OPINION OF ADVOCATE GENERAL LENZ
delivered on 11 July 1991 *

Mr President,
Members of the Court,

A — Facts

1. The questions for a preliminary ruling on which I am to give my opinion today were referred to the Court by the Tribunal de Première Instance, Brussels, in criminal proceedings. The case calls for an assessment in the light of Community law of national monopolies over the provision of services in the field of telecommunications which are at the same time responsible for approving telecommunications equipment and monitoring the provisions relating to type-approval and are themselves competitors in the market in telecommunications equipment.

2. The accused in the main proceedings were prosecuted for having offered cordless telephones for sale or hire without the necessary authorization of the Régie des Télégraphes et Téléphones ('the RTT'). They were also charged with being in possession of or operating cordless telephones and a pair of walkie-talkies without the written, personal and revocable authorization of the competent minister.

3. The national court is uncertain as to the compatibility with Community law of the national provisions on which the criminal proceedings were based and has therefore referred the following questions to the Court for a preliminary ruling:

'Are Articles 37 and 86 of the Treaty establishing the European Economic Community to be interpreted as prohibiting, in the field of radiocommunications and private radiocommunications, legal provisions such as the Law of 30 July 1979 and the Royal Decree of 15 October 1979, which impose penalties of imprisonment and/or fines on persons who have:

(1) offered for sale or hire a transmitter or receiver, in this case cordless telephones, without type-approval having been granted by the RTT,

or

(2) kept, set up or operated transmitters, in this case cordless telephones and a pair of walkie-talkies, without obtaining the written, personal and revocable authorization of the competent minister?'

4. For details of the facts of the main proceedings, the legislative background to the case and the submissions of the parties, reference is made to the Report for the Hearing. I shall refer to the contents of the docu-

* Original language: German.

ments before the Court only in so far as is necessary for my reasoning.

B — Analysis

5. The wording of the questions referred to the Court suggests that the national court's doubts relate to the compatibility with Community law of the obligation to obtain authorization or type-approval under pain of a fine. The context of the request for a preliminary ruling, however, makes it possible to view the question in a different light. Thus it is not in fact the obligation to obtain authorization or type-approval that the national court regards as problematical, but rather the way in which that obligation combines with the position conferred on the RTT in the field of radiocommunications and private radiocommunications, which includes the operation of the telephone network and the sale of equipment for connection to the network. In its order for reference, the national court establishes that the RTT represents 'a kind of monopoly'. The national court expresses doubts as to the compatibility of the RTT's position with the fundamental rules of the Treaty on the free movement of goods and with the provisions on competition. In order to answer the question referred to the Court it will therefore be necessary to interpret the relevant Treaty provisions against the background of the position conferred on the RTT.

6. A reference for a preliminary ruling raising similar problems is currently pending before the Court. [1] In that case the national court based its doubts in relation to Community law on the fact that the RTT could determine the conditions for the type-approval of equipment intended to be connected to the public telecommunications network. Apart from the questions of the means of redress and the reparation of the loss arising out of an infringement of the relevant provisions, in Case C-18/88 the national court took the view that the requirement for type-approval of equipment which could be connected to the public network raised problems. In that case the judgment has yet to be delivered. However, Advocate General Darmon has already delivered his Opinion, on 15 March 1989.

1. *The provisions on the free movement of goods*

7. The combination of different functions in the RTT as the sole operator of the public communications network together with the requirement for type-approval of equipment intended to be connected to the network, which is also exercised by the RTT, and finally that undertaking's competence to monitor the relevant provisions may be contrary to the rules on the free movement of goods laid down in the EEC Treaty. The problem is further aggravated by the fact that the RTT is a competitor in the market for the sale of radio transmitting and receiving equipment.

8. The national court referred expressly only to Article 37 of the EEC Treaty in giving the reasons for its doubts as to the compatibility of the RTT's monopolistic position with the principle of the free movement of goods.

1 — Case C-18/88 *RTT* v *GB-Inno-BM* [1991] ECR I-5941.

However, in examining the Community law issue the Court is not limited to interpreting the articles of the Treaty cited by the national court. For the purpose of answering the questions referred to it the Court may find it helpful to interpret other provisions of relevance to those questions.

9. *(a)* It is appropriate to begin with Article 30 of the EEC Treaty, which prohibits quantitative restrictions on imports and all measures having equivalent effect. The application of Article 30 of the EEC Treaty to the present case raises the problem, first, of the extent to which the free movement of goods in general is impeded by the requirement for type-approval and the control of that approval. According to the broad interpretation of Article 30 in the case-law of the Court, a measure having equivalent effect exists whenever a trading rule enacted by a Member State is capable of hindering, directly or indirectly, actually or potentially, intra-Community trade. [2]

10. It might be possible to take the view that, if the requirements for type-approval did not exist, equipment which does not in fact satisfy the conditions for approval might be imported into Belgium and sold on the Belgian market, and that the obligation to obtain approval might consequently have the effect of an obstacle to trade.

11. In order to fall within the scope of Article 30 of the EEC Treaty the potential obstacle to trade must be the consequence of trading rules *adopted by the State*. The Belgian Government therefore rightly draws a distinction in its submissions between the Belgian State and the RTT, a public undertaking. The way in which the powers of type-approval and control are exercised by the RTT cannot therefore be attributed to the Belgian State, but is to be regarded as the autonomous conduct of the independent undertaking. In those circumstances the only conduct which can be attributed to the Belgian State is the fact of establishing a requirement for type-approval and entrusting a public undertaking with implementing the approval procedure.

12. Since the requirement for type-approval is applicable as such to both domestic and foreign goods in the same way, it does not specifically affect imported goods. In fact trading rules which apply equally to domestic and foreign products may also infringe Article 30 of the EEC Treaty, [3] although only in so far as they are not necessary in order to satisfy mandatory requirements.

13. In the present case consumer protection, the fairness of trade and in particular the protection of the telecommunications network operated in the public interest are to be considered as such requirements. Both the operation of the network and the administration of the frequencies are in the interest of the proper functioning of the telecommunications and radio service. Testing the safety

2 — Case 8/74 *Procureur du Roi* v *Dassonville* [1974] ECR 837

3 — Case 120/78 *REWE Zentrale* v *Bundesmonopolverwaltung für Branntwein* [1979] ECR 649.

of equipment intended to be connected to the network likewise serves the maintenance of a functioning radio and telephone service. In that regard, cordless telephones also come within the category of equipment intended to be connected to the network since, although not physically joined to the telephone network, they are only capable of operating through it. The same applies to walkie-talkies. A reliable administration of the frequencies is possible only if interference caused by the use of unauthorized equipment is avoided.

14. As regards the requirement for the type-approval of telephone equipment, Advocate General Darmon also speaks in his Opinion in Case C-18/88 of the imperative requirements in the public interest of the protection of users and of the preservation of the proper operation of the telecommunications network. [4] The same considerations must apply to the approval of cordless telephones. The type-approval procedure does not therefore constitute a breach of Article 30.

15. It follows that there is no need to examine, from the point of view of Article 36 of the EEC Treaty, the circumstances justifying possible restrictions on imports or exports within the meaning of Articles 30 and 34 of the EEC Treaty, although any such obstacles may conceivably be justified from the points of view of public policy or public security.

16. If it could be established that the way in which the approval procedure is implemented constituted an obstacle, that would not be a matter for Article 30 of the EEC Treaty, since such conduct is directly attributable to the public undertaking and not to the State.

17. Apart from the question of attributability, an administrative practice which obstructs imports can constitute a measure prohibited under Article 30 of the EEC Treaty only where it 'show [s] a certain degree of consistency and generality'; [5] and, depending on the circumstances of the case, the treatment of a single undertaking may fulfil that condition. [6]

18. The real problem in this case is in my view not the requirement for type-approval and the fact that its implementation is ensured by criminal sanctions but the conflict of interests inherent in the fact that functions which are virtually those of a public authority have been conferred on the RTT, in so far as it is competent to approve equipment and to bring criminal proceedings in the event of any breaches of the relevant provisions, and yet it is a competitor in the market in telecommunications equipment. The conflict of interests does not in itself constitute a case which comes under Article 30 of the EEC Treaty, however.

19. If that conflict of interests were to give rise to a discriminatory practice in the implementation of the type-approval procedure and the prosecution of offences against the

4 — Opinion in Case C-18/88, point 13.

5 — Case 21/84 *Commission* v *France* [1985] 1355, paragraph 13.

6 — Opinion in Case 21/84, cited above, and judgment, paragraph 13.

requirements for approval, then at the very most that might be relevant as a discriminatory administrative practice by a public undertaking within the framework of Article 37, or the Community rules on competition, as the case may be.

20. *(b)* Within the framework of the provisions on the free movement of goods, Article 37 of the EEC Treaty must be examined as a possibly relevant special provision. Article 37 provides that any State monopolies of a commercial character are to be adjusted so as to ensure that 'when the transitional period has ended no discrimination regarding the conditions under which goods are procured and marketed exists between nationals of Member States'.

21. In the context of that examination, it should be pointed out at the outset that the RTT has *no* monopoly of a *commercial* character. It has no monopoly in either the import or the marketing of telecommunications equipment. On the other hand, as the sole operator of the telecommunications network it has a monopoly in the *provision of services*. The question arises to what extent that monopoly is influenced by the fact that the RTT is empowered to implement and monitor the type-approval procedure. Both the approval of equipment and the monitoring of compliance with the relevant provisions are virtually functions of public power. However, the exercise of those functions does not make the monopoly in the provision of services a monopoly of a commercial character.

22. Those considerations apart, the mere existence of a monopoly of a commercial character is still not contrary to Article 37, which limits the requirements to adjust monopolies of a commercial character to what is necessary to preclude discrimination regarding the movement of goods. Nor does the fact that the monopoly in question is a monopoly in the provision of services have the inevitable consequence that the applicability of Article 37 of the EEC Treaty is precluded *a priori*. According to the second subparagraph of Article 37(1), Article 37 applies to 'any body through which a Member State, in law or in fact, either directly or indirectly supervises, determines or appreciably influences imports or exports between Member States'.

23. The Court has since held on a number of occasions that Article 37 is aimed at trade in goods and not at a monopoly in the provision of services. None the less, it cannot be ruled out that a monopoly in the provision of services may have an indirect influence on trade in goods between Member States. [7] Whether the RTT's activity actually has a negative effect on the trade in telecommunications equipment between the Member States remains open but the possibility of such an obstacle is assumed in the argument. Such assumptions do not suffice to establish an infringement of Article 37 of the EEC Treaty, however, since the wording of that provision shows that it is necessary to prove the existence of discrimination and, according to the case-law of the Court, there is no

7 — Case 155/73 *Sacchi* [1974] 409, paragraph 6 et seq.; Case 271/81 *Amelioration de l'Élevage* v *Mialocq* [1983] 2057, paragraph 8 et seq. and Case 30/87 *Bodson* v *Pompes Funebres des Regions Libérees* [1988] 2479, paragraph 10 et seq., most recently Case C 260/89 *ERT* [1991] ECR I 2925, paragraph 15 et seq., and Opinion, paragraph 24 et seq

discrimination when imported products are subjected to the same conditions as imported products subject to the monopoly. [8]

24. A further consideration, which is also to be found in the submissions of the Belgian Government, speaks against classing the business activities in question as monopolistic conduct incompatible with Article 37 of the EEC Treaty. The exercise of the monopoly to provide services, in the form of the operation of the telecommunications network and the administration of the frequencies, does not have a negative influence on trade between the Member States. Moreover, the approval and monitoring of telecommunications equipment is not an economic activity but has the characteristics of public authority. The alleged obstacle to trade must result from 'activities intrinsically connected with the specific business of the monopoly'. [9]

25. Unequal treatment due to the structure of the legal provisions cannot be established, since the provisions relating to type-approval are applicable to domestic and foreign products without distinction. If the way in which they are implemented by the monopolistic undertaking leads to discrimination, it is at the very most an infringement of the Community rules on competition that is to be considered.

2. *The Treaty provisions on competition*

26. Articles 85 and 86 of the EEC Treaty are aimed at undertakings and are therefore not directly applicable to a situation which calls for an assessment of the position and conduct of a public undertaking. Article 90(1), however, provides that in the case of public undertakings and undertakings to which they 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 EEC Treaty, in particular to those rules provided for in Article 7 and Articles 85 to 94. On the basis of that provision and with reference to Member States' duties under Article 5 of the EEC Treaty, the Court has repeatedly held that Member States are not allowed to enact measures which could deprive Articles 85 and 86 of the EEC Treaty of their effectiveness. [10]

27. It is therefore necessary to establish whether the position conferred on the RTT, which is characterized by the fact that it has a monopoly to provide services and is also competent to approve the relevant equipment and to monitor compliance with the conditions for approval, constitutes a breach of the prohibitions in Article 86 of the Treaty, in view of the circumstance that the RTT is also a competitor in the market for telecommunications equipment. Therefore the issue is not, I reiterate, the RTT's conduct in the market but the combination in a

8 — Case 13/70 *Cinzano* v *Hauptzollamt Saarbrücken* [1970] ECR 1089, paragraph 9.

9 — Case 86/78 *Peureux* v *Services Fiscaux de la Haute-Saône et du Territoire de Belfort* [1979] 897, paragraph 35.

10 — Case 13/77 *Inno* v *ATAB* [1977] ECR 2115, paragraph 28 et seq. and Joined Cases 209/84 to 213/84 *Ministère Public* v *Asjes ('Nouvelles Frontières')* [1986] ECR 1425, paragraph 71 et seq.; Case 66/86 *Ahmed Saeed Flugreisen* v *Zentrale zur Bekämpfung unlauteren Wettbewerbs* [1989] ECR 803, paragraph 47 et seq.; Case 231/83 *Cullet* v *Leclerc* [1985] ECR 305.

public undertaking, as a result of State action, of different responsibilities which have the character of exclusive rights.

28. That situation, which in itself involves a conflict of interests, has already formed the subject-matter of a judgment of the Court in another context. The Commission, acting on the basis of Article 90(3) of the EEC Treaty, adopted a directive on competition in the markets in telecommunications terminal equipment, by which it intended to preclude for the future a combination of tasks of the type at issue in the present proceedings. [11] Article 6 of the directive provides that 'responsibility for drawing up the specifications ..., monitoring their application and granting type-approval is [to be] entrusted to a body independent of public or private undertakings offering goods and/or services in the telecommunications sector'.

29. A number of Member States brought actions before the Court of Justice against that directive. [12] In the proceedings the Member States in question claimed, *inter alia*, that the Commission had no power to adopt the provision in question on the basis of Article 90(3) of the EEC Treaty. In its judgment the Court expressed its views on the problem with which we are concerned — the combination of tasks in a public undertaking. [13]

30. The Court observed that a system of undistorted competition can be guaranteed only if equality of opportunity is secured as between the various economic operators. To entrust an undertaking which markets terminal equipment with the task of drawing up the specifications for such equipment, monitoring their application and granting type-approval in respect thereof is tantamount to conferring upon it the power to determine at will which terminal equipment may be connected to the public network, and thereby placing that undertaking at an obvious advantage over its competitors. For those reasons the Court approved the separation prescribed by the Commission between undertakings providing services or goods and the authorities granting type-approval.

31. Since the Court did not declare Article 6 of Commission Regulation 88/301/EEC void, it must be assumed that it has produced legal consequences since 1 July 1989. [14] Since that time, therefore, the fact that responsibility for drawing up the specifications, monitoring their application and granting type-approval is entrusted to an undertaking offering goods and/or services in the telecommunications sector has been contrary to Community law. It is for the courts of the Member States, where necessary, to draw the legal consequences from that situation.

32. The Commission's powers to take action within the framework of Article 90(3) of the EEC Treaty are not the same as its powers under Article 169 to make a finding that a Member State has infringed the Treaty. For

11 — Commission Directive 88/301/EEC of 16 May 1988 (OJ 1988 L 131, p 73).

12 — Case C 202/88 *France* v *Commission* [1991] ECR I 1223

13 — Case C 202/88, cited above, paragraphs 51 and 52

14 — Article 6 of Commission Directive 88/301/EEC provides that:
'Member States shall ensure that, from 1 July 1989, responsibility for drawing up the specifications referred to in Article 5, monitoring their application and granting type approval is entrusted to a body independent of public or private undertakings offering goods and/or services in the telecommunications sector.'

that reason it is not necessary that a situation contrary to the Treaty exists [15] before the Commission can adopt directives or take decisions on the basis of Article 90(3). Furthermore, the Commission has a certain degree of discretion when it gives concrete form to the Member States' obligations in pursuance of Article 90(3) of the EEC Treaty. The fact that the Commission takes action under Article 90(3) does not therefore in itself imply that there has necessarily been an infringement of the Treaty.

33. While the decision in Case C-202/88 concerned the same conflict of interests as underlies the present reference for a preliminary ruling, it did not directly answer the questions referred to the Court in the present case. The issue in the present case is whether a situation created by State action which is likely to produce conflicts of interests — even though they have not yet arisen — already constitutes an infringement of Article 86 in conjunction with Article 90(1) of the EEC Treaty. However, that judgment undoubtedly provides an indication of how the questions referred by the national court should be answered, especially since the competence of the Commission to address directives and decisions to the Member States in pursuance of Article 90(3) of the EEC Treaty extends to the exercise of its authority to control the application of Article 90 of the EEC Treaty. That means that the lawful exercise of the competence requires at least the existence of a danger or a presumption of a situation incompatible with the Treaty.

15 — Case C-202/88, cited above, paragraph 18.

34. For there to be an infringement of Article 86 in conjunction with Article 90(1) of the EEC Treaty, the public undertaking must occupy a dominant position within the meaning of Article 86 of the EEC Treaty and there must also be an abuse of that position. The assessment of the situation is ultimately a matter for the national court. It is for the Court of Justice, however, to indicate the criteria by which the substance of the case is to be determined.

35. *(a)* First, the undertaking must occupy a dominant position within the meaning of Article 86 of the EEC Treaty. Where an undertaking has been vested with a legal monopoly a positive answer to the question whether it occupies a dominant position does not in itself raise any problems. [16] Where an undertaking combines various functions the answer may depend on which of the functions is to be taken into account. It is necessary to draw that distinction in the present case since there is at least a dual monopoly.

36. The first to be taken into consideration is the monopoly in the provision of services, which concerns the operation of the telecommunications network and the administration of the frequencies. Closely associated with that monopoly is the marketing of telecommunications equipment in the form of the sale and hire of equipment to be used to receive the service provided.

16 — Case 26/75 *General Motors* v *Commission* [1975] ECR 1367; Case 226/84 *British Leyland* v *Commission* [1986] ECR 3263; Case 311/84 *CBEM* v *CLT and IPB* [1985] ECR 3261; Case C-41/90 *Höfner and Elser* v *Macrotron* [1991] ECR I-1979, paragraph 28; and Case C-260/89 *ERT* [1991] ECR I-2925, paragraph 31.

37. If, in order to determine the relevant market, one takes into consideration the sphere of the provision of services, there is no doubt as to the dominant position of the undertaking, owing to its monopoly position. The situation is different if one takes into consideration the sphere of the marketing of equipment. In that sector competition is in principle both possible and present. Whether there is any interference with the competition at that level falls to be determined in the overall assessment.

38. If the relevant market is defined as the market in telecommunications equipment in general and the market in cordless telephones and walkie-talkies in particular, there is no reason why a public undertaking such as the RTT should not occupy a dominant position on that market. According to the case-law of the Court of Justice, a dominant position within the meaning of Article 86 of the EEC Treaty is a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by giving it the power to behave to an appreciable extent independently of its competitors, customers and ultimately of its consumers. [17] The dominant position may consist in the fact that due to the combination of its monopoly to supply services and its position as a supplier of equipment the undertaking is in a position of supremacy over other suppliers of equipment which permits it to act in that independent manner.

39. A dominant position characterized in that or a similar way is considerably strengthened by the fact that, by virtue of legislative provisions, the same undertaking is empowered to approve telecommunications equipment or to authorize its use and also monitors compliance with the provisions relating to approval.

40. Moreover, the type-approval of equipment in itself represents an objectively delimited market over which the undertaking enjoys a monopoly position because it is granted what are virtually powers of public authority in the fields of type-approval and the monitoring of the relevant provisions and by that fact alone already occupies a dominant position. [18] That consideration underlines the extent of the strength of the position in the market for telecommunications equipment. The dominant position in the objectively delimited market must, according to Article 86 of the EEC Treaty, extend to the common market or a substantial part of it. According to the case-law of the Court of Justice, the territory of a Member State to which such a monopoly extends is a substantial part of the common market. [19]

41. The fact that an undertaking as such is granted a monopoly position in one way or another (operation of the network and administration of the frequencies on the one hand and authority to grant type-approval for equipment and to monitor compliance with the relevant provisions on the other) is, according to the case-law of the Court of

17 — See, for example, Case 27/76 *United Brands* v *Commission* [1978] ECR 207, paragraph 65.

18 — Case 26/75 *General Motors* v *Commission* [1975] ECR 1367, paragraphs 7, 8 and 9, and Case 226/84, cited above, paragraph 3 et seq.

19 — Case 322/81, *Michelin* v *Commission*, cited above, paragraph 28, and Case C 41/90 *Höfner and Elser* v *Macrotron*, cited above, paragraph 28.

Justice, not as such incompatible with Articles 90 and 86 of the EEC Treaty. [20]

42. *(b)* There must also be the element of abuse of a dominant position. In that regard it must be taken into consideration that the transfer of public authority does not in itself constitute an abuse. [21] Furthermore, it should be observed that the fact of granting an exclusive power to an undertaking cannot be regarded as constituting a dominant position and at the same time an abuse of that position. [22]

43. As defined in the case-law of the Court of Justice, the concept of abuse is an objective concept relating to the behaviour of an undertaking in a dominant position which is such as to influence the structure of a market where, as a result of the very presence of the undertaking in question, the degree of competition is weakened and which, through recourse to methods different from those which condition normal competition in products or services on the basis of the transactions of commercial operators, has the effect of hindering the maintenance of the degree of competition still existing in the market or the growth of that competition. [23]

44. A feature of the present case is that it is the structure created by legislative measures as such rather than, for instance, any particular conduct on the part of the public undertaking that falls to be assessed as to its compatibility with the Community rules on competition.

45. In previous case-law the abuse within the meaning of Article 86 of the EEC Treaty had to be constituted by the conduct of the undertaking in a dominant position. However, the Court has already taken the view in the *Continental Can* judgment [24] that there is abuse of a dominant position 'if an undertaking in a dominant position strengthens such position in such a way that the degree of dominance reached substantially fetters competition, i. e. that only undertakings remain in the market whose behaviour depends on the dominant one'. [25] In that case the 'impact on an effective competition structure' [26] was sufficient to be caught by the prohibition in Article 86 of the EEC Treaty, 'regardless of the means and procedure by which [the dominant position was] achieved'. [27]

46. In earlier judgments [28] in which the Court had to consider situations created by State measures which threatened competition, the element of abuse was always found to be present or considered to be necessary to constitute an infringement of Arti-

20 — Case 155/73 *Sacchi*, cited above, paragraph 14.

21 — Case 26/75 *General Motors* v *Commission*, cited above, Case 226/84 *British Leyland* v *Commission*, cited above, and Case C-202/88 *France* v *Commission*, paragraph 55.

22 — Opinion in Case C-18/88 *RTT* v *GB Inno BM*, paragraph 34 et seq.

23 — Case 85/76 *Hoffmann-La Roche* v *Commission* [1979] ECR 461, paragraph 91.

24 — Case 6/72 *Europemballage and Continental Can* v *Commission* [1973] ECR 215.

25 — Case 6/72 *Europemballage and Continental Can* v *Commission*, cited above, paragraph 26.

26 — Case 6/72 *Europemballage and Continental Can* v *Commission*, cited above.

27 — Case 6/72 *Europemballage and Continental Can* v *Commission*, cited above, paragraph 27.

28 — Case 26/75 *General Motors* v *Commission*, cited above; Case 226/84 *British Leyland* v *Commission*, cited above, and Case 21/84 *Commission* v *France* [1985] 1355.

cle 86 of the EEC Treaty, in the form of conduct in the relevant market.

47. More recent judgments, in Case C-41/90 [29] concerning an exclusive right of employment procurement and Case C-260/89 [30] concerning a dual monopoly for the broadcasting and exploitation of television broadcasts, are ambiguous on that point, at least in the grounds of the judgments. In Case C-41/90 the Court held that a Member State was in breach of the prohibition contained in Article 90(1) and Article 86 of the EEC Treaty only if the undertaking in question, *merely by exercising* the exclusive right granted to it, could not avoid abusing its dominant position. [31]

48. An abuse in the form of limiting the service to the prejudice of consumers within the meaning of Article 86(2)(b) of the EEC Treaty may consist in the fact that a Member State creates a situation in which the undertaking is manifestly not in a position to satisfy the demand prevailing on the market for activities of that kind, when the effective pursuit of such activities by private companies is rendered impossible by the maintenance in force of a statutory provision. [32]

49. The Court of Justice delivered its judgment in Case C-260/89 on 18 June 1991. Paragraph 4 of the German version of the operative part of the judgment is worded as follows:

'Artikel 90 Absatz 1 EWG-Vertrag steht der Einräumung eines ausschließlichen Rechts zur Ausstrahlung von Sendungen und eines ausschließlichen Rechts zur Übertragung von Fernsehsendungen an ein einziges Unternehmen entgegen, wenn durch diese Rechte eine Lage geschaffen werden *könnte*, in der dieses Unternehmen durch eine seine eigenen Programme bevorzugende diskriminierende Sendepolitik gegen Artikel 86 EWG-Vertrag *verstößt*; ...' [33]

50. Although in that wording the accent is on the situation created by the State measures, it may none the less be taken to mean that a discriminatory broadcasting policy on the part of the undertaking must actually be established for it to fall under the prohibition laid down in Community law. In the French version of the judgment the emphasis has a different nuance. That version reads as follows:

'L'article 90 paragraphe 1 du traité s'oppose à l'octroi d'un droit exclusif de diffusion et d'un droit exclusif de retransmission d'émissions de télévision à une seule entreprise, *lorsque ces droits sont susceptibles de créer une situation dans laquelle cette entreprise est amenée à enfreindre l'article 86 par une politique d'émission discriminatoire en faveur de ses propres programmes*, ...' [34]

51. I take that wording to mean that a State measure is prohibited if it is liable to place an undertaking in, or lead an undertaking into, a situation in which it infringes Article 86 of

29 — Case C 41/90 *Höfner and Elser* v *Macrotron*, cited above (note 16).

30 — Case C 260/89 *ERT*, cited above (note 16).

31 — Case C 41/90 *Höfner and Elser* v *Macrotron*, cited above, paragraph 29 (emphasis added).

32 — Case C 41/90 *Höfner and Elser* v *Macrotron*, cited above, paragraphs 30 and 31

33 — Case C-260/89 *ERT*, cited above (emphasis added). The English version of the relevant extract from the judgment is worded as follows: 'Article 90(1) of the Treaty prohibits the granting of an exclusive right to transmit and an exclusive right to retransmit television broadcasts to a single undertaking, where those rights are liable to create a situation in which that undertaking is led to infringe Article 86 by virtue of a discriminatory broadcasting policy which favours its own programmes, unless the application of Article 86 obstructs the performance of the particular tasks entrusted to it; ...'

34 — Case C 260/89 *ERT*, cited above (emphasis added)

the EEC Treaty by virtue of a discriminatory broadcasting policy, although no actual breach by the undertaking is required to render the State measure contrary to Community law.

52. In my Opinion in Case C-260/89 I stated in paragraphs 40 and 41 that ERT's dual monopoly was in itself contrary to Community law. To my mind the tendency towards an abuse in the structure already merits criticism in itself and deserves to be held incompatible with Article 90(1) in conjunction with Article 86 of the EEC Treaty.

53. Continuing that approach, I am also of the opinion, as regards the situation to be assessed in the present case, that the combination of different exclusive rights and tasks in one public undertaking which is at the same time a competitor in the market for telecommunications equipment constitutes an abuse within the meaning of Article 86 of the EEC Treaty.

54. Competition which has already been weakened by the existence of a public undertaking which enjoys a monopoly to provide services in regard to the operation of the telecommunications network and at the same time markets equipment intended to be connected to the network may be further hindered where that the same undertaking decides whether to grant type-approval for competing equipment and exercises public authority to monitor compliance with the relevant provisions. The latter authority is quite different from a means of 'normal competition in products or services'. [35]

55. *(c)* As the third element, apart from the dominant position and the abuse of that position, the structure in question must be such as to affect trade between Member States. It is sufficient that it is *capable* of having that effect. [36]

Since, according to the documents before the Court, cordless telephones and walkie-talkies are imported by Belgium from Denmark and Germany, [37] products from other Member States are also subject to the requirement to obtain type-approval.

56. *(d)* I shall conclude my considerations of the interpretation of Articles 90 and 86 of the EEC Treaty by observing that according to Article 90(2) undertakings entrusted with the operation of services of general economic interest are to be subject to the rules on competition only 'in so far as the application of such rules does not obstruct the perfor-

35 — Case 85/76 *Hoffmann-La Roche* v *Commission*, cited above, paragraph 91.

36 — Case 322/81 *Michelin* v *Commission* [1983] ECR 3461, paragraph 104, and Case C-41/90 *Höfner and Elser* v *Macrotron*, cited above, paragraph 32.

37 — See the Belgian Government's answers to the questions put by the Court.

mance, in law or in fact, of the particular tasks assigned to them'.

57. On that point, I believe that I can be brief. The problem in the present case is not the conferring of tasks as such on a public undertaking but the combination of those tasks in an undertaking which is also a competitor in the market. Those tasks might be performed equally well if they were given to different authorities.

Costs

58. Since these proceedings are in the nature of a step in the proceedings before the national court, the decision on costs is a matter for that court. The costs incurred by the Belgian Government and the Commission are not recoverable.

C — Conclusion

59. In the light of the foregoing observations, I suggest that the Court should answer the question referred to it as follows:

Where national legislation allows a public undertaking which operates the telephone network to enter the market as a provider of telephone equipment and at the same time empowers that undertaking to approve equipment intended to be connected to the network and to bring prosecutions in respect of offences against the regulations on admission to the market, that constitutes a measure contrary to Article 86 of the EEC Treaty for the purposes of Article 90(1).