OPINION OF MR ADVOCATE GENERAL LENZ
delivered on 11 July 1985 *

Mr President,
Members of the Court,

A.1. The proceedings in which I am to give my Opinion today are concerned with certain aspects of the rules in Article 86 of the EEC Treaty, that is to say with questions concerning the abuse of a dominant position on the market. The following are the facts:

The plaintiff in the main action, the Centre belge d'études de marché — Télémarketing SA, is a trading company formed in 1958, which since 1978 has been concerned with telephone marketing. Telephone marketing is an advertising technique whereby an advertiser places in one of the media (in the present case, television) an advertisement carrying a telephone number which the addressee of the advertisement can call either to obtain information about the goods or to respond to the advertising campaign in some other way. In 1982 the plaintiff organized the first telemarketing operation aimed at Belgium on the RTL television station, which is run by the first defendant, the Compagnie luxembourgeoise de télédiffusion SA (CLT). On 22 March 1983 the second defendant, Information publicité Benelux SA (IPB), granted the plaintiff the exclusive right for one year to carry out telemarketing operations on the RTL station. IPB has been responsible for CLT's advertising since the 1930s; access to RTL advertising is possible only through IPB. IPB and CLT are related companies. Until the expiry of the said agreement on 23 March 1984 telemarketing operations were carried out using only the plaintiff's telephone number. After the expiry of the contract IPB informed potential advertisers, both by acircular of 26 March 1984 and by advertisements, that in future IPB's telephone number (Brussels 640 50 50) had to be used for all telemarketing operations. As justification for the new practice it was stated that television viewers had the impression that in responding to the telemarketing campaign they were dealing with the television station itself. Viewers expected treatment which they might expect from RTL and moreover put questions concerning the RTL channel. To preserve the viewers' image of RTL it was therefore necessary that telemarketing operations should be conducted exclusively through IPB.

The plaintiff considered itself to have been excluded by the conduct of IPB from the market in telemarketing, which the plaintiff itself had essentially built up in Belgium; it therefore brought an action before the Tribunal de commerce, Brussels. It claimed *inter alia* a declaration that the refusal of the defendants, acting jointly or individually, to sell television time on the RTL television station for telephone marketing operations using a telephone number other than that of IPB constituted an unfair trading practice. In its view the defendants' conduct served an unlawful purpose and infringed Articles 3 (f) and 86 of the EEC Treaty.

In order to answer the question whether the defendants occupied a dominant position in

* Translated from the German.

the relevant market the Tribunal de commerce, Brussels, referred the following two questions to the Court:

'(1) The interpretation of the concept of a dominant position

Is there a dominant position within the meaning of Article 86 of the EEC Treaty where an undertaking enjoys a legal monopoly for the supply of certain goods or services and where, as a result, competition in the supply of those goods or services is excluded? Does the concept of a dominant position imply a real possibility of competition suppressed or extinguished by the action of the party which occupies the dominant position or may it apply in a context in which such competition cannot exist or is, in any event, extremely limited?

(2) Interpretation of the concept of abuse of a dominant position

Where, in the situation envisaged in the first question, it is accepted that the undertaking in question occupies a dominant position within the meaning of Article 86 of the Treaty, must the conduct of such an undertaking be interpreted as constituting an abuse of a dominant position, where that conduct consists in reserving for itself or for a subsidiary under its control, to the exclusion of any other undertaking, an ancillary activity which could be carried out by a third undertaking as part of its activities?'

At this juncture I should mention once again that the present case concerns only some of the conditions for the application of Article 86 of the EEC Treaty. Other aspects, such as the question of the relevant market or whether trade between Member States may be affected, have not been mentioned by the national court. Therefore I do not need to express an opinion on them. It is necessary to answer only two questions, namely whether there can be a dominant position for the purposes of Article 86 of the EEC Treaty where an undertaking has a legal monopoly and whether certain specified conduct can be regarded as an abuse of a dominant position. In answering those questions we have to assume the existence of a dominant position, that trade between Member States is affected and, as is set out in Question 2, that CLT controls IPB Whether those matters are really true is for the national court to decide.

Moreover, for those reasons account has to be taken of the parties' observations only in so far as they relate to the answer to the two specific questions.

2. (a) In the *plaintiff's* opinion, an undertaking which has a monopoly in a particular service has a dominant position in the market in that service. According to the case-law of the Court, Article 86 of the EEC Treaty applies to the conduct of broadcasting stations. CLT cannot rely on the proviso in Article 90 (2) since it is not an undertaking which is 'entrusted with the operation of services of general economic interest'. The conduct of the CLT/IPB group is an abuse of a dominant position, consisting in the strengthening of an

existing dominant position and the imposition of unfair trading conditions contrary to Article 86.

The plaintiff therefore proposes that the Court should answer the two questions put by the Tribunal de commerce, Brussels, as follows:

'(1) An undertaking occupies a "dominant position" within the meaning of Article 86 of the EEC Treaty where it has a legal monopoly for the provision of certain services. In particular Article 86 applies to a broadcasting station; the latter cannot rely on Article 90 (2) of the EEC Treaty.

(2) There is an abuse of a dominant position where an undertaking occupying a dominant position intentionally strengthens that position by reserving exclusively to itself a new activity which could have been undertaken by one or more other undertakings and in so doing affects the conditions of competition in the common market.'

(b) *CLT* admits that it has a monopoly, but points out that the Luxembourg Government is at liberty to issue licences to other companies. That monopoly does not however conflict with Article 86 of the EEC Treaty.

The decision to transfer telemarketing operations to IPB is based on reasons of expediency. IPB is closer to CLT; it is informed of programme changes made at short notice and is in a position to react accordingly. CLT's decision no longer to use the services of the plaintiff is based on economic principles and is in no way contrary to the interests of advertisers.

CLT therefore proposes that the two questions should be answered as follows:

'(1) It is not *per se* incompatible with Article 86 of the EEC Treaty for an undertaking to which a State has granted exclusive rights within the meaning of Article 90 to enjoy a monopoly.

(2) An undertaking to which a State has granted exclusive rights and which therefore occupies a dominant position does not abuse that position by reserving to itself or to an undertaking with which it has common interests ancillary services which could have been performed by another undertaking.'

(c) *IPB* basically adopts the observations of CLT. On the second question it submits in addition that there is no abuse within the meaning of Article 86 of the EEC Treaty where an undertaking reserves to itself or to another undertaking the right to perform a particular activity. There is such abuse only if an undertaking in a dominant position uses that position to create advantages for itself which it could not have obtained had there been effective competition and its conduct is likely to harm consumers by a serious interference with competition in a substantial part of the common market.

IPB proposes the following answers:

'(1) Where a State grants a legal monopoly to an undertaking to which it gives exclusive rights within the meaning of Article 90 of the EEC Treaty, that does not *per se* mean that there is a dominant position within the meaning of Article 86.

(2) Where an undertaking which occupies a dominant position within the meaning of Article 86 reserves to itself or to a subsidiary an activity which could have been performed by another under-

taking, that does not *per se* amount to an abuse of a dominant position.'

(d) The *Commission* takes the view that, where a monopoly arises from objective, legal circumstances, independent of the conduct of the undertaking in question, it falls within the concept of a dominant position within the meaning of Article 86 of the EEC Treaty. Whether a dominant position exists is a matter of fact and does not depend on the reasons for its existence.

There is an abuse of a dominant position where an undertaking which occupies a dominant position in a particular market and which is thus able to control the activity of other undertakings on a neighbouring market establishes itself on the second market. That applies in any event if without valid reason it refuses to supply the goods or services in which it already controls the market to the undertaking active in the second market.

In the Commission's view the questions referred to the Court by the Tribunal de commerce, Brussels, should be answered as follows:

'(1) Where an undertaking has a legal monopoly for the supply of certain goods or services and competition in the supply of those goods or services is therefore excluded, the undertaking may nevertheless occupy a dominant position within the meaning of Article 86 of the EEC Treaty.

(2) The conduct of an undertaking in reserving to itself or to a subsidiary under its control an ancillary activity which could be carried out by another undertaking amounts to an abuse of a dominant position. There is likewise an abuse of a dominant position where the carrying out of ancillary activities by another undertaking is made subject to discriminatory conditions such as, in the case of television advertising, the exclusive use of the telephone number of the undertaking occupying the dominant position.'

B. My opinion on this request for a preliminary ruling is as follows:

1. First question

In considering the question whether CLT and IPB occupy a dominant position the national court came up against the problem that RTL or CLT has a legal monopoly over television broadcasting. The effect of that monopoly is that, in the context of the agreements allocating frequencies and wavelengths to the various States, there is no real freedom of establishment. Thus the conditions of free competition on the relevant market are distorted if not completely eliminated and that situation is recognized by law. The national court wishes to know whether, in such a situation, there can be said to be a dominant position and whether the concept of a dominant position presupposes that at least theoretically there is the possibility of competition.

Since it seems to me apparent that a monopoly protected by law represents one of the clearest examples of a dominant position, I take the question put by the national court to be asking whether the competition rules of the EEC Treaty are at all applicable to undertakings which are granted a legal monopoly.

First of all, it is appropriate to make a preliminary observation on the scope of Article 86 of the EEC Treaty. That provision states that any abuse by one or more undertakings of a dominant position within the common market or in a substantial part of it is prohibited as incompatible with the common market in so far as it may affect trade between Member States. The term 'trade' has not been interpreted narrowly by the Court so as to cover only trade in goods. For the purposes of Article 86 'trade' also includes the provision of services, as the Court held in its judgment of 25 October 1979. [1] Thus, since the transmission of television broadcasts constitutes a service, [2] the sale of television time for advertisements may fall within the scope of Article 86.

Article 90 (1) of the EEC Treaty provides that, in the case of undertakings to which Member States grant special or exclusive rights, Member States are neither to enact nor to maintain in force any measure contrary to the rules contained in the Treaty, in particular to the rules laid down in Article 7 and Articles 85 to 94. That provision makes it clear that public undertakings and undertakings to which special rights are granted are subject to the general provisions in the Treaty on competition. The sole exception to that general principle is contained in Article 90 (2), which provides that in the case of undertakings entrusted with the operation of services of general economic interest the rules on competition are to apply only in so far as they do not obstruct the performance, in law or in fact, of the particular tasks assigned to them.

In its judgment of 30 April 1974 [3] the Court confirmed that the existence of a legally protected monopoly does not preclude the application of Article 86 of the EEC Treaty. In that judgment the Court stated: 'The interpretation of Articles 86 and 90 taken together leads to the conclusion that the fact that an undertaking to which a Member State grants exclusive rights has a monopoly is not as such incompatible with Article 86.' The Court further stated in that case, which was concerned with the then still existing Italian television monopoly: 'Moreover, if certain Member States treat undertakings entrusted with the operation of television, even as regards their commercial activities, in particular advertising, as undertakings entrusted with the operation of services of general economic interest, the same prohibitions apply, as regards their behaviour within the market, by reason of Article 90 (2), so long as it is not shown that the said prohibitions are incompatible with the performance of their tasks.'

In its judgment of 13 November 1975 [4] the Court inferred that there was a dominant position directly from the existence of a legal monopoly and stated: 'This legal monopoly, combined with the freedom of the manufacturer . . . to fix the price for its

1 — Judgment of 25 October 1979 in Case 22/79 *Greenwich Film Production* v *Société des auteurs, compositeurs et éditeurs de musique and Others* [1979] ECR 3275, paragraph 11.

2 — Judgment of 30 April 1974 in Case 155/73 *Giuseppe Sacchi*, [1974] ECR 409, paragraph 6, p. 427; judgment of 18 March 1980 in Case 52/79 *Procureur du Roi* v *Marc J. V. C. Debauve and Others* [1980] ECR 833, paragraph 8, p. 855.

3 — Judgment of 30 April 1974 in Case 155/73 *Giuseppe Sacchi*, cited above, especially paragraph 14 *et seq.*, p. 429.

4 — Case 26/75 *General Motors Continental NV* v *Commission* [1975] ECR 1367, paragraph 9, p. 1379.

service, leads to the creation of a dominant position with the meaning of Article 86...'.

The Court recently again confirmed that Article 86 applies to monopoly undertakings. In its judgment of 20 March 1985 [5] it applied Article 86 to British Telecommunications, a public corporation registered in the United Kingdom, without expressing any doubts as to the applicability thereof.

There is nothing in what the Court said in its judgment of 13 February 1979 to conflict with this preliminary conclusion that the existence of a legal monopoly does not preclude the application of Article 86 but rather is evidence of a dominant position. It is true that in that judgment the Court, in defining a dominant position, referred by way of contrast to the case of a monopoly or oligopoly. [6] However, the Court's remarks must be taken to mean that there may still be a dominant position if, in contrast to the case of a monopoly, there is still some competition. If however, as in the case of a monopoly, competition is completely excluded, then there is even greater evidence of a dominant position.

Thus, although as a rule the existence of a legal monopoly indicates a dominant position, it is nevertheless necessary to mention the following special feature: the monopoly and the dominant position may well overlap partially but they do not have to overlap completely. In the present case in particular the national court will have to have regard to the fact that the legal monopoly — if it exists and that is not clear — extends to the transmission of television broadcasts in the Grand Duchy of Luxembourg. The dominant position however, if it exists, consists in the fact that CLT is the only company offering television advertising time in Belgium. There must therefore at least be some doubt as to whether the fact that RTL or CLT has a Luxembourg monopoly is at all significant in the present case.

It is necessary to deal only briefly with the second part of the first question, which asks whether the fact that competition is restricted or prevented by State legislation has any bearing on the applicability of Article 86. Amongst the various factors indicating the existence of a dominant position, market share is a factor which provides particularly cogent evidence. [7] In the case of a monopoly it is the sole relevant factor. [8] If an undertaking has a 100% market share it necessarily occupies a dominant position. [9] The reasons that have led to such a position are irrelevant. It may *inter alia* be due to a legal monopoly. [10]

2. Second question

By its second question the national court seeks to ascertain whether, by reserving to

5 — Case 41/83 *Italy* v *Commission* [1985] ECR 880.

6 — Case 85/76 *Hoffmann-la-Roche & Co. AG* v *Commission* [1979] ECR 461, paragraph 38 *et seq.*, p. 520.

7 — Judgment of 13 February 1979 in Case 85/76, cited above, paragraph 40, p. 520.

8 — See H. Schröter, Note 14 on Article 86 in *Kommentar zum EWG-Vertrag*, by Groeben, Boeck, Thiesing, Ehlermann; Baden-Baden, 1983.

9 — Judgment of 13 November 1975 in Case 26/75, cited above, paragraph 4 *et seq.*, p. 1377; judgment of 31 May 1979 in Case 22/78 *Hugin Kassaregister AB and Others* v *Commission* [1979] ECR 1869, paragraph 7, p. 1896.

10 — Judgment of 30 April 1974 in Case 155/73, cited above, paragraph 12 *et seq.*, p. 428.

itself or to a subsidiary under its control, to the exclusion of any other undertaking, an ancillary activity which could be carried out by another undertaking as part of its activities, an undertaking occupying a dominant position abuses that position.

An answer to that question can already be found in the judgment of the Court of 22 January 1974. [11] That case was concerned with the conduct of an undertaking manufacturing raw materials which occupied a dominant position. The undertaking no longer wished to confine itself to the manufacture of raw materials but wished to extend its activity to processed goods. At the same time it refused to supply its previous customers with further raw materials. In its judgment the Court held as follows:

'An undertaking being in a dominant position as regards the production of raw material and therefore able to control the supply to manufacturers of derivatives, cannot, just because it decides to start manufacturing these derivatives (in competition with its former customers), act in such a way as to eliminate their competition, which in the case in question would amount to eliminating one of the principal manufacturers . . . in the common market. Since such conduct is contrary to the objectives expressed in Article 3 (f) of the Treaty and set out in greater detail in Articles 85 and 86, it follows that an undertaking which has a dominant position in the market in raw materials and which, with the object of reserving such raw material for manufacturing its own derivatives, refuses to supply a customer, which is itself a manufacturer of those derivatives, and therefore risks eliminating all competition on the part of this customer, is abusing its dominant position within the meaning of Article 86.' [12]

In other words that means that an undertaking abuses its dominant position in the market if it uses that position to force its way into a neighbouring market and does not confine itself to participating in that market but simultaneously attempts, by means of a refusal to supply, to eliminate the competition of those already active in the market.

Applying that to the present case leads to the following result:

IPB and CLT occupy a dominant position in the sale of television advertising time in Belgium. By their conduct, that is to say by requiring that television telemarketing operations should be conducted solely through IPB's technical facilities, they have not only entered the sphere of telemarketing but have at the same time forced the plaintiff out of the market by refusing it an essential service, namely the broadcasting of advertisements over the RTL transmitter. According to the criteria developed by the Court, that conduct amounts to an abuse of a dominant position.

In conclusion let me make a few remarks on the additional observations which the Commission submitted in relation to Article 86 (a) and (d).

The Commission considered whether the facts fall within the examples given in Article 86. Article 86 (a) mentions, by way

11 — Joined Cases 6 and 7/73 *Istituto Chemioterapico Italiano SpA and Commercial Solvents Corporation* v *Commission* [1974] ECR 223.

12 — *Ibid*, paragraph 25, p. 250.

of example of an abuse, the direct or indirect imposition of unfair purchase or selling prices or other unfair trading conditions and Article 86 (d) refers to the case in which the conclusion of contracts is made subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

I do not think that it is necessary to deal fully with those points since it is already clear that the exclusion of the plaintiff from the market in television telemarketing amounts to an abuse. Moreover, CLT and IPB could come within the above-mentioned examples only in respect of conduct *vis-à-vis* advertisers and not *vis-à-vis* the plaintiff, with whom they no longer have any business relationship. The national court must decide whether the conduct of CLT and IPB *vis-à-vis* third parties has to be taken into account in these proceedings.

C. In view of the foregoing considerations I propose that the Court should answer the questions put by the Tribunal de commerce, Brussels, as follows:

(1) An undertaking which has a legal monopoly in the provision of certain services may occupy a dominant position within the meaning of Article 86 of the EEC Treaty even if competition in those services is largely excluded by legislative provisions.

(2) Where such an undertaking reserves to itself or to a subsidiary under its control, to the exclusion of all other undertakings, an ancillary activity which could be carried out by another undertaking as part of its activities, its conduct amounts to an abuse of a dominant position.