafter referred to as "Radio Luxembourg"), its subsidiary, Radio Music International (hereinafter referred to as "RMI"), both of which have registered offices in Luxembourg, and Radio Tele-Music (hereinafter referred to as "RTM"), whose registered office is in Berlin-Wilmersdorf.

[…]

3 The Commission complied with the terms of the applicant's complaint on 23 January 1974 by sending to the aforementioned three companies a letter containing a statement of the objections raised against them in accordance with Article 19 (1) of Regulation No 17. On 23 April 1974 the Commission conducted hearings of the parties but did not inform the applicant of the subsequent course of the proceedings.

4 By letter of 31 January 1978 the applicant called upon the Commission to adopt "a formal decision in the inquiry into the proceedings" within two months failing which the applicant would lodge against the Commission an application for failure to act, in accordance with Article 175 of the Treaty.

5 The Commission replied by letter of 22 March 1978 in which it expressed the view that “the most recent information” in its possession did not entitle it to grant the applicant’s application for a decision recording an abuse of a dominant position by Radio Luxembourg and the other aforementioned undertakings. In the light of recent developments in the situation the Commission considered it doubtful whether it was possible to demonstrate convincingly that Radio Luxembourg occupied a dominant position in a substantial part of the Common Market and abused such a position. After setting out in detail the reasons for that opinion the Commission concluded that a decision by way of Article 86 of the Treaty would not be justified. In accordance with Article 6 of Regulation No 99/63 of the Commission of 25 July 1963 on the hearings provided for in Article 19 (1) and (2) of Council Regulation No 17 (Official Journal, English Special Edition 1963-1964, p. 47) the Commission allowed the applicant the opportunity of submitting any further comments within two months of receipt of “this notification”.

[…]

7 On 31 May 1978 the applicant lodged an application under Article 175 of the Treaty, seeking to establish the illegality of the Commission’s failure to act and to call upon it either to adopt a formal decision within the context of the proceedings instituted in 1971 following the applicant’s complaint or, if appropriate, to inform the applicant of the discontinuance of the proceedings, in pursuance of Article 6 of Regulation No 99/63. The applicant claims that the letter of 22 March 1978 did not constitute performance by the Commission of its obligations under Article 3 (2) of Regulation No 17 since the applicant is “entitled ... to have ... the Commission continue the proceedings instituted against Radio Luxembourg, establish the existence of the infringement and prescribe the measures necessary in order to put an end to it”.

[…]

Admissibility

10 The Commission contests the admissibility of the application for failure to act on the ground that the conditions for the application of Article 175 are not satisfied.

11 The Commission observes that the second paragraph of Article 175 requires it not to have “defined its position” within two months of being called upon to act and claims that there is no failure to act in this instance since its letter of 22 March 1978 constitutes a definition of its position within the meaning of Article 175. That statement is in turn challenged by the applicant who claims, first, that the letter of 22 March is purely interlocutory in nature and, secondly, that as a private applicant making an application by way of Article 3 (2) of Regulation No 17 it is entitled to a “decision” within the meaning of Article 189 of the Treaty. The Commission claims, furthermore, that as the decision demanded by the applicant could not have been addressed to it but only to the undertakings whose conduct was called in question by the complaint the applicant does not fall within the category of natural or legal persons who, under the terms of the third paragraph of Article 175, may complain to the Court.

[…]

A - The application for failure to act

14 It is necessary to decide, first, whether the letter of 22 March 1978 constitutes defining a position within the meaning of the second paragraph of Article 175. To that end it is first necessary to consider the Commission’s obligations within the context of the procedure laid down by Regulation No 17 and supplemented by Regulation No 99/63 for the purpose of establishing possible infringements of Articles 85 and 86 of the Treaty.

15 Article 3 of Regulation No 17 provides in particular as follows:

“(1) Where the Commission, upon application or upon its own initiative, finds that there is infringement of Article 85 or Article 86 of the Treaty, it may by decision require the undertakings or associations of undertakings concerned to bring such infringement to an end.

2. Those entitled to make application are:

(a) Member States;

(b) natural or legal persons who claim a legitimate interest”.

16 Article 6 of Regulation No 99/63 provides that:

“Where the Commission, having received an application pursuant to Article 3 (2) of Regulation No 17, considers that on the basis of the information in its possession there are insufficient grounds for granting the application, it shall inform the applicants of its reasons and fix a time-limit for them to submit any further comments in writing”.

17 As is shown by the phrase “... shall inform the applicants of its reasons”, it follows that the communication referred to in Article 6 of Regulation No 99/63 only seeks to ensure that an applicant within the meaning of Article 3 (2) (b) of Regulation No 17 be informed of the reasons which have led the Commission to conclude that on the basis of the information obtained in the course of the inquiry there are insufficient grounds for granting the application. Such a communication implies the discontinuance of the proceedings without, however, preventing the Commission from re-opening the file if it considers it advisable, in particular where, within the period allowed by the Commission for that purpose in accordance with the provisions of Article 6, the applicant puts forward fresh elements of law or of fact. The applicant’s argument that an applicant under Article 3 (2) of Regulation No 17 is entitled to obtain from the Commission a decision within the meaning of Article 189 of the Treaty on the existence of the alleged infringement cannot, therefore, be accepted.

18 Moreover, even assuming that such a communication is in the nature of a decision within the meaning of Article 189 of the Treaty and that it is therefore capable of being contested by way of Article 173 of the Treaty, that in no way implies that the applicant within the meaning of Article 3 (2) of Regulation No 17 is entitled to require from the Commission a final decision as regards the existence or non-existence of the alleged infringement. In fact the Commission cannot be obliged to continue the proceedings whatever the circumstances up to the stage of a final decision. The interpretation put forward by the applicant would remove all meaning from Article 3 of Regulation No 17 which in certain circumstances allows the Commission the opportunity of not adopting a decision to compel the undertakings concerned to put an end to the infringement established. It therefore follows from the nature of the procedure to establish an infringement laid down by Article 3 of the regulation that it cannot be accepted that a natural or legal person who, in pursuance of Article 3 (2) (b) of the regulation, has requested the Commission to establish the said infringement, is entitled to demand a final decision on the proceedings instituted by the Commission following his complaint.

19 As regards the letter of 22 March 1978 it must be noted that the Commission informed the applicant of its view that a decision by way of Article 86 of the Treaty would not be justified and set out the facts and reasons on which that opinion was based. In addition, in accordance with the provisions of Article 6 of the aforementioned Regulation No 99/63 it fixed a time-limit of two months for the submission by the applicant of any further comments in writing.

20 It follows that the Commission acted in accordance with the aforementioned provisions of Article 6 of Regulation No 99/63 by informing the applicant of the outcome of the proceedings and of the reasons for the discontinuance of the inquiry into its complaint. It must be added that it emerges from the terms of the letter, which is in two separate sections, that the Commission’s suggestion for discussions with the applicant in order to examine other suitable methods of dealing with the consequences of the practices called in question by it falls outside the scope of the procedure to establish an infringement of the rules on competition

instituted by the Commission following the submission of the original complaint. Contrary to the argument put forward by the applicant that suggestion cannot therefore confer on the letter an interlocutory character.

21 It results from the foregoing considerations that by replying by means of the letter of 22 March 1978, which was in accordance with the requirements of Article 6 of Regulation No 99/63, to the applicant's letter of 31 January 1978 calling upon it to act, the Commission addressed to the applicant an act which constitutes a definition of its position within the meaning of the second paragraph of Article 175 of the Treaty.

22 It follows that in this instance the Commission has not failed to act on the applicant's application to it and that the circumstances contemplated by Article 175 are not present.

23 The application on the grounds of failure to act must therefore be dismissed as inadmissible.

[…]

On those grounds,

THE COURT

hereby:

1. Dismisses the application as inadmissible;

2. Orders the applicant to pay the costs with the exception of those which may have been incurred as a result of the intervention, in respect of which the applicant and the interveners must each bear their own costs.

Kutscher
O'Keeffe
Touffait
Mertens de Wilmars
Pescatore
Mackenzie Stuart
Bosco

Delivered in open court in Luxembourg on 18 October 1979.

A. Van Houtte
Registrar

H. Kutscher
President

1 - Language of the Case: German