

Case C-159/94

Commission of the European Communities

v

French Republic

(Failure of a Member State to fulfil its obligations —
Exclusive rights to import and export gas and electricity)

Opinion of Advocate General Cosmas delivered on 26 November 1996	I - 5818
Judgment of the Court, 23 October 1997	I - 5819

Summary of the Judgment

National monopolies of a commercial character — Exclusive rights to import and export electricity and gas — Not permissible — Justification — Article 90(2) of the Treaty — Conditions for application — Allocation of exclusive rights in France
(EC Treaty, Arts 37, 90 and 169)

Under Article 37 of the Treaty Member States are precluded from conferring on public undertakings exclusive rights to import and export gas and electricity where the exclusive import rights are such that they directly affect the conditions under which

the product is marketed only as regards operators or sellers in other Member States and where the exclusive export rights affect only the conditions under which goods are procured by operators or consumers in other Member States, giving rise in both cases to

discrimination against exporters or importers established in other Member States.

It follows, however, from the combined effect of paragraphs 1 and 2 of Article 90 of the Treaty that 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. In that regard, for the Treaty rules not to be applicable to an undertaking entrusted with a service of general economic interest, it is sufficient that the application of those rules obstruct the performance, in law or in fact, of the special obligations incumbent upon that undertaking, without its being necessary for the survival of the undertaking itself to be under threat.

As regards, first, the question whether the French Republic has shown, to the requisite legal standard, that the exclusive rights at issue are necessary to enable the undertaking on which they are conferred to perform the particular tasks assigned to it, 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. However, that burden of proof cannot be so extensive as to require the French

Republic, which has set out in detail the reasons for which, in the event of elimination of the contested measures, the performance of the tasks of general economic interest, under economically acceptable conditions 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.

Since the Commission, upon which it is incumbent 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, confined itself essentially to purely legal arguments in rejecting the arguments put forward by the Member State to justify maintenance of the exclusive rights, the Court can judge only the merits of the pleas in law which the Commission has put forward. It is not for the Court, on the basis of observations of a general nature, 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 and gas on national territory, continuity of supply and equal treatment of customers and consumers.

As regards, second, the question whether the exclusive rights in question affect the development of trade to an extent contrary to the Community interest, 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 and to show how, in the absence of a common policy in the area concerned, development of direct trade between producers and consum-

ers, 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.