# JUDGMENT OF THE COURT
23 October 1997 *

In Case C-158/94,

**Commission of the European Communities**, represented by Richard B. Wainwright, Principal Legal Adviser, and Antonio Aresu, of its Legal Service, acting as Agents, with an address for service in Luxembourg at the office of Carlos Gómez de la Cruz, of its Legal Service, Wagner Centre, Kirchberg,

applicant,

supported by

**United Kingdom of Great Britain and Northern Ireland**, represented by Lindsey Nicoll, of the Treasury Solicitor's Department, acting as Agent, assisted by David Anderson, Barrister, with an address for service in Luxembourg at the British Embassy, 14 Boulevard Roosevelt,

interveners,

v

**Italian Republic**, represented by Professor Umberto Leanza, Head of the Legal Service, Ministry of Foreign Affairs, acting as Agent, assisted by Ivo M. Braguglia, Avvocato dello Stato, with an address for service in Luxembourg at the Italian Embassy, 5 Rue Marie-Adélaïde,

defendant,

* Language of the case: Italian.

supported by

**French Republic**, represented by Catherine de Salins, Head of Subdirectorate in the Directorate for Legal Affairs, Ministry of Foreign Affairs, and Jean-Marc Belorgey, Chargé de Mission in the same directorate, acting as Agents, with an address for service in Luxembourg at the French Embassy, 8B Boulevard Joseph II,

and

**Ireland**, represented by Michael A. Buckley, Chief State Solicitor, acting as Agent, assisted by John D. Cooke SC and Jennifer Payne, Barrister, with an address for service in Luxembourg at the Irish Embassy, 28 Route d'Arlon,

intervener,

APPLICATION for a declaration that, by establishing and maintaining, as against the other Member States, as part of a national monopoly of a commercial character, exclusive import and export rights in the electricity industry, the Italian Republic has failed to fulfil its obligations under Articles 30, 34 and 37 of the EC Treaty,

THE COURT,

composed of: G. C. Rodríguez Iglesias, President, C. Gulmann, H. Ragnemalm and M. Wathelet (Presidents of Chambers), G. F. Mancini, J. C. Moitinho de Almeida, P. J. G. Kapteyn, J. L. Murray, D. A. O. Edward (Rapporteur), J.-P. Puissochet, G. Hirsch, P. Jann and L. Sevón, Judges,

Advocate General: G. Cosmas,
Registrars: H. von Holstein, Deputy Registrar,
D. Loutermann-Hubeau, Principal Administrator

having regard to the Report for the Hearing,

after hearing oral argument from the parties at the hearing on 7 May 1996, at which the Commission was represented by Richard B. Wainwright and Antonio Aresu, the United Kingdom of Great Britain and Northern Ireland by Nicholas Green, Barrister, the Italian Republic by Ivo M. Braguglia, the French Republic by Marc Perrin de Brichambaut, Director of Legal Affairs in the Ministry of Foreign Affairs, acting as Agent, and Jean-Marc Belorgey, and Ireland by Paul Gallagher SC and Jennifer Payne,

after hearing the Opinion of the Advocate General at the sitting on 26 November 1996,

gives the following

## Judgment

1 By application lodged at the Court Registry on 14 June 1994 the Commission of the European Communities brought an action under Article 169 of the EC Treaty for a declaration that, by establishing and maintaining, as regards the other Member States, as part of a national monopoly of a commercial character, exclusive import and export rights in the electricity industry, the Italian Republic had failed to fulfil its obligations under Articles 30, 34 and 37 of the EC Treaty.

2 In Italy, Law No 1643 of 6 December 1962 (GURI No 316 of 12 December 1962) nationalized the electricity industry, setting up the Ente Nazionale per l'Energia

Elettrica (hereinafter 'ENEL') and transferring to it the industrial undertakings operating in the electricity industry. In particular, the first paragraph of Article 1 of the law gives ENEL the task of providing within Italy the production, import and export, transmission, transformation, distribution and sale of electricity, of whatever origin.

3 ENEL's rights were set out in detail in Legislative Decree No 342 of 18 March 1965 (GURI No 104 of 26 April 1965), Article 20 of which expressly prohibits undertakings other than ENEL from importing, exporting or trading in electricity, or transmitting electricity on behalf of third parties.

4 Moreover, by virtue of Article 133 et seq. of Consolidated Law No 1755 of 11 December 1933 on water and electrical installations, as amended by Laws No 127 of 26 January 1942 and No 606 of 19 July 1959, the import and export of electricity are subject to the grant of a licence to be issued by the Minister of Public Works. According to the documents before the Court, by virtue of the licence at present in force, which is valid until 31 December 1997, ENEL may import from, or export to, European countries adjoining Italy, up to 30 000 TWh (terawatt-hours) each year, with an excess tolerance of 20%.

5 Taking the view that under the Italian legislation described above exclusive rights to import and export electricity were conferred on the State, which exercised them through ENEL, the legislation thus being contrary to Articles 30, 34 and 37 of the Treaty, the Commission, by a letter dated 9 August 1991, formally called on the Italian Government, under Article 169 of the Treaty, to submit its observations within a period of two months on the infringement of which it was accused.

6 By letter of 5 November 1991 the Italian Government denied any infringement and contended, in particular, that the maintenance of ENEL's exclusive import and export rights was justified under Articles 36 and 90(2) of the EC Treaty.

7 On 26 November 1992, the Commission addressed a reasoned opinion to the Italian Republic, in which it rejected the arguments put forward by the Italian Government and maintained, in particular, that the exceptions provided for in Articles 36 and 90(2) of the Treaty were not applicable to this case.

8 By letter of 6 October 1993 the Italian Government maintained its position, as a consequence of which the Commission brought the present proceedings.

9 By two orders of 18 January 1995, the President of the Court granted leave to the French Republic and Ireland to intervene in support of the forms of order sought by the Italian Republic; by order of the same date, he granted leave to the United Kingdom of Great Britain and Northern Ireland to intervene in support of the forms of order sought by the Commission.

**The conformity of the exclusive import and export rights with Articles 30, 34 and 37 of the Treaty**

10 The Commission has observed that the fact that ENEL enjoys a national import monopoly prevents producers in other Member States from selling their production to customers in Italy other than that monopoly-holder, and potential customers in Italy from freely choosing their sources of supply for electricity from other Member States.

11 The exclusive import rights of ENEL are therefore, in its view, liable to restrict trade between Member States and, being measures having an effect equivalent to quantitative restrictions on imports, contrary to Article 30 of the Treaty. They further constitute discrimination within the meaning of Article 37 of the Treaty not

only as regards exporters established in other Member States but also as regards users established in the Member State concerned.

12 The Commission has maintained that the same considerations apply *mutatis mutandis* to the exclusive export rights enjoyed by ENEL. The holder of such rights naturally tends to allocate national production to the national market, to the detriment of demand from other Member States, and they should therefore be regarded as discriminatory within the meaning of Articles 34 and 37 of the Treaty.

13 Before examining those arguments, it is first necessary to consider the Italian Government's contention that electricity does not constitute 'goods' within the meaning of the Treaty and cannot therefore be covered by the Treaty provisions on the free movement of goods.

*The classification of electricity as 'goods' within the meaning of the Treaty*

14 The Italian Government has contended that electricity displays much greater similarity to the category of 'services' than to that of 'goods' and therefore does not fall within the scope of Articles 30 to 37 of the Treaty *ratione materiae*. It has emphasized that electricity is an incorporeal substance which cannot be stored and has no economic existence as such, in that it is never useful in itself but only by reason of its possible applications. In particular, imports and exports of electricity are merely aspects of the management of the electricity network which, by their nature, fall within the category of 'services'.

15 The Italian Government has also contended that, even if electricity does constitute goods within the meaning of the Treaty, it is clear from the judgments in Case C-275/92 *H. M. Customs and Excise* v *Schindler* [1994] ECR I-1039 and Case C-260/89 *ERT* v *DEP* [1991] ECR I-2925 that the import and export of goods for the sole purpose of providing services form part of the services themselves and accordingly escape the rules governing the free movement of goods.

16 In those judgments, the Court held that the import of lottery advertisements and tickets into a Member State with a view to the participation by residents of that Member State in a lottery conducted in another Member State relates to a 'service' within the meaning of Article 60 of the EC Treaty and accordingly falls within the scope of Article 59 of the EC Treaty (paragraph 1 of the operative part of *Schindler*, cited above). It also held that the grant to a single undertaking of exclusive rights in relation to television broadcasting and the grant for that purpose of an exclusive right to import, hire or distribute material and products necessary for that broadcasting does not as such constitute a measure having an effect equivalent to a quantitative restriction within the meaning of Article 30 of the Treaty (paragraph 15 of *ERT*, cited above).

17 It must be remembered, however, that in its judgment in Case C-393/92 *Almelo and Others* v *Energiebedrijf IJsselmij* [1994] ECR I-1477, paragraph 28, the Court noted that it is accepted in Community law, and indeed in the national laws of the Member States, that electricity constitutes a good within the meaning of Article 30 of the Treaty. It noted in particular that electricity is regarded as a good under the Community's tariff nomenclature (Code CN 27.16) and that it had already been accepted, in Case 6/64 *Costa* v *ENEL* [1964] ECR 585, that electricity may fall within the scope of Article 37 of the Treaty.

18 In paragraph 22 of *Schindler*, cited above, the Court expressly stated that the import and distribution of the documents and tickets needed for the organization of a lottery are not ends in themselves, their sole purpose being to enable residents of the Member States where those objects are imported and distributed to participate in the lottery. The *Schindler* judgment cannot therefore be transposed to a situation such as the present where the services needed for the import or export of

electricity and its transmission and distribution merely constitute the means for supplying users with goods within the meaning of the Treaty.

19 The Court also held in *ERT*, cited above (paragraph 18), that the granting, to an undertaking with a monopoly over television-related services, of the exclusive right to import, hire or distribute materials and products necessary for television broadcasting does not constitute a measure having an effect equivalent to a quantitative restriction within the meaning of Article 30 of the Treaty, provided that no discrimination is thereby created between domestic products and imported products to the detriment of the latter. Accordingly, it cannot in any way be inferred from that judgment that the import and export of the material in question fall outside the scope of the rules of the Treaty relating to the free movement of goods.

20 It is therefore necessary to consider whether the exclusive rights to import and export electricity at issue in this case are compatible with those rules, including Article 37.

*Article 37 of the Treaty*

21 Under Article 37(1), the Member States are progressively to adjust any State monopolies of a commercial character 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. That obligation 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, and likewise to monopolies delegated by the State to others. Moreover, Article 37(2) requires the Member States in particular to

refrain from introducing any new measure which is contrary to the principles laid down in paragraph 1.

22 Accordingly, without requiring the abolition of those monopolies, that provision prescribes in mandatory terms that they must be adjusted in such a way as to ensure that when the transitional period has ended the discrimination referred to has ceased to exist (Case 59/75 *Pubblico Ministero* v *Manghera* [1976] ECR 91, paragraph 5). Moreover, even before the expiry of the transitional period, it prohibited the Member States from introducing further discrimination of the kind referred to in Article 37(1).

23 As the Court held in *Manghera*, cited above (paragraph 12), and Case C-347/88 *Commission* v *Greece* [1990] ECR I-4747 (paragraph 44), exclusive import rights give rise to discrimination prohibited by Article 37(1) against exporters established in other Member States. Such rights directly affect the conditions under which goods are marketed only as regards operators or sellers in other Member States.

24 Similarly, exclusive export rights inherently give rise to discrimination against importers established in other Member States since that exclusivity affects only the conditions under which goods are procured by operators or consumers in other Member States.

25 Moreover, it must be pointed out — as has been done by the Commission — that ENEL, which has the statutory responsibility of providing within Italy not only the generation, import and export, transmission and transformation but also the distribution and sale of electricity, reserves available national production as a matter of priority to users in Italy. Accordingly, it must be concluded that ENEL's exclusive export rights have, if not the object, at least the effect of specifically restricting patterns of exports and thereby establishing a difference in treatment between domestic trade and export trade, in such a way as to provide a special

advantage for the Italian domestic market (on that point, see in particular, with regard to Article 34 of the Treaty, Case C-47/90 *Delhaize* v *Promalvin* [1992] ECR I-3669, paragraph 12).

26 The Italian Government has contended, however, that is clear from *ERT*, cited above, that where trade in goods is closely linked with the provision of a service, as in the case of electricity, it is not sufficient, in order to establish an infringement of the Treaty rules on the free movement of goods in general and Article 37 in particular, to refer to indirect or potential obstacles to Community trade; evidence must be provided of the existence of an actual obstacle and therefore of real discrimination suffered by the imported product as compared with the domestic product.

27 The Italian Government has stated in that connection that the level of imports of electricity into Italy has constantly increased in recent years and that Italy is at present the largest importer of electricity in the European Union.

28 The Italian Government has also pointed out that, in its judgment in Joined Cases C-267/91 and C-268/91 *Keck and Mithouard* [1993] ECR I-6097, paragraph 16, the Court held that the application to products from other Member States of national provisions restricting or prohibiting certain selling arrangements is not such as to hinder directly or indirectly, actually or potentially, trade between Member States within the meaning of the *Dassonville* judgment (Case 8/74 *Procureur du Roi* v *Dassonville* [1974] ECR 837), so long, in particular, as those provisions affect in the same manner, in law and in fact, the marketing of domestic products and those from other Member States. Thus, according to the Italian Government, the Court generalized the principle established by *ERT*, cited above. Consequently, ENEL's exclusive import and export rights could be contrary to the Treaty provisions on free movement of goods only if they were intended to enable ENEL freely to practice discrimination, in exercising them, between electricity produced in Italy and that produced in the remainder of the European Union, to the advantage of the former.

29 It is true that, in *ERT*, cited above, the Court held that the articles of the Treaty relating to the free movement of goods do not preclude the granting to a single undertaking of exclusive rights relating to television broadcasting and the granting for that purpose of exclusive authority to import, hire or distribute material and products necessary for that broadcasting, provided that no discrimination is thereby created between domestic products and imported products to the detriment of the latter.

30 However, as the Advocate General has observed at point 65 of his Opinion, the imports of the goods at issue in *ERT* were intended solely for the holder of a service monopoly which, in itself, was not contrary to Community law, whereas in this case the electricity imported by the holder of the exclusive rights is intended not for its exclusive consumption but for consumption by all undertakings and consumers in the Member State concerned.

31 It must also be noted that *Keck and Mithouard*, cited above, is concerned only with domestic provisions which limit or prohibit certain selling arrangements and not national legislation designed to regulate trade in goods between Member States (paragraph 12 of the judgment) or which relate to the requirements to be met by the goods in question (paragraph 15 of the judgment).

32 Finally, the fact that the volume of trade has constantly increased over recent years is not such as to detract from the findings in paragraphs 23 to 25 of this judgment, that the existence of exclusive import and export rights in a Member State gives rise to discrimination against exporters and importers established in other Member States, since that trade is carried on exclusively by the holder of those rights and all the economic operators in the other Member States are automatically excluded from direct imports and exports and deprived of the freedom to choose their customers or suppliers in the Member State in which the holder of those rights is established.

*Articles 30, 34 and 36 of the Treaty*

33 Since the exclusive import and export rights at issue are therefore contrary to Article 37 of the Treaty, it is unnecessary to consider whether they are contrary to Articles 30 and 34 or, consequently, whether they might possibly be justified under Article 36 of the Treaty.

34 Nevertheless, it is still necessary to verify whether the exclusive rights at issue might be justified, as the Italian Government contends, under Article 90(2) or Articles 130a and 130b of the Treaty.

**Justification under Article 90(2) of the Treaty**

35 Primarily, the Commission has claimed that Article 90(2) of the Treaty cannot be relied on to justify State measures contrary to the Treaty rules on the free movement of goods, including Article 37.

36 As a subsidiary argument, it has maintained that, by virtue of the case-law of the Court, in order to qualify for the derogation provided for in Article 90(2), it is not sufficient for a Member State to have entrusted to an undertaking the operation of a service of general economic interest but it is also necessary for the application of the rules of the Treaty to obstruct the performance of the particular tasks assigned to the undertaking and for the interests of the Community not to be affected (Case C-179/90 *Merci Convenzionali Porto di Genova* v *Siderurgica Gabrielli* [1991] ECR I-5889, paragraph 26). The Commission adds that it is clear from the judgments in Case C-320/91 *Corbeau* [1993] ECR I-2533, paragraphs 14 and 16, and Case C-393/92 *Almelo*, cited above, paragraph 49, that, for restrictions on competition involving the granting of exclusive rights to undertakings entrusted with tasks of general economic interest to be justified under Article 90(2) of the Treaty,

they must be necessary to ensure performance of the specific tasks assigned to those undertakings and in particular to enable them to operate under economically acceptable conditions.

37 The Commission's main argument, that Article 90(2) of the Treaty cannot be relied on to justify State measures incompatible with the Treaty rules on the free movement of goods, should be examined first.

*The applicability of Article 90(2) of the Treaty to state measures contrary to the Treaty rules on the free movement of goods*

38 Article 90(1) of the Treaty imposes a general prohibition on the Member States, with regard to public undertakings and undertakings to which they grant special or exclusive rights, of enacting or maintaining in force measures contrary to the rules contained in the EC Treaty, in particular in Articles 6 and 85 to 94. That provision necessarily implies that the Member States may grant exclusive rights to certain undertakings and thereby grant them a monopoly.

39 Article 90(2) provides that undertakings entrusted with the operation of services of general economic interest are to be subject to the rules contained in the Treaty, in particular the rules on competition, in so far as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them, subject to the proviso, however, that the development of trade must not be affected to such an extent as would be contrary to the interests of the Community.

40 As the Court held in Joined Cases 188/80, 189/80 and 190/80 *France, Italy and United Kingdom* v *Commission* [1982] ECR 2545, paragraph 12, Article 90 concerns only undertakings for whose actions States must take special responsibility by reason of the influence which they may exert over such actions. It emphasizes that such undertakings, subject to the provisions contained in paragraph 2, are subject to all the rules laid down in the Treaty and, further, requires the Member States to respect those rules in their relations with those undertakings.

41 That being so, Article 90(1) must be interpreted as being intended to ensure that the Member States do not take advantage of their relations with those undertakings in order to evade the prohibitions laid down by other Treaty rules addressed directly to them, such as those in Articles 30, 34 and 37, by obliging or encouraging those undertakings to engage in conduct which, if engaged in by the Member States, would be contrary to those rules.

42 It is against that background that Article 90(2) lays down the conditions in which undertakings entrusted with the operation of services of general economic interest may exceptionally not be subject to the Treaty rules.

43 Having regard to the scope just attributed to paragraphs 1 and 2 of Article 90, and to their combined effect, paragraph 2 may be relied upon to justify the grant by a Member State, to an undertaking entrusted with the operation of services of general economic interest, of exclusive rights which are contrary to, in particular, Article 37 of the Treaty, to the extent to which performance of the particular tasks assigned to it can be achieved only through the grant of such rights and provided that the development of trade is not affected to such an extent as would be contrary to the interests of the Community.

44 In those circumstances, it is necessary also to verify whether, in accordance with the Commission's subsidiary argument, those conditions are not met in this case.

*The necessity of ENEL's exclusive import and export rights*

45 In its letter of formal notice, the Commission stated that the Italian Republic was no longer entitled to maintain, with regard to the other Member States, exclusive import and export rights in respect of electricity which were, in its view, incompatible with Articles 30, 34 and 37 of the Treaty.

46 In its response, the Italian Government gave a detailed description of the national electricity industry, as it was before the adoption of the 1962 Law, and pointed out in particular that, under that Law, the tasks entrusted to ENEL consisted in particular in 'ensuring at minimum management cost the availability of electrical energy of a quantity and at a price appropriate to the requirements of balanced economic development of the country'. It also put forward a number of arguments, both economic and legal, to justify maintenance of the exclusive rights at issue by reference, in particular, to Article 90(2) of the Treaty. Specifically, it maintained that the elimination of those rights would inevitably obstruct performance of the particular tasks assigned to ENEL, as it had described them.

47 In its reasoned opinion, the Commission hardly considered the economic aspect but concentrated rather on the legal considerations on the basis of which it adhered to its view that maintenance of the exclusive rights at issue was incompatible with Articles 30, 34 and 37 of the Treaty. As regards Article 90(2), it merely stated that that provision did not apply to State measures which were contrary to those articles.

48 In its observations on the reasoned opinion, the Italian Government drew attention in particular to the consequences of the position taken by the Commission which, by criticizing certain aspects of the organization of the Italian electricity industry, was attacking an organization which satisfactorily met national energy policy objectives, despite the fact that at present there was no Community policy capable of replacing it.

49 The Italian Government also emphasized the need to take account, in any critical analysis of the exclusive import and export rights, which constitute only part of that organization, of the specific situation of each Member State.

50 Although in those observations the Italian Government also confirmed that it maintained its position concerning the alleged infringement, the Commission has continued to confine itself, in its application, as indicated in paragraphs 35 and 36 above, to insisting on its principal argument that Article 90(2) of the Treaty does not apply to State measures which are contrary to the Treaty rules on the free movement of goods and to mentioning the *Merci Convenzionali Porto di Genova*, *Corbeau* and *Almelo* judgments, cited above, but without examining how they specifically applied to this case.

51 Before the Court, the Italian Government has essentially reiterated the considerations which it put forward in the prelitigation procedure, in particular its conviction that the elimination of ENEL's exclusive import and export rights would prevent it from fulfilling its obligation to supply energy on the basis of cost and price containment such as to guarantee the balanced economic development of the country. In that connection, it has maintained that, if those rights were removed, most large consumers, established in northern Italian regions near the frontiers, would choose to resort to foreign suppliers, thereby depriving ENEL of the principal means of equalizing the costs of distributing electricity and causing an increase in the average price of electricity which would affect consumers who, either because of their low consumption or because they are established in central and southern Italian regions where access to foreign suppliers is impossible or economically unjustified, would have no alternative but to obtain their electricity supplies from ENEL.

52 Notwithstanding that argument, the Commission has merely referred, in its reply, to the legal considerations set out in the application and has added that a mere fear that a mass trend on the part of industrial consumers to purchase electricity abroad might deprive ENEL of its most profitable customers does not in any way justify

the conclusion that the task of ensuring balance entrusted to ENEL might be jeopardized, given that the Italian Government has not proved that there are no other economic measures of a less restrictive nature, such as grants to consumers placed at a disadvantage or national support funds, which would enable the same results to be achieved in compliance with the requirements of the Treaty.

53 It must nevertheless be pointed out that by thus enumerating, in general terms, certain means as alternatives to the rights at issue, the Commission has neither taken account of the particular features of the national system of electricity supply (in particular those imposed by geography) to which the Italian Government drew attention nor specifically considered whether those means would enable ENEL to perform the tasks of general economic interest entrusted to it under economically acceptable conditions.

54 Whilst it is true that it is incumbent upon a Member State which invokes Article 90(2) to demonstrate that the conditions laid down by that provision are met, that burden of proof cannot be so extensive as to require the Member State, when setting out in detail the reasons for which, in the event of elimination of the contested measures, the performance, under economically acceptable conditions, of the tasks of general economic interest which it has entrusted to an undertaking would, in its view, be jeopardized, to go even further and prove, positively, that no other conceivable measure, which by definition would be hypothetical, could enable those tasks to be performed under the same conditions.

55 In proceedings under Article 169 of the Treaty for failure to fulfil an obligation, it is incumbent upon the Commission to prove the allegation that the obligation has not been fulfilled and to place before the Court the information needed to enable it to determine whether the obligation has not been fulfilled (see Case 96/81 *Commission* v *Netherlands* [1982] ECR 1791, paragraph 6).

56 In that regard, it must be borne in mind that the purpose of the prelitigation procedure provided for by Article 169 of the Treaty is to enable the Member State to comply of its own accord with the requirements of the Treaty or, if appropriate, to justify its position (see, to that effect, Case 85/85 *Commission* v *Belgium* [1986] ECR 1149, paragraph 11). That is precisely what the Italian Government did by putting forward, in its reply to the Commission's letter of formal notice, a number of arguments to justify maintenance of the exclusive rights at issue under, in particular, Article 90(2) of the Treaty.

57 The reasoned opinion must contain a coherent and detailed statement of the reasons which led the Commission to conclude that the State in question failed to fulfil one of its obligations under the Treaty (see in particular Case C-289/94 *Commission* v *Italy* [1996] ECR I-4405, paragraph 16). In this case, the reasons given by the Commission on that point were essentially legal considerations in relation to which the explanations given by the Italian Government were not relevant.

58 The purpose of the application, if the Commission brings proceedings before the Court, is to specify, by reference to the prelitigation procedure, the complaints on which the Court is called upon to rule and, at the very least in summary form, the legal and factual particulars on which those complaints are based (see in particular *Commission* v *Greece*, cited above, paragraph 28). In this case, the Commission confined itself essentially to purely legal arguments.

59 The terms of the dispute having thus been defined, the Court can judge only the merits of the pleas in law which the Commission has put forward. It is certainly not for the Court, on the basis of observations of a general nature made in the reply, to undertake an assessment, necessarily extending to economic, financial and social matters, of the means which a Member State might adopt in order to ensure the supply of electricity on national territory on the basis of costs and prices capable of guaranteeing the balanced economic development of the country.

60 In view of the foregoing and, in particular, of the fact that the Court has not accepted the legal approach on which both the Commission's reasoned opinion and its application were based, the Court is not in a position, in these proceedings, to consider whether, by maintaining ENEL's exclusive import and export rights, the Italian Republic has in fact gone further than was necessary to enable that establishment to perform, under economically acceptable conditions, the tasks of general economic interest assigned to it.

61 However, for ENEL's exclusive import and export rights to escape application of the Treaty rules under Article 90(2) of the Treaty, the development of trade must not be affected to such an extent as would be contrary to the interests of the Community.

*The effect on the development of intra-Community trade*

62 As noted in paragraph 27 above, the Italian Government has explained, in its defence, that the level of imports of electricity into Italy has constantly increased in recent years and that Italy is at present the largest importer of electricity in the European Union. It has stated, without being contradicted by the Commission, that imports of electricity increased by 11.6% in 1993 as compared with 1992, attaining the level of almost 40 000 million kWh, which is equivalent to the total electricity production of Austria.

63 The Commission, on the other hand, has merely reiterated that, for certain measures to escape the application of the Treaty rules under Article 90(2), it is necessary not only that the application of those rules should directly or indirectly obstruct performance of the particular tasks concerned but also that the Community interest is not affected; it has, however, provided no explanation to demon-

strate that, because of ENEL's exclusive import and export rights, the development of intra-Community trade in electricity has been and continues to be affected to an extent contrary to the interests of the Community.

64 In this case it should have done so.

65 Given the explanations offered by the Italian Government, it was incumbent on the Commission, in order to prove the alleged failure to fulfil obligations, to define, subject to review by the Court, the Community interest in relation to which the development of trade must be assessed. In that regard it must be borne in mind that Article 90(3) of the Treaty expressly requires the Commission to ensure the application of that article and, where necessary, to address appropriate directives or decisions to Member States.

66 In this case, such definition was particularly necessary since the only Community measure directly concerning trade in electricity, namely Council Directive 90/547/EEC of 29 October 1990 on the transit of electricity through transmission grids (OJ 1990 L 313, p. 30) expressly states, in the sixth recital in its preamble, that there is increasing trade in electricity from year to year between the high-voltage electricity grids of Europe.

67 Since the Commission has been careful to state expressly that its application is concerned only with exclusive import and export rights and not with other rights relating in particular to transmission and distribution, it was under an obligation, in particular, to show how, in the absence of a common policy in the area

concerned, development of direct trade between producers and consumers, in parallel with the development of trade between major networks, would have been possible without, among other things, a right of access for such producers and consumers to the transmission and distribution networks.

68 It follows from all the foregoing that the Commission's application must be dismissed, without there being any need to examine the arguments put forward by the Italian Government on the basis of Articles 130a and 130b of the Treaty.

## Costs

69 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs, if they have been asked for in the other party's pleadings. Since the Commission has been unsuccessful, it must be ordered to pay the costs. Under Article 69(4) of those rules, Member States and institutions which have intervened in the proceedings are to bear their own costs.

On those grounds,

THE COURT

hereby:

**1. Dismisses the application;**

**2. Orders the Commission of the European Communities to pay the costs;**

**3. Orders the United Kingdom of Great Britain and Northern Ireland, the French Republic and Ireland, as interveners, to bear their own costs.**

Rodríguez Iglesias Gulmannn Ragnemalm Wathelet

Mancini Moitinho de Almeida Kapteyn Murray

Edward Puissochet Hirsch Jann Sevón

Delivered in open court in Luxembourg on 23 October 1997.

R. Grass

Registrar

G. C. Rodríguez Iglesias

President