OPINION OF MR ADVOCATE GENERAL DARMON
delivered on 8 February 1994 *

Mr President,
Members of the Court,

1. This reference for a preliminary ruling is, to my knowledge, the first case in which the Court has been asked to interpret the competition rules in the EEC Treaty with regard to the public distribution of electric energy. Can there be competition for the supply of electricity? Must access by third parties to public networks be authorized in order for there to be effective competition between electricity suppliers? As will be seen, the issue is of some importance.

2. The economic and physical characteristics of the supply of electricity are very specific. Electricity can only be conveyed by means of conductors. Over long distances, the losses are considerable. The fact that electricity cannot be stored means that production must at all times keep up with consumption. At the same time, given that it has to meet all sorts of different needs, electricity is a product of prime importance, the supply of which must be guaranteed, available to all and affordable.

3. The main distinguishing characteristic of the electricity *market* lies in the fact that, as with conventional vocal telephony, distribution is achieved by means of a network and fixed lines. As a result, the customers form a captive market and the sources of supply and demand are not mobile. Mobility, which enables the customer to choose his contractor, lies at the very heart of any system of undistorted competition. The electricity network is managed in a *centralized* way, in order to ensure the existence at all times of an adequate balance between supply and demand, and thus security of supply.

4. Those exceptional economic and technical constraints have an impact on the legal framework governing the sale and purchase of electricity and on the state of integration in these matters within the Community.

5. A brief summary of the way in which the relevant Community law has developed is needed here.

6. The electricity market has for a long time remained outside the framework of Community law. Neither the original Treaty nor the Single Act provide for any common policy in this sphere.

* Original language: French.

7. There are only two provisions in the Treaty establishing the European Community which have any bearing on the matter: under Article 3(t), the activities of the European Community are to include measures in the sphere of energy. Article 129b provides that the Community is to 'contribute' to the establishment and development of trans-European networks in the area of energy infrastructures. However, a declaration relating to energy appearing in the Final Act of the Maastricht Treaty provides that the question of introducing into the Treaty a title relating to the sphere of energy is to be examined on the basis of a report which the Commission is to submit to the Council by 1996 at the latest.

8. Community law in this area has been limited, initially, to the coordination of national policies, [1] with the matter remaining basically within the competence of the Member States.

9. At the prompting of the Commission, [2] an internal electricity market is being built up in stages within the framework of Article 8a of the Treaty of Rome, as is evidenced by the Proposal for a Council Directive concerning common rules for the internal market in electricity, [3] which gives third parties limited access to the network, that being a condition of effective competition between suppliers: 'the establishing of the internal electricity market needs to be progressive and to be implemented in phases in order to enable industry to adjust in a flexible and ordered manner to its new environment'. [4] It will be noted that the Commission has not availed itself, as in the telecommunications field, of its regulatory powers under Article 90(3) of the Treaty, preferring to seek the approximation of the provisions laid down by law, regulation or administrative action (Article 100a).

10. The distribution system in the Netherlands forms the background to the questions referred to the Court for a preliminary ruling.

11. There is pending before the Gerechtshof te Arnhem an appeal from an arbitration award given in a dispute between certain *local electricity distribution undertakings* (or the municipalities which are themselves responsible for such distribution) and a regional distributor ('IJsselcentrale').

12. There are in the Netherlands four producers, which are shareholders in a common parent company, NV Samenwerkende Elektriciteitsproduktiebedrijven (hereinafter referred to as 'SEP'). [5] The electricity gener-

1 — See, for example, Council Directive 90/377/EEC of 29 June 1990 concerning a Community procedure to improve the transparency of gas and electricity prices charged to industrial end-users (OJ 1990 L 185, p. 16) and Council Directive 90/547/EEC of 29 October 1990 on the transit of electricity through transmission grids (OJ 1990 L 313, p. 30).

2 — The Internal Energy Market (Commission Working Document) of 2 May 1988, COM(88)238.

3 — 92/C 65/04 (OJ 1992 C 65, p. 4). It was not approved in that form by the Council.

4 — Ibid., third recital of the preamble.

5 — SEP's objects, as laid down in its statutes, 'include in particular the operation of the high voltage grid, the conclusion of agreements with foreign electricity undertakings concerning imports and exports of electricity and the use of international interconnections' (judgment in Case T-16/91 *Rendo and Others* [1992] ECR II-2417, paragraph 4).

ated is sold to regional distributors (such as the defendant in the main proceedings); the latter sell it on to local distributors (such as the plaintiffs in the main proceedings), who in turn sell it on to the consumers.

13. Between 1985 and 1988 IJsselcentrale (which changed its name in 1988 to IJsselmij and is hereinafter referred to as 'IJM') imposed on the municipal distribution undertakings an 'equalization supplement' ('egalisatietoeslag') which was intended to offset the additional cost of distribution in rural areas with a view to the application of uniform tariffs in relation to all end-users in the areas covered.

14. The plaintiffs in the main proceedings are local distributors. They are contesting their liability to pay the equalization charge due in respect of that period, amounting to HFL 20 707 942.

15. The local distributors are bound by an exclusive purchasing obligation and a ban on imports, arising from two separate agreements:

— a horizontal agreement concluded on 22 May 1986 between the electricity generators of the one part and SEP of the other part (the 'Overeenkomst van Samenwerking', known as the '*cooperation agreement*', hereinafter referred to as the 'OvS'); this provides in *Article 21* that imports and exports of electricity are reserved to SEP and that the generators are to stipulate in the supply contracts which they conclude with electricity distributors that the latter are to refrain from importing or exporting electricity; [6]

— the general conditions governing the supply of electric power to municipalities [7] (hereinafter referred to as the 'GC') contain an exclusivity clause imposing on the latter an exclusive purchasing obligation and thus an implied ban on imports (Article 2(2)). [8] In return, IJM undertakes not to supply electric power to third parties in the territory of the municipality without the municipality's consent (Article 2(1)). There is *reciprocal exclusivity*.

16. Article 34 of the Law of 16 November 1989 (the 'Elektriciteitswet') [9] and the Ministerial Decree of 20 March 1990 provide

6 — According to the Netherlands Government, that prohibition is justified by the fact that imports are carried out solely on a centralized — and planned — basis by SEP (Observations of the Netherlands Government, paragraph 10).

7 — General conditions for the supply of electric power to municipalities with their own distributors in the territory of IJsselcentrale's concession, drawn up at Zwolle on 17 December 1964, which came into force on 1 April 1965.

8 — 'The Municipality undertakes to obtain electric power for supply in its territory exclusively from IJsselcentrale, and to use that power only for its own consumption or for supply to third parties for consumption in the territory of the Municipality.'

9 — Staatsblad 535. The Law on electricity of 16 November 1989 opened up the Netherlands market, within strict limits: distribution companies can choose their Netherlands supplier (cross-shopping) and industrial consumers may import electricity for their own consumption, since it does not make use of the public supply network.

that SEP is to have the sole right to import electric power with a view to public supply, with the exception of electricity with a voltage below 500 volts.

17. The national court considers that without the import ban the equalization charge could probably not be imposed. The local distributors could possibly avoid having to pay it, at least in part, if they were able to obtain supplies from abroad. [10] In order to determine whether it is payable, therefore, it is necessary to establish whether that ban is in conformity with Community law.

18. By an arbitration award of 12 December 1986, the local distributors' claims were dismissed on the grounds that reciprocal exclusivity is needed by IJM in order to carry out its task, that its effect on trade is minimal and that, since Article 90(2) is applicable, 'the fact that the claimants are unable to procure electricity from third parties is not incompatible with Article 85 of the Treaty'. As to the equalization charge, the arbitrators did not consider that this had been shown to affect trade between Member States.

10 — See paragraph 5.11 of the order of the national court.

19. The claimants appealed to the Gerechtshof te Arnhem, which seeks from the Court a preliminary ruling on the following two questions:

'1. Is a national court or tribunal which determines an appeal against an arbitration award to be regarded as a "national court or tribunal" for the purposes of Article 177 of the EEC Treaty if under the arbitration agreement made between the parties it must give judgment according to what appears fair and reasonable?

and, in the event that the answer to the first question is in the affirmative,

2. How are Articles 37 and/or 85 and/or 86 and/or 90 of the EEC Treaty to be interpreted with reference to a ban on the import of electricity for public supply purposes contained in the general conditions of a regional electricity distributor from 1985 to 1988 inclusive, possibly in conjunction with an import ban contained in an agreement made between the electricity generation undertakings in the Member State concerned?'

20. Certain aspects of the Netherlands electricity supply system have previously been examined, or are now under examination, both by the Commission and by the Community judicature.

21. In parallel with the present case, certain local electricity distributors (IGMO of Meppel, Centraal Overijsselse Nutsbedrijven of

Almelo, Regionaal Energiebedrijf Salland of Deventer and the Municipality of Hoogeveen) submitted to the Commission on 26 May 1988 a complaint against IJM for infringement of Article 85 of the Treaty, with reference to 'civil proceedings concerning the imposition by (IJM) of an import and export ban coupled with an exclusive purchasing obligation, and the imposition of an extra cost equalization charge'. [11]

22. In its Decision 91/50, the Commission considered that 'Article 21 of the Cooperation Agreement ... constitutes an infringement of Article 85(1) of the Treaty in so far as it has as its object or effect the restriction of imports *by private industrial consumers* and of exports of production *outside the field of public supply*, by *distributors* and *private industrial consumers*, including autogenerators'. [12]

23. The action brought against that decision was dismissed by judgment of the Court of First Instance of 18 November 1992. [13] An appeal against that judgment is pending before the Court of Justice (Case C-19/93 P).

24. It will be noted that the Commission did not in its decision express a view on the equalization charge imposed by IJM [14] or the contested ban on *imports* applied by the distributors responsible for public supply prior to the entry into force of the Electricity Law of 16 November 1989. [15]

25. However, it informed the complainants by letter of 20 November 1991 [16] that '... the equalization charge against which the original complaint was in essence levelled cannot form the subject-matter of a proceeding based on Articles 85 and/or 86 of the Treaty because it does not significantly affect trade between Member States'. That letter gave rise to a second action, which was held inadmissible by final order of the Court of First Instance of 29 March 1993 [17] (Case T-2/92 *Rendo II*).

26. Lastly, it will be noted that on 26 November 1992 the Commission notified a reasoned opinion to the Netherlands Government: the exclusive import right conferred on SEP by the 1989 Law constituted an infringement of Articles 30 and 37 of the

11 — See Commission Decision 91/50/EEC of 16 January 1991 relating to a proceeding under Article 85 of the EEC Treaty (OJ 1991 L 28, p. 32, point 1).

12 — Article 1 of the operative part, emphasis added.

13 — Judgment in *Rendo*, cited above.

14 — Point 1, penultimate paragraph.

15 — Judgment in *Rendo*, paragraphs 58 and 61. As regards the ban on imports applied by the distributors and prohibited by Article 34 of the 1989 Electricity Law, the Commission refrained from reaching any conclusion on the question whether that ban was justified having regard to Article 90(2) of the Treaty, anticipating that Treaty infringement proceedings would be brought in that regard (point 50 of the decision and paragraphs 46 and 47 of the judgment of the Court of First Instance).

16 — Ibid., paragraph 27.

17 — On the ground that the letter was not in the nature of a decision and had no legal effect.

EEC Treaty and was justified neither by Article 36 nor by any public interest requirements. [18]

27. Neither the Commission, in its Decision 91/50, nor the Court of First Instance has examined the conformity with Community competition law of *the ban on imports of electric power through the public distribution network*, as imposed by a regional distribution company on a *local distribution company* by the general conditions for the supply of electric power to municipalities of 17 December 1964 and by the cooperation agreement preceding the entry into force of the 1989 Electricity Law.

28. That is precisely the point with which the second preliminary question is concerned. First of all, however, the first question needs to be examined.

The first preliminary question

29. Does a national court hearing and determining an appeal against an arbitration award according to what appears fair and reasonable constitute a court or tribunal within the meaning of Article 177 of the Treaty?

18 — Written observations of the Commission, paragraphs 16 and 17. See also paragraph 26 of the *Rendo* judgment.

30. In the judgment in *Vaassen-Göbbels*, [19] drawing inspiration from general principles common to the laws of the Member States, the Court held that the Community concept of a court or tribunal implied the fulfilment of a combination of criteria; it must be instituted in law, have a permanent existence, exercise binding jurisdiction, be bound by rules of adversary procedure and apply the rule of law. In subsequent judgments delivered by the Court, the principle of judicial independence has also been taken into consideration. [20]

31. In order to decide whether a body constitutes a 'court or tribunal of a Member State' within the meaning of Article 177, it is necessary to consider whether there is a sufficiently close link between the procedure before that body and the general organization of legal remedies in the Member State in question. [21]

32. There can be no doubt that that requirement is met by domestic rules of procedure which provide that an appeal against an arbitration award is to be brought before the court normally having jurisdiction in the absence of an arbitration clause [22] and which thus mandatorily designate a national court as the forum in which such appeals are to be brought where the parties decide to provide for such an appeal procedure. [23]

19 — Case 61/65 [1966] ECR 261.

20 — See the judgments in Case 14/86 *Pretore di Salò* [1987] ECR 2545, paragraph 7, and Case 338/85 *Pardini* [1988] ECR 2041, paragraph 9.

21 — Judgment in Case 102/81 *Nordsee* [1982] ECR 1095, paragraph 13.

22 — See the observations of IJM on p. 8 of the French translation.

23 — See Article 647 of the former Netherlands Code of Procedure, which applied at the time in question to the action brought before the court making the reference, and Article 16 of the GC agreed between the parties.

33. Consequently, a national court which is instituted in law, which is permanent and independent, the composition of which is not left to the parties' discretion [24] and the decision of which is binding fulfils the conditions laid down by Article 177.

34. It will be noted, moreover, that the power vested in any ordinary court hearing an appeal against an arbitration award to make a reference for a preliminary ruling is expressly acknowledged by the judgment in *Nordsee*. [25]

35. Is that conclusion altered by the fact that that court gives judgment according to what appears fair and reasonable ('als goede mannen naar billijkheid')? Can the application of Community law be excluded in such a case?

36. In my view, a national court must apply that law, even where it gives judgment according to what appears fair and reasonable.

37. It follows from the principles of the primacy of Community law and of its uniform application that the rules laid down by the Treaty, and in particular those relating to competition, are binding in all Member States.

38. The Court thus held, in its judgments in *Broekmeulen* [26] and *Nordsee*, cited above, that

'Community law must be observed in its entirety throughout the territory of all the Member States; parties to a contract are not, therefore, free to create exceptions to it'. [27]

39. Similarly, the Court has held that

'national legislative or judicial practices, even on the supposition that they are common to all the Member States, cannot prevail in the application of the competition rules set out in the Treaty'. [28]

40. Such practices would be contrary to the second paragraph of Article 5 of the Treaty, and would render the Community rules ineffective. [29]

41. It follows that a national court, even where giving judgment according to what

24 — See, as regards this point, the judgment in Case 109/88 *Danfoss* [1989] ECR 3199, paragraph 8.

25 — Cited above (footnote 21), paragraph 14.

26 — Case 246/80 [1981] ECR 2311.

27 — Judgment in *Nordsee*, paragraph 14.

28 — See the judgment in Joined Cases 43/82 and 63/82 *VBVB and VBBB* v *Commission* [1984] ECR 19, paragraph 40, emphasis added.

29 — See the judgment in Case 229/83 *Leclerc* [1985] ECR 1, paragraph 14.

appears fair and reasonable, must comply with the Community competition rules and must have the power to refer to the Court any question relating to the interpretation or, as the case may be, the validity of those rules. [30]

42. As can be seen, an obligation to decide a matter solely on grounds of equity cannot have the effect of excluding the application of rules which the Court has, moreover, described as *absolute*. [31]

43. It will, moreover, be noted that the application made to the national court is for a 'ruling in *law*' ('verzoek om een verklaring voor recht'). [32]

44. There can thus be no doubt that Article 177 is applicable.

30 — See, on this point, paragraph 19 of my Opinion in Case C-24/92 *Corbiau* [1993] ECR I-1277.

31 — See the paragraph reiterated in several of the Court's judgments: Joined Cases 46/87 and 227/88 *Hoechst* v *Commission* [1989] ECR 2859, paragraph 25, Case 85/87 *Dow Benelux* v *Commission* [1989] ECR 3137, paragraph 36, Joined Cases 97, 98 and 99/87 *Dow Ibérica and Others* v *Commission* [1989] ECR 3165, paragraph 22, and Case 374/87 *Orkem* v *Commission* [1989] ECR 3283, paragraph 19, hereinafter quoted with emphasis added: 'The function of those (competition) rules, as is apparent from the fourth recital in the preamble to the Treaty, Article 3(f) and Articles 85 and 86, is to prevent competition from being distorted to the detriment of the public interest, individual undertakings and consumers. The exercise of the powers given to the Commission by Regulation No 17 contributes to the maintenance of the system of competition intended by the Treaty which undertakings have an *absolute duty* to comply with'.

32 — Decision given on 24 April 1990 by the court making the reference.

The second preliminary question

45. Before the substance of the second question is examined, it is necessary to consider a preliminary point: the French Government maintains that that question has only a hypothetical link with the proceedings before the national court and that it does not adequately specify the factual and legal context in which it arises.

46. I do not share that view: the main proceedings concern the payment of an equalization charge levied by a Netherlands regional distributor pursuant to the general conditions for the supply of power. If, during the period under consideration, the local distributors had been able to procure electricity from a foreign supplier, they would possibly have been able, at least in part, to avoid having to pay that charge. They thus have an interest in seeking a ruling that the implied ban on imports by which they are affected is contrary to Community law.

47. In my view, moreover, the Court is in possession of all the factual and legal information which it needs in order to reply to the question referred. In particular, the national court has rightly referred to Decision 91/50, the factual background to which was exactly the same.

48. The second question, relating to the interpretation of Articles 37, 85, 86 and 90 of the EEC Treaty, is in essence concerned with

the ban on imports between 1985 and 1988, in so far as that ban affected the relationship between regional and local distributors (but not consumers: their situation was considered in Decision 91/50).

49. As IJM points out: [33] 'These proceedings are concerned with the very point which the Commission, in its decision regarding IJsselcentrale, clearly wished not to have to deal with: the private law rules relating to public supply in the Netherlands electricity sector, as applied until the entry into force of the 1989 Electricity Law'.

50. As regards that market, it is necessary to circumscribe the scope of the question put to the Court.

51. In the present case, the need for a single network is not in dispute: any advantage resulting from the introduction of competition in the conveyance of electricity would be greatly outweighed, in any event, by the inconvenience caused by a duplication of the network.

52. Nor is there any dispute as to the need for a single administrative body (SEP, in the present case) or the existence of regional distribution monopolies.

53. The only point at issue here is the ban on imports through the public supply network.

54. Having thus defined the second question, I will now proceed to examine in turn each of the articles mentioned in it.

Article 37

55. The application of Article 37 depends on three things:

— as regards the scope of the article, it refers only to trade in goods;

— as regards its subject-matter, it is concerned only with State monopolies of a commercial character;

— as regards its effects, it is aimed at the elimination of all discrimination between nationals of the Member States.

56. What do these three points involve?

33 — Page 24 of the French translation of its observations.

1. *Does electricity constitute a 'good'?*

57. It was held in the judgment in *Sacchi*: [34] 'It follows both from the place of (Article 37) in the Chapter on the elimination of quantitative restrictions and from the use of the words "imports" and "exports" in the second indent of Article 37(1) and of the word "products" in Article 37(3) and (4) that it refers to trade in *goods* and cannot relate to a monopoly in the provision of services'.

58. The conditions under which electricity is transmitted and distributed are as important as those under which it is generated: '... the circumstances in which it is transmitted and distributed inevitably lead to certain distortions in its characteristics'. [35] The definition of 'goods' therefore needs to be considered. [36]

59. Thus the French Government stated in its observations in Case C-22/92 *EDF* v *Coramine*: [37] 'Moreover, one of the special characteristics of electricity is that its quality is dependent only on the network by which it is transmitted and distributed, and not, in practice, on the circumstances of its production. As a result, electricity may be regarded as a service rather than as a "good", since the network functions not only as a means of transmission but also as a means of optimizing and processing elements which determine the quality of the electricity supplied to the end-user'. [38]

60. It may be added that Article 2 of the United Nations Convention on International Contracts for the Sale of Goods, signed in Vienna on 11 April 1980, excludes the sale of electricity from the scope of that convention.

61. Lastly, the absence of any common policy in the matter [39] serves as a reminder, if such were needed, of the extremely specific nature of the product.

62. I have no doubt, however, that electricity must be regarded as a 'good' within the meaning of the Treaty.

34 — Case 155/73, [1974] ECR 409, paragraph 10, emphasis added. Since that judgment was delivered, the Court's case-law has been consistent: see paragraph 8 of the judgment in Case 271/81 *Amélioration de l'Élevage* [1983] ECR 2057 and paragraph 33 of the judgment in Joined Cases C-46/90 and C-93/91 *Lagauche and Évrard* [1993] ECR I-5267.

35 — P. Sablière: comment on the judgment of the Cour d'Appel d'Angers (Court of Appeal, Angers) of 16 December 1987, in: *Cahiers juridiques de l'électricité et du gaz*, May 1988, p. 2.

36 — See paragraph 30 of the observations of the Netherlands Government.

37 — Observations submitted before the question referred for a preliminary ruling was withdrawn.

38 — Page 7.

39 — See Article 3(t) of the EC Treaty and the declaration on civil protection, energy and tourism annexed to the Final Act of the Maastricht Treaty.

63. First, it is the subject-matter of trade and of a market which are comparable with those in respect of a 'good', and must be capable of benefiting from the Community rules relating to the abolition of trade barriers. [40]

64. Secondly, services form a residual category, as is demonstrated by the wording of Article 60 of the Treaty.

65. Thirdly, as the Court has previously ruled — impliedly, at least — in its well-known judgment in the case of *Costa* v *ENEL*, [41] electricity falls within the scope of Article 37.

66. Fourthly, electricity is regarded as a good under the tariff nomenclature (code CN 27.16).

67. Lastly, other sources of energy, such as coal, natural gas and oil, are viewed as goods under Community law. [42] It appears logical, therefore, to treat electricity in the same way.

68. If electricity constitutes a good, does that mean that this case concerns a commercial monopoly within the meaning of Article 37?

2. Does the present case concern a State monopoly of a commercial character?

69. It follows from the Court's judgment in the case of *Bodson* [43] that Article 37 encompasses situations in which the monopoly covers only part of the national territory, such as a region. [44]

70. In order for Article 37 to apply, there must be a situation in which 'the national authorities are in a position to control, direct or appreciably influence trade between Member States through a body established for that purpose or a delegated monopoly to others'. [45]

71. The circumstances of the case before the national court do not fit that description. Until 1989, IJM enjoyed a non-exclusive concession [46] from the State for the public

40 — See, in that regard, U. Everling: 'Der Binnenmarkt nach der Rechtsprechung des Gerichthofs der Europäischen Gemeinschaften', in: *Ein EWG-Binnenmarkt für Elektrizität — Realität oder Utopie,* herausgegeben von Rudolf Lukes, 1988, p. 142.

41 — Case 6/64 [1964] ECR 585, at p. 597.

42 — See, for example, the judgment in Case C-347/88 *Commission* v *Greece* [1990] ECR I-4747, concerning imports of crude oil and petroleum products.

43 — Case 30/87 [1988] ECR 2479, paragraph 13.

44 — As Advocate General Da Cruz Vilaça points out in his Opinion in *Bodson*, Article 37 does not refer to any territorial dimension in the list of conditions for its application, 'which are defined instead by reference to the effects of the monopoly on intra-Community trade' ([1988] ECR, p. 2494, paragraph 41).

45 — Judgment in *Bodson*, paragraph 13.

46 — See in that regard paragraph 1.1 of IJM's observations and Article 2(1) of the concession. See also Decision 91/50 of the Commission, paragraph 9.

supply of electricity which did not provide for any ban on imports. [47]

72. That is laid down in the cooperation agreement between the electricity generators and SEP (Article 21(1] and, impliedly, by IJM's general conditions; as was correctly observed in Decision 91/50 [48] relating to the OvS, both those instruments are matters of private law.

73. There is no evidence whatever that that ban was imposed, or even merely recommended, by the public authorities between 1985 and 1988. [49] The law on electricity imports which applied during the period under consideration did not prohibit such imports, but merely provided that they were to be conditional on the grant of a licence. [50]

74. Consequently, the fact that a ban on imports was imposed on the regional electricity distributors and that they imposed it on their customers resulted not from the actions of the national authorities but from those of the undertakings themselves.

75. It follows that, in accordance with the rule laid down by the Court's judgment in *Bodson*, [51] the circumstances of the case before the national court fall to be assessed in the light of the provisions of the Treaty which apply to undertakings, and not from the standpoint of the rules on State monopolies contained in Article 37. [52]

76. For the same reason, the monopoly in respect of imports created by the OvS is not covered by that article. As will be noted, it was not until 1989 that State legislation (the Elektriciteitswet, which came into force on 1 July 1989) reserved to SEP the right to import electricity with a view to public supply. Furthermore, it was that law, which is extraneous to this case, which was the subject of the reasoned opinion addressed to the Netherlands Government on 26 November 1992. [53]

77. It follows that neither the ban on imports nor the exclusive purchasing obligation at issue fall within the scope of Article 37. Consequently, there is no need to examine the third condition for the application of that article.

47 — See that decision and Royal Order No 54 of 13 June 1918 (*Staatscourant* of 15 June 1918, No 138). See also IJM's observations, pp. 21 and 22: the Netherlands legislation does not prohibit imports of electricity, provided a licence is obtained.

48 — Point 21.

49 — Ibid.

50 — Law of 22 October 1938, Staatsblad 523. See the final part of paragraph 3.2 of IJM's observations.

51 — Paragraphs 14 and 15.

52 — See also the judgment in Case 65/86 *Bayer and Henneke* [1988] ECR 5249, paragraph 12.

53 — See paragraph 25 of the observations of the Netherlands Government.

Article 85

78. A preliminary point needs to be considered: do Articles 85 to 90 of the Treaty apply to the supply of electricity?

79. The Court's case-law on the point is consistent: '... where the Treaty intended to remove certain activities from the ambit of the competition rules, it made an express derogation to that effect'. [54] The exceptions to that principle are applied restrictively. [55]

80. As regards electricity, there exists no provision analogous to Article 42 of the Treaty on agricultural products. Moreover, the Council has never adopted in that regard any of the possible measures provided for by Article 87(2)(c).

81. The Court has recognized since it delivered its judgment in *BNIC* [56] that agreements relating to raw materials from which a finished product is manufactured and marketed throughout the Community fall within the scope of Article 85.

82. Article 85 and the following articles must therefore apply to agreements relating to the generation and supply of electricity, just as, according to the Court's case-law, Article 90 applies to rules concerning the supply of petroleum products in Ireland. [57]

83. Between 1985 and 1988, the electricity supply system in the Netherlands was governed by a series of legal relationships the scheme of which may be presented as follows:

1. horizontally: the ban on imports agreed between the generators and SEP (Article 21(1) of the OvS);

2. vertically, from top to bottom:

   (a) the relationships between generators and regional distributors, governed by Article 21(2) of the OvS;

54 — Judgments in Joined Cases 209/84, 210/84, 211/84, 212/84 and 213/84 *Asjes and Others* [1986] ECR 1425, paragraph 40, and Case 45/85 *Verband der Sachversicherer* [1987] ECR 405, paragraph 12.

55 — See the definitive judgment in Case T-61/89 *Dansk Pelsdryavlerforening* [1992] ECR II-1931, paragraph 54.

56 — Case 136/86 [1987] ECR 4789, paragraph 18.

57 — Judgment in Case 72/83 *Campus Oil and Others* [1984] ECR 2727.

(b) the relationships between regional distributors and local distributors, governed by Article 2(2) of the GC;

(c) the relationships between local distributors and consumers, also governed by provisions of a contractual nature.

84. Do a ban on imports, such as that arising from Article 21(1) of the OvS, and an exclusive purchasing obligation, such as that contained in the vertical agreements, constitute an infringement of Article 85(1)?

85. They are both contained in agreements between undertakings. Although it was held in paragraph 18 of the *Bodson* judgment that Article 85 does not apply to contracts for concessions concluded between communes acting in their capacity as public authorities and undertakings entrusted with the operation of a public service, it will be noted that IJM does not contract solely with municipalities but also with private companies. [58]

86. In order to assess the effects of such agreements from the standpoint of the Community competition rules, it is necessary to take into consideration the economic and legal context in which they occur and the actual scope of those restrictive practices. [59] The electricity market has certain specific characteristics which should be noted at this point.

87. The trade in electricity between the Netherlands and the rest of the Community is characterized by a factor common to all the Member States: it constitutes a 'trade between large networks', [60] resulting from 'voluntary cooperation between the national monopolies'. [61]

88. As has been observed, electricity imports into the Netherlands are centralized by SEP, which deals with the administration of the transmission network and trade with other countries.

89. There is considerable trade between interconnected networks, and in 1988 nearly one tenth of the requirements of the Netherlands were met by imports. [62]

90. The Community is seeking to promote this type of trade, as is demonstrated by

58 — Paragraph 1.2 of IJM's observations.

59 — Judgment in Case C-234/89 *Delimitis* [1991] ECR I-935, paragraph 14.

60 — The term used is that applied by J. L. de Guièze in his commentary on Commission Decision 91/50 in: *Cahiers juridiques de l'électricité et du gaz*, January 1992, p. 34.

61 — Decision 91/50, point 11.

62 — Ibid., point 12. According to the Commission Working Document on the energy market, the EEC has 'one of the most fully integrated international high-voltage networks in the world' (p. 69, footnote 2 above).

Directive 90/547 on the transit of electricity through transmission grids. [63]

91. As is stated in Decision 91/50, there is hardly any cross-border trade in electricity *apart from trade between large networks.* [64]

92. It became apparent at the hearing in the present case that the local distributors do not have the use of any 'coupling lines' linking them directly to foreign electricity grids, [65] and that imports can be effected only through the public supply network (administered in the Netherlands by SEP).

93. Consequently, if the exclusive import right were to be withdrawn, the local distributors could only purchase electricity from a producer established in another Member State if such electricity could be transmitted through the public supply network.

94. The nature of such a facility, known as a 'common carrier' facility, is such that it enables the public supply network to be used in the context of supply contracts between users (or local electricity distributors) and generators, irrespective of whether the latter are established in the same State or in another Member State.

95. Where there is a total ban on imports, [66] therefore, there are two ways in which that ban can affect the market. The regional and local distributors are precluded from obtaining supplies from electricity generators established in other Member States which pass through the public network. Furthermore, the cost of electricity in the Member State in which the import ban applies can affect the export capacity of consumer undertakings having their production centre in that State.

96. Is the combined effect of the OvS and the general conditions such as to restrict competition? [67]

97. Article 21(1) of the OvS prohibits generators from importing. Article 21(2) prohibits electricity purchasers from obtaining supplies from producers other than members of SEP, thereby precluding them from having any access whatever to other sources of supply.

63 — Cited above (footnote 1). The directive acknowledges that, within a Member State, a single entity may be responsible for a large high-voltage electricity grid. In relation to the Netherlands, it designates SEP.

64 — Point 16.

65 — See, in particular, the final part of point 3 (p. 30) of the French translation of IJM's observations.

66 — As appears to be the case in the Netherlands. See point 27 of Decision 91/50.

67 — See in that regard point 25 et seq. of Decision 91/50.

98. Local distributors are obliged by the GC to obtain supplies exclusively from regional distributors; that exclusive purchasing obligation applies for an indeterminate period of time terminable on three years' notice (Article 17(2)).

99. The effect of the reciprocal nature of that exclusivity is to make it completely impossible to have access to the market in question, which is thus closed to potential competitors of both generators and distributors. This results in the formation of 'a coherent whole', [68] leading to a channelling of the market such as to preclude all independent generators from gaining access to it. It is thus clear that such agreements have a restrictive effect on competition. [69]

100. Do those agreements have an appreciable effect, however, on trade between Member States?

101. As regards production, the Commission demonstrated in Decision 91/50 how the OvS influenced trade between Member States, having regard, in particular, to its duration and the geographic area covered by it. [70]

102. In my view, an exclusive purchasing obligation such as that laid down by Article 2(2) of the GC can also have a similar effect on the relationship between regional and local distributors.

103. Local distributors are precluded from obtaining supplies from any other regional distributors or from generators established in other Member States.

104. If such exclusivity were confined to a sparsely populated region of a Member State, there might be some doubt as to whether it had an appreciable effect. However, since the Court's judgments in *Brasserie de Haecht* [71] and *Delimitis*, cited above, it is established that such an agreement has to be assessed in its economic and legal context and that, where it is combined with other exclusivity agreements, its possible cumulative effect on competition must be taken into account. [72]

105. The general conditions imposed by IJM appear to follow the form of the model General Terms and Conditions for the supply of electricity drawn up by the Association of Operators of Electricity Undertakings in the Netherlands (VEEN). [73] It is possible, therefore, that they may have had a cumulative effect on the whole of the territory of a Member State. If so, a substantial part of the common market would be at issue. [74] That would result in the partitioning of a national

68 — Decision 91/50, point 28.
69 — Ibid., points 25 and 28.
70 — Ibid., point 32.
71 — Case 23/67, [1967] ECR 407.
72 — See paragraph 14 of the judgment in *Delimitis*.
73 — See points 6 and 28 of Decision 91/50.
74 — See, for example, the judgment in *Michelin* v *Commission* [1983] ECR 3461, paragraphs 23 to 28.

market such as to restrict the establishment of a single market. It is for the national court to examine whether this is the case.

106. In my view, therefore, agreements of the type under consideration may be such that it is possible, as the Court has consistently held, 'to foresee with a sufficient degree of probability ... that (they) may have an influence, direct or indirect, actual or potential, on the pattern of trade between Member States, such as might prejudice the realization of the aim of a single market in all the Member States'. [75]

107. It follows that such a ban on imports

(1) does not affect trade in electricity between large public supply networks,

(2) but may affect trade in electricity between Member States in so far as that trade necessarily involves the use of the public supply network at regional and local levels.

75 — Judgment in Case 42/84 *Remia and Others* v *Commission* [1985] ECR 2545, paragraph 22.

108. It will be noted that Article 85(3) does not apply to the present case. Neither the OvS nor the GC, which have not been notified, [76] qualified for exemption decisions. Moreover, those agreements do not fall within the scope of the exemption rules hitherto adopted by the Commission in relation to categories. [77]

Article 86

109. As regards the question of any abuse of a dominant position, the parties' submissions have been concerned with IJM only, and not with any possible infringement of Article 86 by SEP. In any event, that undertaking is not a party to the main proceedings. I will restrict my analysis, therefore, to an examination of the situation in relation to IJM.

110. Taken in isolation, an undertaking whose dealings are limited to a sparsely populated area of a Member State does not *ex hypothesi* occupy a dominant position within a substantial part of the common market.

76 — See Commission Decision 91/50, point 53, in relation to the OvS.

77 — Commission Regulation (EEC) No 1983/83 of 22 June 1983 on the application of Article 85(3) of the Treaty to categories of exclusive distribution agreements (OJ 1983 L 173, p. 1) is inapplicable to the GC, by virtue of Article 3(c) thereof.

111. Nor would it necessarily do so if its dealings covered the whole — or even a large part — of the territory of that State. [78]

112. As has been noted, other Netherlands regional electricity distributors are tied to local distributors by contracts similar to that linking IJM to the plaintiffs in the main proceedings.

113. Consequently, the question arises whether there exists a collective dominant position.

114. As is apparent from the very words of the first paragraph of Article 86, 'one or more undertakings' may abuse a dominant position.

115. The Court has thus held that Article 86 applies in a case in which a number of communal monopolies (relating to the 'external services' for funerals) '... are granted to a single group of undertakings whose market strategy is determined by the parent company', [79] particularly where that group occupies a position of economic strength which enables it to hinder effective competition in that market.

116. In its judgment in the 'Flat glass' case, *SIV and Others* v *Commission*, [80] the Court of First Instance defined the concept of a collective dominant position:

'There is nothing, in principle, to prevent two or more *independent* economic entities from being, on a specific market, united by such economic links that, by virtue of that fact, together they hold a dominant position vis-à-vis the other operators on the same market. This could be the case, for example, where two or more *independent* undertakings jointly have, through agreements or licences, a technological lead affording them the power to behave to an appreciable extent independently of their competitors, their customers and ultimately of their consumers ...'. [81]

117. No dominant position can exist, therefore, without a minimum of links enabling the undertakings in question collectively to dominate the market.

118. It is for the national court to determine whether the regional distributors are united by sufficiently close economic links that they collectively hold such a position. It will be noted that a common factor in relation to the regional electricity distributors established in the Netherlands is that they are bound to the

78 — Judgment in Case C-260/89 *ERT* [1991] ECR I-2925, paragraph 31.

79 — Judgment in *Bodson*, cited above, paragraph 35.

80 — Joined Cases T-68/89, T-77/89 and T-78/89 [1992] ECR II-1403, paragraph 357 et seq.

81 — Paragraph 358, emphasis added.

local distributors by *the same type of contract*. [82]

119. Is there, however, an abuse?

120. The Court has held on a number of occasions that 'if an undertaking having a dominant position on the market ties buyers — even if it does so at their request — by an obligation or promise on their part to obtain all or most of their requirements from that undertaking, this constitutes an abuse of a dominant position within the meaning of Article 86 of the Treaty, whether the obligation in question is stipulated without further qualification or whether it is undertaken in consideration of the grant of a rebate'. [83]

121. Thus, even where a regional distributor is bound by an unconditional supply obligation, the exclusive purchase obligation which it imposes on its customers constitutes an insurmountable barrier to the entry of third parties into the market.

122. In the circumstances set out above, therefore, Article 86 is applicable.

Article 90(2)

123. Can the existence of agreements or practices between undertakings which are contrary to Articles 85 or 86 be justified by the tasks entrusted to them? Are the electricity distributors in the present case to be regarded as entrusted with the operation of a service of general economic interest?

124. Before those questions are considered, it is necessary to consider whether or not Article 90(2) has direct effect.

125. In its judgment in the 'Port of Mertert' case, [84] the Court held categorically that it has no such effect. Clearly, however, the Court has since taken the view that Article 90(2) is directly applicable, even though it has not expressly ruled to that effect.

126. Thus, the Court initially held that any derogation from the competition rules had first to be authorized by a decision of the Commission taken pursuant to Article 90(3). [85]

82 — Point 28 of Decision 91/50.

83 — This was stated most recently in the judgment in Case T-65/89 *BPB Industries* v *Commission* [1993] ECR II-389, paragraph 68. See also the judgments in Case 85/76 *Hoffmann-La Roche* v *Commission* [1979] ECR 461, paragraph 89, and Case C-62/86 *AKZO* v *Commission* [1991] ECR 3359, paragraph 149.

84 — Judgment in Case 10/71 *Muller* [1971] ECR 723.

85 — See the judgments in the 'Port of Mertert' case, cited above (paragraph 16), and in Case 41/83 *Italy* v *Commission* [1985] ECR 873, paragraph 30, as well as paragraph 16 of Commission Decision 90/16/EEC of 20 December 1989 concerning the provision in the Netherlands of express delivery services (OJ 1990 L 10, p. 47). That decision was annulled by the judgment in Joined Cases C-48/90 and C-66/90 *Netherlands and Others* v *Commission* [1992] ECR I-565.

127. Although expressly requested to rule on the question of direct effect in the *BRT II* case, [86] the Court was not obliged to answer it, since the undertaking which invoked Article 90(2) was not entrusted by the State with the operation of a service of general economic interest.

128. The judgment in *Ahmed Saeed* [87] marks a turning point in the case-law: according to that judgment, national courts have competence analogous to that of the Commission in the interpretation and application of Article 90(2). As Professor Berlin has noted: '... if the national court is able to undertake that assessment, it is because that provision has been invoked before it for the purposes of the application. It is thus implicit that it can be invoked'. [88] It is for the national court (1) to establish whether the undertaking invoking Article 90(2) is in fact entrusted with the operation of a service of general economic interest, [89] and (2) to determine its requirements for the purposes of performing the task of general interest in question and the impact of those requirements on the application of the competition rules [90] ('It is for the national court to make the necessary findings of fact in that connection'). [91]

129. In its judgment in *ERT*, [92] the Court confirmed its position as follows:

'... it is for the national court to determine whether the practices of such an undertaking (in that case, the holder of a monopoly comprising the exclusive right to retransmit foreign television programmes) are compatible with Article 86 and to verify whether those practices, if they are contrary to that provision, may be justified by the needs of the particular task with which the undertaking may have been entrusted'. [93]

130. The judgment in *Corbeau* [94] constitutes the latest stage reached to date in the development of the relevant case-law: even though it is for the national court to determine whether an undertaking is covered by Article 90(2), that determination is subject to the application of certain conditions — laid down by the Court — governing derogation from the competition rules.

131. Thus, the operator of a service of general economic interest, such as the national postal service, must be able to ensure the economic stability of its operations by means of profitable fields of activity. [95] On the other hand, the exclusion of competition may not extend to 'specific services, inextricably linked to the service of general interest, which meet the particular needs of economic

86 — Judgment in Case 127/73 *BRT* [1974] ECR 313, paragraphs 19 to 23. See also the judgment in Case C-179/90 *Merci Convenzionali Porto di Genova* [1991] ECR I-5889, paragraph 27.

87 — Case 66/86 [1989] ECR 803.

88 — 'L'application du droit communautaire de la concurrence par les autorités françaises', *RTDE*, 1991, p. 1, 5.

89 — Paragraph 55 of the judgment in *Ahmed Saeed*, cited above.

90 — Paragraph 56.

91 — Paragraph 57.

92 — Cited in footnote 78 above. See also paragraph 99 of the judgment of 18 November 1992 in *Rendo*, cited above.

93 — Paragraph 34.

94 — Case C-320/91 [1993] ECR I-2533.

95 — Paragraph 17.

operators and which call for the provision of certain additional services not offered by the traditional postal service ...'. [96]

132. Furthermore, the scheme of Article 90 necessarily results in such direct effect.

133. This is borne out by the Court's judgments in *France* v *Commission* [97] and *Spain and Others* v *Commission*, [98] relating to directives on competition in the markets in telecommunications terminal equipment and telecommunications services: 'Article 90 ... confers powers on the Commission only in relation to State measures ...'. [99]

134. In parallel with the foregoing, it must be possible for individuals to invoke Article 90(2) in relation to the conduct of undertakings.

135. That result is all the more necessary in that it is always open to the national court to refer questions to the Court for a preliminary ruling or to consult the Commission. [100]

136. It is necessary at this point to examine whether regional and local electricity distributors constitute 'undertakings entrusted with the operation of services of general economic interest' within the meaning of Article 90(2).

137. Given that it permits derogation from the principles of Community law relating to competition, that concept must be strictly interpreted. [101] It covers only 'activities of direct benefit to the public'. [102]

138. In the related field of telecommunications, the Court has held that a monopoly in the provision to users of a public telephone network constitutes a service of general economic interest within the meaning of Article 90(2). [103] The same applies in relation to the Belgian national postal service, inasmuch as its monopoly is limited to the exclusive right to collect, carry and distribute mail. [104]

96 — Paragraph 19.

97 — Case C-202/88 [1991] ECR I-1223.

98 — Joined Cases C-271/90, C-281/90 and C-289/90 [1992] ECR I-5833.

99 — Paragraph 55 of the judgment in *France* v *Commission* and paragraph 24 of the judgment in *Spain and Others* v *Commission*. The Court held that Article 90(2) applies not only to undertakings but also to States which derive from it the power to confer on undertakings entrusted by them with the operation of services of general economic interest exclusive rights which hinder the application of the competition rules (judgment in *Corbeau*, cited above, paragraph 14). This demonstrates the practical importance of that provision.

100 — See Notice 93/C 39/05 on cooperation between national courts and the Commission in applying Articles 85 and 86 of the Treaty (OJ 1993 C 39, p. 6).

101 — See the judgment in *BRT II*, cited above, paragraph 19.

102 — Paragraph 27 of the Opinion of Advocate General Van Gerven in *Merci Convenzionali Porto di Genova* (cited in footnote 86 above).

103 — Judgments in *Italy* v *Commission* (cited in footnote 85 above, paragraphs 28 to 33) and Case C-18/88 *GB-Inno-BM* [1991] ECR I-5941, paragraph 16.

104 — Judgment in *Corbeau*, cited above, paragraph 15.

139. The Commission considered in its Decision 91/50 that SEP — and the participating generators — provide services of general economic interest, since (i) 'SEP's main task is to ensure the reliable and efficient operation of the national public electricity supply' [105] and (ii) that task has been assigned to the generators by the grant of a concession in the form of an act of public law. [106]

140. In its Decision 93/126/EEC of 22 December 1992, [107] the Commission considered that the German electricity companies fell within the scope of Article 90 'in so far as they provide basic supplies of electricity'. [108]

141. It appears, therefore, that the position must be the same where an undertaking entrusted by the public authorities [109] with the operation of a service involving the *public distribution* of electricity is bound, under the terms of its concession, by a supply *obligation* (point 7 of Decision 91/50).

142. On the basis that Article 90(2) is directly applicable and that an undertaking of that kind falls within its scope, what are the conditions needing to be fulfilled in order to satisfy the proportionality rule laid down by that provision?

143. The Court's interpretation in that regard has traditionally been restrictive. It has stated that

'according to Article 90(2) of the Treaty, undertakings entrusted with the operation of services of general economic interest are subject to the rules on competition so long as it is not shown that the application of those rules is *incompatible* with the performance of their particular task ...'. [110]

144. The judgment in *Corbeau* marks a turning point: instead of reiterating that principle, or repeating the things which States are prohibited from doing in relation to the grant of exclusive rights, it specifies what it is that they can do:

'(Article 90(2)) permits ... Member States to grant to undertakings entrusted by them with the operation of services of general economic interest exclusive rights which may obstruct the application of the rules on competition contained in the Treaty, in so far as it is necessary to impose restrictions on competition, or even to exclude all competi-

105 — Point 40.

106 — Point 41.

107 — Relating to a proceeding under Article 85 of the EEC Treaty and Article 65 of the ECSC Treaty (Jahrhundertvertrag) (OJ 1993 L 50, p. 14).

108 — Point 28.

109 — As in the case of IJM, the holder of a concession granted by the State.

110 — Paragraph 33 of the judgment in *ERT*, cited above, emphasis added. See also the judgment in *Sacchi* (cited above, paragraph 15) and those in Case 311/84 *CBEM* [1985] ECR 3261, paragraph 17, and Case C-41/90 *Höfner and Elser* [1991] ECR I-1979, paragraph 24.

tion, [111] on the part of other economic operators in order to ensure the performance of the particular task which has been entrusted to the undertakings holding the exclusive rights'. [112]

145. The Court has stated that, in order for an undertaking holding an exclusive right to perform its task of general interest, it must in particular be able to operate on the basis of 'economically acceptable conditions' [113] or 'conditions ensuring economic stability'. [114]

146. Consequently, the competition rules may be disapplied not only where they make it impossible for the undertaking in question to perform its public service task but also where they jeopardize its financial stability.

147. For that reason, an undertaking holding exclusive rights may be permitted to operate profitable services on an exclusive basis, in order to make up for the losses incurred by it in its other fields of activity: the restriction, or even the exclusion, of competition in those fields is therefore permissible, since undertakings in the private sector do not have to offset such losses. [115]

148. However, 'specific services, inextricably linked to the service of general interest, which meet the particular needs of economic operators and which call for the provision of certain additional services not offered by the traditional postal service' must be open to competition, since they 'do not involve the economic stability of the service of general economic interest'. [116]

149. The Court has thus concluded that express delivery services should be open to competition, subject to that condition, the existence of which is a matter to be determined by the national court.

150. The increased flexibility which the *Corbeau* judgment brings to bear on the conditions for applying Article 90(2) has been assessed in the following terms: its merit 'lies in the fact that it draws attention to the constraints attaching to the provision of public services which recent developments in Community law had perhaps tended to overlook'. [117]

111 — This interpolation represents, I think, a reappraisal by the Court of the contents of paragraph 19 of its judgment in *Campus Oil and Others* (cited in footnote 57 above), in which it declared:
'Article 90(2) does not, however, exempt a Member State which has entrusted such an operation to an undertaking from the prohibition on adopting, in favour of that undertaking and with a view to protecting its activity, measures that restrict imports from other Member States contrary to Article 30 of the Treaty'. It hardly needs to be pointed out that that qualification, which was expressed in an *obiter dictum*, has never been confirmed in the Court's subsequent case-law, and that it referred only to *State measures*.

112 — Paragraph 14.

113 — Paragraph 16.

114 — Paragraph 17.

115 — Paragraph 18.

116 — Paragraph 19.

117 — F. Hamon: Commentary on the *Corbeau* judgment (cited in footnote 94 above), *AJDA*, 20 December 1993, p. 866, 869.

151. What constitute 'economically acceptable' conditions for the supply of electricity by a local distributor? Or, to adopt the term used in the Court's judgment in *GB-Inno-BM*, [118] what are the 'essential requirements' of that supply?

152. In line with the judgment in *Corbeau*, the Court should define for the national court the criteria which will enable that court to assess whether the facts presented to it are such as to justify a restriction of the competition rules, such as a ban on imports.

153. Rather than prohibiting regional or local distributors from importing electricity through the public supply network, should the generators allow third parties to have access to that network, albeit perhaps subject to restrictive conditions?

154. It is significant that, whilst the Commission denounces, in its Decision 91/50, the fact that direct imports by private industrial consumers (which do not involve the use of the public supply network) are not free from restrictions, [119] it does not express a view on those which have to pass through the public supply network. [120]

155. The new rules applying in the United Kingdom are illuminating in that regard. It is significant that, although the United Kingdom has an electricity supply system which is more open to competition than in any other Member State, electricity generators established in other Member States and wishing to export to the United Kingdom may only do so through the intermediary of the pool administered by the National Grid Company, the owner and operator of the high-voltage network. It is not possible to use the network in order to transmit supplies direct to a local distribution company. [121]

156. As has been noted, the proposal submitted by the Commission for a directive concerning common rules for the internal market in electricity seeks to eliminate barriers to the supply of electricity by producers to their customers and establishes *limited* access to the network by third parties.

157. In seeking to initiate 'a second phase' in the process of liberalization, the proposal takes into consideration the need to 'increase efficiency in the production, transmission and distribution of (electricity), while reinforcing the Community's security of supply' and to prevent distortions of competition between industrial concerns, whether they

118 — Cited in footnote 103 above, paragraph 22.

119 — Point 44(c).

120 — Paragraph 50.

121 — See, with regard to these points, Notice 90/C 191/04 given pursuant to Article 19(3) of Council Regulation No 17/62 concerning the reorganization of the electricity industry in England and Wales (OJ 1990 C 191, p. 9). Consumers may conclude option contracts or 'contracts for differences' with generators, which permit hedging against fluctuations in the pool price. The electricity produced by a given generator is not supplied to any specific consumer.

are producers and consumers of electricity. [122]

158. It states that 'eligible' companies should be allowed access to the transmission and distribution systems, 'subject to the availability of capacity and in return for reasonable remuneration'. [123] That liberalization measure relates to large industrial consumers and distribution companies. The use of the network is made subject to the grant of authorization by the system operator, who may refuse it 'if such use would prejudice the distribution of electricity in fulfilment of any statutory obligation or of contractual commitments'. [124]

159. The proposal for a directive, whilst advocating the establishment at Community level of a framework of general principles, leaves the Member States free, 'in accordance with the principle of subsidiarity', to determine 'the extent and nature of distribution companies' rights ... and of their public service obligations', particularly as regards the security of the system, the meeting of demand and a tariff structure ensuring equal treatment of customers. [125]

160. One cannot but be struck by the divergence between the spirit of the operative part of the proposal, as expounded above, and the approach adopted by the Commission in the present case.

161. The proposal for a directive, which was rejected in that form by the Council, is now being examined by the Parliament. [126] Whatever the final outcome may be, it is clear that, in order to achieve the elimination of all restrictions on relations between electricity generators and their customers, particularly those located in another Member State, it will be necessary to overcome a series of obstacles — which have not, incidentally, been overlooked by the Commission — arising from the use of the public supply network.

162. In my view, the opening up of the electricity supply market must, given the special characteristics of that sector, which is a service of general economic interest, be subject to the fulfilment of four essential criteria, as follows:

— the obligation to provide an uninterrupted supply to all users;

— equal treatment of those users;

122 — Second and sixth recitals.
123 — Tenth recital.
124 — Article 21(2) of the proposal.
125 — Seventeenth recital.

126 — See *Agence Europe*, 19 November 1993, p. 13, and the answer given by Mr Matutes on behalf of the Commission to a written question (No 827/93) by a Member of the European Parliament (OJ 1993 C 333, p. 14).

— the prevention of distortions of competition between producers;

— the effective protection of the environment.

163. As regards the first point, security of supply must be absolute: production must at all times be fully capable of meeting demand. Imports must therefore be coordinated and adapted to meet demand by means of the centralized administration of the network.

164. Secondly, distribution must be ensured, even more than in the postal service, 'for the benefit of all users, throughout the territory (for which the concession is granted), at uniform tariff rates and on similar terms as to quality, regardless of individual situations and the level of profitability'. [127] Consequently, there must be taken into account any special expense involved in the supply of electricity to consumers located far away from production centres.

165. Thirdly, the opening up of the electricity supply market presupposes that producers are placed on an equal footing as regards the conditions under which they compete. But how can a national producer which has to pay the cost of providing a national service, such as the expense of maintaining the network, or which bears a substantial tax burden by reason of the pollution caused by power stations, be placed in a position to compete normally with a producer in a neighbouring Member State which is not subject to the same constraints? Similarly, should account be taken of the fact that the economies of scale achieved by a producer may render the entire national production of another Member State uncompetitive? Can a national producer which bears the long-term investment burden imposed on it by its national government compete on equal terms with a producer which is wholly independent and which is concerned with achieving profits in the short term?

166. Lastly, the opening up of the market must be subject to compliance with minimum standards in relation to the environment and the prevention of pollution.

167. The foregoing requirements may be regarded as embodying an objective justification for the monopoly on importing electricity retained by the Member States of the Community.

168. Nevertheless, is such a monopoly *essential* in order to ensure the fulfilment of the four criteria mentioned above? Is it not possible for the same objectives to be achieved by means of agreements — or legislation — involving a lesser degree of interference with the normal operation of the competition rules?

127 — Paragraph 15 of the judgment in *Corbeau*.

169. It is for an operator who seeks to invoke the exception contained in Article 90(2) to justify the application of that exception. Consequently, it is for IJM to demonstrate to the national court that the fulfilment of the four criteria mentioned above can be ensured only by means of the ban on imports and the exclusive purchasing obligation which are at issue in this case.

170. I would point out that there already exists some interdependence between networks in the Community. I conclude from this that, in the present state of Community development, the retention of import monopolies does not affect trade to an extent contrary to the interests of the Community within the meaning of Article 90(2). My view appears to be supported by the Commission's operational proposals concerning trans-European networks in the energy sector, which provide for the development of interconnections between the Member States. [128]

171. One last observation: the very great diversity of the Member States' *energy policies* is such that there is a need for *Community rules* allowing third parties, by means of *harmonization* measures, to have access to the network. This appears to be confirmed by the role conferred on the Community in the matter by Article 129b.

172. I therefore propose that the Court should hold that:

(1) A national court deciding an appeal against an arbitration award according to what appears fair and reasonable constitutes a court or tribunal within the meaning of Article 177 of the EEC Treaty.

(2) In the absence at the present time of any Community rules governing access by third parties to the public supply network, Article 90(2) of the EEC Treaty does not prohibit a monopoly on importing electricity resulting from an agreement between undertakings or an exclusive purchasing obligation imposed on local electricity supply companies by regional supply companies,

128 — See *Agence Europe*, 20 January 1994, p. 8.

provided that it is established before the national court that such measures constitute the only means of ensuring:

— an uninterrupted supply to all users;

— equal treatment of those users;

— the prevention of distortions of competition between producers;

— the effective protection of the environment.