OPINION OF ADVOCATE GENERAL JACOBS
delivered on 17 May 2001 [1]

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1 — Original language: English.

I — Introduction

1. The present case, referred by the Oberverwaltungsgericht Rheinland-Pfalz (Rhineland-Palatinate Higher Administrative Court), concerns the compatibility with Article 86 EC, read in conjunction with Article 82 EC, of a legislative provision under which private undertakings are to be refused authorisation to provide independent ambulance services where the grant of such an authorisation is likely to have adverse effects on the operation and profitability of the public ambulance service, which is entrusted for given geographical areas to private medical aid organisations such as the Red Cross.

II — The regional law at issue

2. In Germany ambulance services are governed by laws adopted at the level of the *Länder*. The relevant law in the Land of Rheinland-Pfalz (Rhineland-Palatinate) is the Rettungsdienstgesetz (Law on the public ambulance service) in its version of 22 April 1991 [2] to which I will refer as 'RettDG 1991'.

1. *Basic concepts*

3. The RettDG 1991 distinguishes in essence between two types of ambulance services, namely emergency transport (Notfalltransport) and patient transport (Krankentransport).

4. 'Emergency transport' concerns emergency patients (Notfallpatienten), namely persons with life-threatening injuries or conditions. It consists of taking life-saving

2 — GVBl. 1991, 217.

measures, preparing emergency patients for transport, and transporting them, with provision of appropriate care, to a hospital suitable for their further treatment. [3]

5. 'Patient transport' is the transport of persons ill, injured or otherwise in need of help who are not emergency patients. It consists of administering medically appropriate care and of transporting the patients at the same time as monitoring their condition. [4]

6. Both emergency and patient transport services must be provided by ambulances (Krankenkraftwagen) [5] of which there are essentially two types.

7. Emergency transport is normally to be provided by emergency ambulance (Rettungswagen). [6] An emergency ambulance must be equipped with special apparatus. The person taking care of the emergency patient during the transport must be a qualified rescue service assistant (Rettungsassistent). [7]

8. Patient transport is normally to be provided by a patient transport ambulance (Krankentransportwagen) which does not need to have the same technical equipment. It is moreover sufficient that the person taking care of the patient during the transport possesses the lesser qualification of an ambulance attendant (Rettungssanitäter). [8]

9. The RettDG 1991 does not apply to the conveyance of patients not in need of qualified help or supervision, in vehicles other than ambulances (Krankenfahrten). [9]

2. *The public ambulance service (Rettungsdienst)*

10. According to Paragraph 2(1) of the RettDG 1991 the public ambulance service (Rettungsdienst) consists in the provision to the population whenever necessary (bedarfsgerecht) and throughout the territory (flächendeckend) of both emergency and patient transport services. Contrary to what the referring court appears to assume it follows from documents submitted to the Court that patient transport (and not only emergency transport) was also covered by

3 — Paragraph 2(2) of the RettDG 1991.
4 — Paragraph 2(3).
5 — Paragraph 21(1).
6 — Paragraph 21(2).
7 — Paragraph 22(3)(2).
8 — Paragraph 22(3)(1).
9 — Paragraph 1(2)(3).

the rules in force before the RettDG 1991 as an integral part of the public ambulance service. The main feature of the public ambulance service is to guarantee ambulance services on a permanent basis and on similar quality conditions even in remote areas irrespective of the profitability of individual operations.

11. For the purposes of the organisation of the public ambulance service the *Land* is divided into operational areas (Rettungsdienstbereiche). [10] Ambulance services within each operational area are to be coordinated by one central coordination unit (Rettungsleitstelle). [11] The actual services are to be provided by ambulance stations (Rettungswachen) which are to be set up, staffed and equipped according to local requirements. [12] It must be possible to reach any point on the public road network within 15 minutes after the central coordination unit is alerted. [13]

12. Responsibility for the public ambulance service lies in principle with the *Land*, the administrative districts at provincial level (Landkreise) and the towns which are administrative districts in their own right (kreisfreie Städte). [14]

13. However, according to Paragraph 5(1) of the RettDG 1991 the competent authority 'assigns' (überträgt) the operation of the public ambulance service to 'recognised medical aid organisations' (anerkannte Sanitätsorganisationen) if and in so far as those organisations are able and willing to guarantee a permanent public ambulance service. The public ambulance service may be assigned to other operators only if the organisations mentioned in Paragraph 5(1) are not willing or able to operate it. [15]

14. The assignment of the public ambulance service to medical aid organisations relates only to the operation of the service. The ultimate responsibility of the delegating public authority for the service appears to remain intact, as is reflected in the fact that they retain the rights to exercise supervision and give directions and the obligation to bear the costs. [16]

15. The referring court states that in almost all cases the competent districts and towns have assigned the public ambulance service to the recognised medical aid organisations, namely the Deutsches Rotes Kreuz (German Red Cross), the Arbeiter-Samariter

10 — Paragraph 4(1).
11 — Paragraphs 4(3) and 7.
12 — Paragraphs 4(3) and 8.
13 — Paragraph 8(2).
14 — Paragraph 3.
15 — Paragraph 5(3).
16 — Paragraphs 10, 11.

Bund (Workers Samaritans' Federation), the Johanniter-Unfall-Hilfe (St. John's accident assistance) and the Malteser-Hilfsdienst (Maltese aid service). The town of Trier however — more precisely the town fire brigade — operates the public ambulance service itself.

16. The referring court states also that the operation of the service is assigned by means of a unilateral act of the competent authority (Beleihung). Paragraph 5(2) of the RettDG 1991 states however that assignment is effected by a public law contract (öffentlich rechtlicher Vertrag) between the competent authority and the medical aid organisation concerned. Two such contracts have been submitted to the Court.

17. The ambulance stations are set up, staffed and maintained by the medical aid organisation to which the public ambulance service in that geographical area has been assigned. [17] Where the ambulance stations within a given operational area are assigned to more than one medical aid organisation, it is for the largest organisation to set up, staff and maintain the central control unit. [18]

3. *The financing of the public ambulance service*

18. The public ambulance service is financed partly by the State, partly through user charges.

19. Infrastructure costs of the central control units and the ambulance stations (construction, maintenance, equipment, rents) are to a large extent financed directly by the *Land* or the districts and towns. [19]

20. Under Paragraph 12(1) of the RettDG 1991 the remaining costs — mostly operating costs (Betriebskosten) — are to be financed through user charges (Benutzungsentgelte). According to the principle of full cost coverage (Selbstkostendeckungsprinzip) the user charges must be calculated so as to cover all costs of the public ambulance service which are not financed from other sources.

21. Under Paragraph 12(2) of the RettDG 1991 the medical aid organisations entrusted with the public ambulance service and the associations representing the health insurance sector conclude agree-

17 — Paragraph 8(1).
18 — Paragraph 7(4).

19 — Paragraph 11.

ments on the sums to be paid as user charges. Those agreements must be approved by the competent minister. The reason the associations representing the health insurance sector play such an important role in the determination of the user charges is that those charges are ultimately to be paid by public and private health insurers.

22. User charges must be fixed uniformly for the *Land*. They are thus identical for ambulance services provided in towns and in remote areas.

4. *Authorisations for the provision of independent ambulance services*

23. In parallel with the rules on the public ambulance service there are general rules governing authorisations for the provision of ambulance services.

24. Those rules were initially to be found in the Law on the conveyance of persons (Personenbeförderungsgesetz) [20] which is a federal law applicable throughout Germany. That law regarded the provision of ambulance services as a mode of conveyance of persons by hired car. Providers of ambulance services needed an authorisation to engage in that occupation. The grant of authorisation was subject to guarantees as to the safety and efficiency of the operation and to assurances as to the reliability and professional qualifications of the operator. Authorisation to operate an ambulance service — unlike a taxi service, for example — did not however depend on an assessment of need. Within that legal framework the public ambulance service, with its obligation to be available throughout the territory 24 hours every day, coexisted with private independent operators who were mainly engaged in non-emergency transport of patients during day-time.

25. In 1989 — apparently at the request of the *Länder* — the federal law in question was amended in such a way as to remove the sector of ambulance services from its scope. The way was thus clear for legislation of the *Länder* — in Rheinland-Pfalz the RettDG 1991.

26. As a consequence the RettDG 1991 contains, unlike its predecessors, not only rules on the public ambulance service but also general rules on the provision of

20 — BGBl. 1961 I 241.

ambulance services and in particular on the authorisations necessary to provide such services.

27. As under the previous federal regime the grant of the authorisation is subject to guarantees as to the safety and efficiency of the operation and to assurances as to the reliability and professional qualifications of the operator.

28. Paragraph 18(3) of the RettDG 1991, which is the provision at the heart of the present case, imposes however a new requirement. It is worded as follows:

'Authorisation shall be refused if it would be likely to have an adverse effect on the general interest in the operation of an effective public ambulance service as defined in Paragraph 2(1). In establishing the plan of the *Land* for the public ambulance service ... regard shall be had in particular to the reserve capacity of the public ambulance service throughout the territory and the actual use made of the public ambulance service within the operational area concerned; planning should also be based on the number of operations, on arrival times and on the duration of operations, as well as on expenditure and revenue ...'

29. According to the national court that rule must be interpreted as granting the medical aid organisations a *de facto* monopoly over the markets for emergency and patient transport services. In its view, under the rule at issue authorisations for independent operators of ambulance services could be issued only if the public ambulance service were unable to cover the needs. That however can never be the case since the public ambulance service is obliged to ensure a comprehensive public ambulance service around the clock. The necessary capacities of the public ambulance service are determined, not by economic considerations, but by possible emergency cases and even catastrophes. In the public ambulance service periods of standby duty will therefore necessarily predominate over operating periods. Authorisations for private operators will therefore never be useful or necessary. They would on the contrary reduce utilisation of the public ambulance service and thus negatively affect its expenditure and revenues.

III — The main proceedings

30. The plaintiff Firma Ambulanz Glöckner ('Ambulanz Glöckner') is a private undertaking established in Pirmasens which provides ambulance services outside the public ambulance service. It appears from the file that it owns and operates two patient transport ambulances and one emergency ambulance. Under a framework

agreement which it has concluded with two major health insurers it may request a reimbursable remuneration for its services which appears to be considerably lower than the user charges for the public ambulance service.

31. As regards its emergency ambulance, it was granted in 1990 — thus before entry into force of the RettDG 1991 and still under the previous federal legislation — an authorisation to provide patient transport services which was due to expire in October 1994.

32. In July 1994 it applied to the authorities of the defendant Landkreis (administrative district) Südwestpfalz ('the Landkreis') for a renewal of the authorisation for the provision of 'emergency and patient transport services'.

33. The Landkreis invited the two medical aid organisations entrusted with the public ambulance service in the area, namely the Deutsches Rotes Kreuz Landesverband Rheinland-Pfalz ('the DRK') and the Arbeiter Samariter-Bund Landesverband Rheinland-Pfalz ('the ASB') to express their views on the effects which the requested authorisation would have.

34. Both organisations stated that the comprehensive provision of the public ambulance service was in any event not being operated in such a way as to cover costs, so that the addition of a further operator would either require user charges to go up or the basic availability of the public ambulance service to be reduced.

35. Thereupon the Landkreis refused the renewal of the authorisation on the basis of Paragraph 18(3) of the RettDG 1991. It stated that in the relevant area the public ambulance service was operating in 1993 at only 26% of its capacity.

36. Ambulanz Glöckner first lodged an unsuccessful objection against that decision and then brought proceedings before the courts.

37. By judgment of 28 January 1998 the Verwaltungsgericht (Administrative Court) Neustadt an der Weinstrasse ordered the defendant authorities to issue the applicant with the authorisation applied for. It held essentially that it was wrong to interpret Paragraph 18(3) of the RettDG 1991 as precluding in all cases the possibility to grant independent operators authorisations to provide ambulance services. On the contrary it followed from the system established by the law in issue that the legislature

sought to enable private operators to provide ambulance services in parallel with the public ambulance service. The legislature therefore implicitly accepted that there may, to a certain extent, be concomitant increases in costs. Since the applicant had operated ambulance services for more than seven years, it was clear that its activity had not put at risk the operational capacity or the existence of the public ambulance service.

38. The Landkreis lodged an appeal against that judgment before the referring court, which joined the medical organisations concerned, namely the ASB and the DRK, as parties to the proceedings. Under the applicable procedural rules the Vertreter des öffentlichen Interesses (representative of the public interest) also participates in those proceedings.

39. According to the referring court the case depends on the applicability of Paragraph 18(3) of the RettDG 1991. In its view, if that provision is to be applied, the authorities had to refuse the renewal of the authorisation since the organisations entrusted with the public ambulance service have spare capacity available, and the appeal would therefore succeed. If however Paragraph 18(3) were found to be incompatible with Community law and thus not applicable, the appeal would fail.

40. In that regard the referring court considers that the medical aid organisations are undertakings with 'special or exclusive rights' within the meaning of Article 86(1) EC. Moreover, the adoption of Paragraph 18(3) of the RettDG 1991 by the legislature of the *Land* may be regarded as a 'measure' prohibited by Article 86(1) EC. That is because the disputed provision creates monopolies on the market for ambulance services in violation of the general objectives of the Treaty and the prohibition under Article 81(1)(c) EC of sharing markets. In its view, the disputed provision cannot be justified under Article 86(2) EC. Since the pre-existing situation was entirely satisfactory it was unnecessary to create a service monopoly.

41. Referring to a number of judgments of the Court the national court is however in doubt about two issues, namely whether the grant of an exclusive right as such may be regarded as incompatible with the Treaty and whether the disputed measure 'may affect trade between Member States' within the meaning of Articles 81 EC et seq.

42. In the light of those considerations it referred the following question for a preliminary ruling:

'Is the creation of a monopoly for the provision of ambulance services over a defined geographical area compatible with

Article 86(1) EC and Article 81 EC et seq.?'

43. In the meantime the referring court has ordered the authorities provisionally and pending definitive determination in the main proceedings to issue the applicant with an authorisation to provide emergency and patient transport with the ambulance in question.

44. Ambulanz Glöckner, the Landkreis Südwestpfalz, the ASB, the Vertreter des öffentlichen Interesses, the Austrian Government and the Commission submitted written observations. They also submitted written answers to questions put by the Court. At the hearing Ambulanz Glöckner, the Landkreis Südwestpfalz, the Vertreter des öffentlichen Interesses and the Commission were represented.

IV — The scope of the present preliminary ruling procedure

45. One of the difficulties in the present case is that those submitting observations tend to disagree with the referring court and amongst themselves not only on the interpretation of the relevant provisions of the EC Treaty, but also on the interpretation of the national provisions at issue, on the factual background and on the scope of the question referred. Before starting the analysis it is thus necessary to clarify a number of preliminary points.

46. First, the referring court considers that the rules in force before 1991 entrusted only emergency transport to the medical aid organisations concerned and that the RettDG 1991 extended the scope of that assignment to comprise also patient transport. [21] On the basis of that understanding the Commission's observations for example deal extensively with the issue whether the competition rules preclude a Member State from extending the scope of an existing monopoly for emergency transport to the new field of patient transport.

47. It is however evident from the observations of the parties to the main proceedings and in particular from the text of the Law in force before 1991 [22] that the public ambulance service already comprised both emergency transport and patient transport before 1991. The pre-existing Law excluded from its scope (as does the RettDG 1991) only the conveyance of patients not in need of qualified help or supervision, in vehicles other than ambulances (Krankenfahrten). [23]

21 — See paragraph 10 above.

22 — GVBl. 1986, p. 60. The text of that law was helpfully submitted to the Court.

23 — See Paragraph 1(3) of the pre-existing Law and above at paragraph 9.

48. Since that misunderstanding is manifest and concerns the pre-existing legal situation, which is not directly in issue in the present case, the Court should in my view proceed on the basis that the public ambulance service always comprised both emergency and patient transport. Where an issue manifestly does not arise, it would be unwise for the Court to try to resolve it.

49. Secondly, several of those submitting observations appear to assume that the present case also raises the question whether a provision such as Paragraph 5 of the RettDG 1991[24] under which the public ambulance service is to be assigned primarily to 'the recognised medical aid organisations' is compatible with the competition rules.

50. It follows however from the facts giving rise to the main proceedings and from the order for reference that the provisions on the assignment of the public ambulance service as such are not at issue. Ambulanz Glöckner did not request to be entrusted with the public ambulance service in a given area. It asked only for an authorisation to provide independent ambulance services in parallel with and outside the public ambulance service. Nor does the referring court appear to be concerned with the fact that the public ambulance service is in principle reserved to a closed group of organisations. It merely considers that the provisions governing authorisations for the provision of independent ambulance services and in particular Paragraph 18(3) of the RettDG 1991 might be incompatible with Community law.

51. Thirdly — and this is perhaps the most difficult point — the referring court considers that Paragraph 18(3) of the RettDG 1991 must be interpreted as precluding in *all* cases the grant of authorisations to independent providers of ambulance services.[25] That seems to be the reason why it refers in its question to the creation of a 'monopoly'. A similar point is made by the Vertreter des öffentlichen Interesses who contends that the disputed provision must be applied strictly in order to preclude any adverse effects on the public ambulance service.

52. The defendant Landkreis and the ASB maintain by contrast that Paragraph 18(3) must be interpreted as precluding the grant of authorisations to independent providers only where it is likely to have *considerable* adverse effects on the public ambulance service. They rely on the judgment at first instance of the Verwaltungsgericht Neustadt an der Weinstrasse[26] and a passage in

24 — See paragraph 13 above.

25 — See paragraph 29 above.

26 — See for an account of that judgment paragraph 37.

the *travaux préparatoires* of the Law. The ASB therefore suggests reformulating the question referred accordingly.

53. It is true that the interpretation of Paragraph 18(3) of the RettDG 1991 suggested by the referring court is not easy to reconcile with the fact that the RettDG 1991 introduced in its Paragraphs 14 to 27 a comprehensive set of provisions governing not only the conditions for the grant of authorisations for the provision of ambulance services, but also the obligations of authorised operators and the remuneration for independent ambulance services. Many of those rules would appear to be without practical relevance if the referring court's interpretation of Paragraph 18(3) were to prevail.

54. None the less, since the correct interpretation of the national law is not a matter for this Court, I would not reformulate the question referred in the way that has been suggested. In any event, the disagreement about that interpretation may be resolved in the light of the ruling to be given by this Court.

V — The arguments of the parties in outline

55. Ambulanz Glöckner maintains that the disputed provision is incompatible with Article 86(1) EC read in conjunction with Articles 81 EC et seq. and 249 EC (by virtue of a breach of Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts [27]).

56. In its view, the public authorities responsible for the public ambulance services and the medical aid organisations entrusted with those services must both be regarded as undertakings with special or exclusive rights within the meaning of Article 86(1).

57. Furthermore, the provisions of the RettDG 1991 infringe Article 86(1) EC read in conjunction with other Community law provisions for the following reasons:

— they lead to infringements of Article 81(1)(c) EC, since they enable the medical aid organisations to share out the national market for ambulance services through agreements between themselves and with the public authorities;

27 — OJ 1992 L 209, p. 1.

— they lead to infringements of Article 82 EC in that, first, the medical aid organisations are unable to satisfy consumer demand for qualified ambulance services at acceptable prices,[28] and secondly, the public authorities and the medical aid organisations are enabled jointly to limit the access of competing operators to the market;

— Article 249 EC is infringed since the public authorities did not respect the Directive on procedures for the award of public service contracts when entrusting the medical aid organisations with the public ambulance service.

58. The Commission adopts in essence a similar line of reasoning. In its view however the Court is not sufficiently informed to decide whether the medical aid organisations' position on the market for ambulance services concerns 'a substantial part of the common market' and whether the disputed measure might lead to behaviour which 'may affect trade between Member States' within the meaning of Article 82 EC. With regard to those points the Commission suggests leaving the necessary assessments to the referring court and giving merely general guidance.

28 — Case C-41/90 *Höfner and Elser* [1991] ECR I-1979.

59. The defendant Landkreis, the ASB, the Vertreter des öffentlichen Interesses and the Austrian Government all consider that the disputed measure is compatible with Community law.

60. In the first place, Article 86(1) EC is, in their view, not applicable because the medical aid organisations concerned cannot be regarded as undertakings with 'special or exclusive rights'. Article 81(1)(c) EC and the Directive on procedures for the award of public service contracts are also not applicable.

61. Furthermore, Article 86(1) EC in conjunction with Article 82 EC is not infringed because

— the operational area of each medical aid organisation does not correspond to a substantial part of the common market,

— trade between Member States is not affected to an appreciable extent,

— the mere creation of a dominant position is not caught by those rules,

— the medical aid organisations have always provided satisfactory services and the requested user charges were justified.

62. Finally and in any event the measure at issue is justified under Article 86(2) EC. The medical aid organisations operating the public ambulance service are 'entrusted with the operation of services of general interest'. To repeal Paragraph 18(3) of the RettDG would 'obstruct the performance, in law and in fact, of the particular tasks assigned' to them. That is *inter alia* because it is necessary to give the public ambulance service some measure of protection against 'cherry-picking' by independent operators who wish to provide their services only at profitable peak hours in densely populated and therefore easily accessible areas.

63. In the light of those arguments I will discuss successively

— the applicability of Article 86(1),

— the alleged infringement of Article 86(1) read in conjunction with other Treaty provisions, and

— the possible justification under Article 86(2).

VI — Applicability of Article 86(1): undertakings with special or exclusive rights

64. Article 86(1) applies to 'undertakings' to which Member States grant 'special or exclusive rights'.

1. *The concept of undertaking*

65. Ambulanz Glöckner maintains that both the medical aid organisations and the public authorities primarily responsible for the public ambulance service must be regarded as undertakings.

(a) Medical aid organisations as undertakings

66. As regards, first, the medical aid organisations in issue, none of the parties has argued that they should not be regarded as undertakings for the purposes of competition law. We are informed that

— in the *Land* concerned there are four recognised medical organisations, [29] of which the DRK (German Red Cross) is apparently the most important one,

— they are organised as non-profit-making associations,

— they are engaged *inter alia* in the provision of both emergency transport and patient transport services,

— in the *Land* concerned they have been entrusted with the operation of the public ambulance service in almost all operational areas,

— within those operational areas they set up, staff and maintain the central control units and ambulance stations,

— the infrastructure costs of the public ambulance service are financed mainly through direct public funding and the operating costs mainly through user charges,

— under the principle of full cost coverage the user charges must be calculated so as to guarantee that they cover all the costs of the public ambulance service which are not financed through other sources of funding.

67. It will be recalled that for the purposes of Community competition law the concept of undertaking encompasses every entity engaged in an economic activity regardless of the legal status of the entity and the way it is financed. [30] The basic test is whether the entity in question is engaged in an activity which consists in offering goods and services on a given market [31] and which could, at least in principle, be carried out by a private actor in order to make profits. [32]

29 — See, for their names, paragraph 15 above.

30 — *Höfner and Elser*, cited in note 28, paragraph 21 of the judgment.

31 — Joined Cases C-180/98 to C-184/98 *Pavlov and Others* [2000] ECR I-6451, paragraph 75 of the judgment.

32 — See my Opinion in Case C-67/96 *Albany International* [1999] ECR I-5751, at paragraph 311.

68. In the present case, it is clear from the facts of the main proceedings that non-emergency patient transport has in the past been carried out in Germany by private undertakings with a view to making profits. Moreover, it appears from the file that Ambulanz Glöckner has in the past also provided emergency transport services. Nothing therefore suggests that the nature of either emergency or patient transport is such that those services must *necessarily* be carried out by public entities. [33] Whether emergency or patient transport generates profits will depend exclusively on the remuneration which the operator obtains for his services. Furthermore, the referring court states that under German civil law, too, the relationship between ambulance service provider and patient is viewed as an 'ordinary' service contract. The provision of ambulance services therefore constitutes an economic activity within the meaning of the Court's case-law.

69. That conclusion is not affected by the legal status of the medical aid organisations as non-profit-making associations, [34] the method of financing of their activities, [35] or the fact that they have been entrusted with tasks in the public interest. [36] In connection with the last two points it must be borne in mind that public service obligations may render the services provided by a given operator less competitive than comparable services rendered by other operators and thus justify under certain conditions the grant of special or exclusive rights or of State aid. It follows however from Articles 86(1) and (2) and 87 EC that public service obligations, special or exclusive rights, or State financing cannot prevent an operator's activities from being regarded as economic activities. [37]

70. I conclude therefore that in respect of the provision of ambulance services the medical organisations in issue must be viewed as undertakings within the meaning of Article 86(1).

(b) Public authorities as undertakings

71. Ambulanz Glöckner argues, secondly, that the public authorities at issue and in particular the defendant Landkreis must also be regarded as undertakings. It recalls that the RettDG 1991 entrusts the task of operating the public ambulance service

33 — See *Höfner and Elser*, cited in note 28, paragraph 22 of the judgment. See also my Opinion in *Albany*, cited in note 32, paragraphs 330 and 338.

34 — As regards non-profit-making entities see Joined Cases 209/78 to 215/78 *Van Landewyck* v *Commission* [1980] ECR 3125, paragraph 88 of the judgment; Case C-244/94 *Fédération Française des Sociétés d'Assurances* [1995] ECR I-4013, paragraph 21; as regards associations see, implicitly, Case 127/73 *BRT* [1974] ECR 313, paragraph 7.

35 — See, for example, Case C-55/96 *Job Centre* [1997] ECR I-7119, paragraph 21 of the judgment.

36 — See *Albany*, cited in note 32, paragraph 86 of the judgment and paragraph 312 of the Opinion with further references.

37 — See, for example, *Albany*, cited in note 32, paragraph 86 of the judgment.

primarily to the authorities. Those authorities must therefore be regarded as potential competitors of independent operators such as Ambulanz Glöckner.

72. I consider that a differentiated approach is necessary. It is settled case-law that public bodies engaging in economic activities may be regarded as undertakings. [38] On the other hand, activities in the exercise of official authority are sheltered from the application of the competition rules. [39] Furthermore, the notion of 'undertaking' is a relative concept in the sense that a given entity might be regarded as an undertaking for one part of its activities while the rest fall outside the competition rules. [40]

73. Within the regime established by the RettDG 1991 the public authorities perform three different functions: first, they are the entities primarily responsible for the public ambulance service and on that basis they operate that service themselves in some areas; secondly, in most areas they assign the public ambulance service to medical aid organisations; and finally, they decide on authorisations for independent operators.

74. Where the public authorities operate the public ambulance service themselves (as appears to be the case in the town of Trier) they are engaged in the economic activity 'provision of ambulance services'. In those areas the authorities in question must be viewed as undertakings within the meaning of the competition rules.

75. Where the authorities assign the public ambulance service to the medical aid organisations, it is more difficult to classify the nature of that assignment. It might be argued that the transfer of responsibility for a given economic activity from one (public) entity to another (private) entity must itself also be considered as an economic activity. Conversely it might be argued that in such a situation an authority acts in its capacity as public authority and therefore not as an undertaking within the meaning of Articles 81 EC et seq. [41] Since the present preliminary ruling procedure does not directly concern the assignment of the public ambulance service to the medical aid organisations [42] it is not necessary for me to express a definitive view on that difficult question.

76. As regards the activity at issue in the main proceedings, namely the grant or refusal of authorisations for the provision of independent ambulance services, it will

38 — Case 118/85 *Commission* v *Italy* [1987] ECR 2599, paragraphs 6 to 16 of the judgment and *Höfner and Elser*, cited in note 28.

39 — See, for example, *Commission* v *Italy*, cited in note 38, paragraphs 7 and 8 of the judgment; Case C-343/95 *Calì and Figli* [1997] ECR I-1547.

40 — See, for example, the *Amministrazione Autonoma dei Monopoli di Stato* in *Commission* v *Italy*, cited in note 38, paragraph 7 of the judgment and the *Bundesanstalt für Arbeit* in *Höfner and Elser*, cited in note 28.

41 — Case 30/87 *Bodson* [1988] ECR 2479, paragraph 18 of the judgment.

42 — See above at paragraph 50.

be recalled that an entity acts in the exercise of official authority where the activity in question 'is connected by its nature, its aim and the rules to which it is subject with the exercise of powers ... which are typically those of a public authority'. [43] A decision to grant or to refuse an authorisation for the provision of ambulance services within the framework of the RettDG 1991 falls in my view clearly within that definition. Before granting the authorisation the authorities examine the safety and efficiency of the operation, the reliability and professional qualifications of the operator and — under the disputed provision — the possible effects of an authorisation on the public ambulance service. The grant or refusal of an authorisation is thus a typical administrative decision taken in the exercise of prerogatives conferred by law which are usually reserved for public authorities. I cannot see how that decision-making activity could be assimilated to the offering of goods or services on given markets.

77. The fact invoked by Ambulanz Glöckner that the public authorities are *potential* competitors on the market for ambulance services is in my view irrelevant for the classification of their decision-making activities.

78. First, I do not think that Article 81 EC et seq. apply to potential undertakings. Public authorities could theoretically engage in almost any economic activity and would thus permanently fall within the scope of the competition rules.

79. In any event, even where the authorities are *actual* competitors of independent providers (as appears to be the case in Trier), the operation of the ambulance service (economic activity) and the grant or refusal of authorisations for the provision of independent ambulance services (decision-making activity) must be analysed separately. Only with regard to the former activity do the authorities act as undertakings within the meaning of the competition rules.

80. It is true that the Court's case-law requires that a State body with regulatory powers over a given market should be independent from any undertaking operating on that market. [44] That case-law does not however establish that the authorities' regulatory activities must be viewed as economic activities, but concerns only the compatibility with the Treaty of the resulting conflict of interest.

43 — Case C-364/92 *SAT Fluggesellschaft* [1994] ECR I-43, paragraph 30 of the judgment.

44 — See, for example, Case C-202/88 *France* v *Commission* [1991] ECR I-1223; Case C-18/88 *GB-INNO-BM* [1991] ECR I-5941.

81. I conclude therefore that the authorities cannot be viewed as undertakings where they grant or refuse authorisations for the provision of independent ambulance services.

2. *Special or exclusive rights*

82. Ambulanz Glöckner and the Commission consider that the medical aid organisations must be viewed as undertakings to which special or exclusive rights have been granted. They refer on the one hand to the assignment of the public ambulance service under Paragraph 5 of the RettDG 1991 and on the other to the special protection afforded by Paragraph 18(3) thereof. The Landkreis and the ASB maintain that the medical aid organisations have never enjoyed special or exclusive rights, but have always been subject to competition from independent operators.

(a) The concept of special or exclusive rights

83. The concept of special or exclusive rights and in particular the concept of special rights is not easy to define.

84. In the area of telecommunications the Court partially annulled in 1991 and 1992 two Commission Directives which required the Member States to withdraw special or exclusive rights conferred on incumbent operators. As regards special rights, the Court held that the Commission failed to specify 'the types of rights which are actually involved and in what respect the existence of such rights is contrary to the various provisions of the Treaty'. [45]

85. The Commission reacted and provided in a Directive of 1994 [46] the following definition of special rights:

'"special rights" means the rights that are granted by a Member State to a limited number of undertakings ... which, within a given geographical area,

— limits to two or more the number of such undertakings authorised to provide a service or undertake an activity, otherwise than according to objective, proportional and non-discriminatory criteria, or

45 — *France* v *Commission*, cited in note 44, paragraphs 45 to 47 of the judgment; Joined Cases C-271/90, C-281/90 and C-289/90 *Spain and Others* v *Commission* [1992] ECR I-5833, paragraphs 28 to 32.

46 — Commission Directive 94/46/EC of 13 October 1994 amending Directive 88/301/EEC and Directive 90/388/EEC in particular with regard to satellite communications, OJ 1994 L 268, p. 15.

— designates, otherwise than according to such criteria, several competing undertakings as being authorised to provide a service or undertake an activity, or

— confers on any undertaking or undertakings, otherwise than according to such criteria, legal or regulatory advantages which substantially affect the ability of any other undertaking to provide the same telecommunications service or to undertake the same activity in the same geographical area under substantially equivalent conditions.'

86. In 1996 the Court adopted, for the purposes of the interpretation of several other Directives in the telecommunications sector, a definition which covers both special and exclusive rights and which is clearly inspired by the Commission's definition:

'... the exclusive or special rights in question must generally be taken to be rights which are granted by the authorities of a Member State to an undertaking or a limited number of undertakings otherwise than according to objective, proportional and non-discriminatory criteria, and which substantially affect the ability of other undertakings to provide or operate telecommunications networks or to provide telecommunications services in the same geographical area under substantially equivalent conditions.' [47]

87. The four essential elements of that definition are that the rights in question must

— be granted by the authorities of a Member State,

— be granted to one undertaking or to a limited number of undertakings,

— substantially affect the ability of other undertakings to exercise the economic activity in question in the same geographical area under substantially equivalent conditions, and

47 — Case C-302/94 *British Telecommunications* [1996] ECR I-6417, paragraph 34 of the judgment.

— be granted otherwise than according to objective, proportional and non-discriminatory criteria.

88. I consider that the first three elements of that definition can also be used to define the concept of special or exclusive rights in Article 86(1) EC, whilst the fourth element should not be transposed to that different context. That fourth element — namely that the rights in question must be granted otherwise than according to objective, proportional and non-discriminatory criteria — is designed to apply the liberalisation process in the telecommunications sector to only those rights the grant of which is not justified. It is therefore designed to distinguish between 'legitimate' and 'illegitimate' special or exclusive rights. In Article 86(1) EC, however, the concept of special or exclusive rights serves only the purpose of determining the scope of application of that provision. The separate and further question whether those rights are legitimate is to be determined according to the Treaty provisions to which Article 86(1) EC refers and according to Article 86(2) EC.

89. Special or exclusive rights within the meaning of Article 86(1) EC are thus in my view rights granted by the authorities of a Member State to one undertaking or to a limited number of undertakings which substantially affect the ability of other undertakings to exercise the economic activity in question in the same geographical area under substantially equivalent conditions.

(b) Medical aid organisations as undertakings with special or exclusive rights

90. In the light of the arguments of the parties three distinct State measures — two of a regulatory and one of a decisional nature — might potentially be viewed as the grant of special or exclusive rights, namely

— Paragraph 5 of the RettDG 1991 under which the public ambulance service must be assigned with priority to the 'recognised' medical aid organisations, [48]

— the actual assignment to a medical aid organisation of the public ambulance service for a given geographical area, and

— the introduction of Paragraph 18(3) of the RettDG 1991 which, according to the referring court's interpretation, precludes authorisations for independent operators. [49]

91. As regards, first, Paragraph 5 of the RettDG 1991 it must be recalled that

48 — See above at paragraph 13.

49 — See above at paragraphs 51 to 54.

Ambulanz Glöckner did not request to be entrusted with the public ambulance service and that neither the other parties nor the referring court criticised that provision. I do not therefore need to take a view on whether the special treatment of a closed group of organisations must be viewed as the grant of special or exclusive rights.

92. I consider, secondly, that the actual assignment of the public ambulance to a given medical aid organisation *as such* does not grant special or exclusive rights to that organisation since it does not in itself affect the ability of competing operators to offer ambulance services in the area in question. In that regard it must be borne in mind that before 1991 the assignment of the public ambulance service to certain recognised medical aid organisations had no influence whatsoever on the possibility for independent operators to apply for an authorisation to provide ambulance services.

93. That leads me, thirdly, to Paragraph 18(3) of the RettDG 1991. Before entry into force of that rule independent operators could obtain the necessary authorisations for the provision of ambulance services relatively easily. The grant of those authorisations was subject only to guarantees as to the safety and efficiency of the operation and the reliability and professional qualifications of the operator. Under the new Paragraph 18(3) of the RettDG 1991 authorisation must be refused where its use is likely to have adverse effects on the operation and profitability of the public ambulance service.

94. It is thus Paragraph 18(3) of the RettDG which grants special or exclusive rights to the medical aid organisations entrusted with the public ambulance service. Only Paragraph 18(3) and its application by the authorities affect the ability of other undertakings to exercise the economic activity in question in the same geographical area as the medical aid organisations.

95. I therefore conclude that the introduction of Paragraph 18(3) of the RettDG 1991 granted the medical aid organisations concerned special or exclusive rights within the meaning of Article 86(1) EC. They must consequently be viewed as undertakings falling within the scope of that provision.

VII — Infringement of Article 86(1) EC read in conjunction with other provisions of the Treaty

96. In the case of undertakings with special or exclusive rights Article 86(1) EC prohi-

bits Member States from enacting or maintaining in force any measure 'contrary to the rules contained in [the] Treaty, in particular to those rules provided for in ... Articles 81 to 89'. Article 86(1) cannot therefore be applied in isolation, but must always be used in combination with another provision of the EC Treaty.

97. Ambulanz Glöckner maintains [50] that the disputed provision infringes Article 86(1) EC read in conjunction with three different provisions, namely Articles 249(3), 81(1)(c), and 82 EC.

1. *Articles 86(1) and 249(3) EC*

98. Ambulanz Glöckner claims that the rule assigning the public ambulance service with priority to the 'recognised' medical aid organisations is incompatible with Directive 92/50/EEC on the procedures for the award of public service contracts. [51]

99. I have however already established that the question of the assignment of the public ambulance service lies outside the scope of the present preliminary ruling procedure. [52] In the main proceedings Ambulanz Glöckner does not challenge the fact that the medical aid organisations were entrusted with the public ambulance service, but only that it did not obtain an authorisation to provide independent ambulance services outside the public ambulance service. The procedure for obtaining such an administrative authorisation is very different from the award of a public service contract and is therefore not covered by the rules on public procurement.

2. *Articles 86(1) and 81(1)(c) EC*

100. The referring court and Ambulanz Glöckner consider that the conduct of the authorities and the DRK and ASB when refusing the authorisation [53] constituted prohibited market sharing. They also claim that the regime established by the RettDG 1991 leads inevitably to agreements between the authorities and medical aid organisations which are prohibited by Article 81(1)(c).

50 — See above at paragraph 55.
51 — See above paragraph 55 and note 27.
52 — See paragraph 50 above.
53 — See paragraphs 33 to 35 above.

101. In my view Article 81 EC does not apply since the RettDG 1991 does not lead to agreements between undertakings within the meaning of that provision.

102. That is, in the first place, because the authorities act in the exercise of public authority when they grant or refuse authorisations. [54] In that respect they are therefore not engaged in an economic activity and cannot be regarded as undertakings for the purposes of Article 81 EC.

103. In any event, there do not appear to be 'agreements' or 'concerted practices' between the authorities and the medical aid organisations. The medical aid organisations simply suggest a decision which is then taken unilaterally by the authorities. The authorities have sole power and responsibility for that decision and do not appear to be bound by the observations of the medical aid organisations.

3. *Articles 86(1) and 82 EC*

104. Article 86(1) EC prohibits Member States from adopting measures which are contrary to Article 82. The latter provision is however addressed only to undertakings, not to Member States. The two rules read in combination must thus be understood as prohibiting State measures which would deprive the prohibition in Article 82 EC of its effectiveness.

105. The problem to be analysed is therefore not whether concrete abuses of a dominant position have been committed (for which the undertaking concerned might be responsible under Article 82 EC read in isolation), but whether the Member State in question has adopted or maintained in force measures which are liable to create a situation in which the the undertakings concerned are led to commit such abuses.

106. In the light of the wording of both Article 86(1) and 82 EC I will therefore examine, first, whether the medical aid organisations in issue are in a dominant position within a substantial part of the common market; secondly, whether a provision such as Paragraph 18(3) of the RettDG 1991 is a State measure which is liable to create a situation in which the undertakings concerned are led to commit an abuse of that dominant position; and finally, whether the measure or the abusive behaviour may affect trade between Member States.

54 — See paragraphs 76 et seq. above.

(a) Dominant position of one or more undertakings within a substantial part of the common market

— The relevant product market

107. The Commission argues that there are two different product markets, namely the market for emergency transport and the market for patient transport.

108. The Landkreis and the Vertreter des öffentlichen Interesses contend by contrast that there is one global market for ambulance services. They contend that an emergency ambulance may in practice often be used for non-emergency patient transport. Ambulanz Glöckner's emergency ambulance at issue in the main proceedings was for example also used for non-emergency patient transport. Conversely there are situations (e.g. major accidents, catastrophes) where patient transport ambulances can be used to provide emergency transport services. Moreover, a certain percentage (the Landkreis advances a figure of 8 to 10%) of non-emergency transports change their nature in the course of the transportation and become emergency transports.

109. I am not fully convinced by those arguments. 'Relevant product market' may be defined as follows:

'A relevant product market comprises all those products and/or services which are regarded as interchangeable or substitutable by the consumer, by reason of the products' characteristics, their prices and their intended use.' [55]

110. In the light of that definition I think that the Commission is right to regard the markets for emergency transport and non-emergency transport as distinct markets. First, patients do not normally regard non-emergency transport services as a valid substitute for emergency transport (except perhaps as a last resort in case of catastrophes or major accidents). Emergency transport will conversely not be regarded as a valid substitute for non-emergency transport because emergency transport is considerably more expensive. Furthermore, patients expect emergency transport to be provided as rapidly as possible, 24 hours a day and by highly qualified personnel. Non-emergency transport e.g. from hospital to hospital may be provided at more convenient hours during the week when the

55 — See, for example, Commission Notice on the definition of relevant markets for the purposes of Community competition law, OJ 1997 C 372, p. 5, paragraph 7 of the Notice.

vehicle in question is free. Legal requirements as regards the medical equipment of the respective vehicles and the qualification of the aid personnel are also different. Because of its special nature, efficient planning of emergency transport is considerably more difficult than the planning of non-emergency transport. As a consequence of those fundamental differences the costs of emergency transport services are much higher.

111. There are thus, in my view, two relevant product markets, namely the market for emergency transport and the market for non-emergency patient transport.

— The relevant geographical market

112. The Commission contends that the relevant geographical market is the *Land* of Rheinland-Pfalz.

113. 'Relevant geographical market' may be defined as follows:

'The relevant geographic market comprises the area in which the undertakings concerned are involved in the supply and demand of products or services, in which the conditions of competition are sufficiently homogeneous and which can be distinguished from neighbouring areas because the conditions of competition are appreciably different in those areas.' [56]

114. It might be argued that the relevant geographical market for the provision of ambulance services is confined to one operational area (Rettungsdienstbereich) and thus in the main proceedings the Rettungsdienstbereich Pirmasens. It is at that level that the decisions on authorisations are taken, that medical aid organisations are heard and that the effects on the public ambulance service are assessed.

115. I tend however to agree with the Commission and consider that the Land of Rheinland-Pfalz must be seen as the relevant market. The legislative framework for the provision of independent ambulance services and the organisational structures of the public ambulance service are identical throughout the *Land*. The user charges for the public ambulance service are fixed uniformly at the level of the Land. [57] Ambulanz Glöckner could therefore exercise its activities and apply for authorisations for its ambulances in other geographical areas of the Land under exactly the same conditions.

56 — Ibidem, paragraph 8 of the Notice.

57 — See paragraph 22 above.

116. Ambulanz Glöckner states that the laws of the different *Länder* governing the provision of ambulance services are very similar and that Germany must therefore be seen as a homogeneous area with almost identical market conditions. The Vertreter des öffentlichen Interesses contests that statement and claims that there are considerable differences between the laws of the various *Länder*.

117. It will be for the national court to decide whether the conditions of competition in the two markets for emergency transport and non-emergency patient transport are sufficiently homogeneous throughout Germany to consider the entire territory of that Member State as the relevant geographical market.

118. For the purposes of the present Opinion I will assume that Rheinland-Pfalz is the relevant geographical market.

— Dominant position on the relevant market

119. It follows from the referring court's interpretation of Paragraph 18(3) of the RettDG 1991 that a medical aid organisation entrusted with the public ambulance service for a given ambulance station enjoys a legally protected monopoly in the geographical area covered by that station.

120. In the operational area of Pirmasens the DRK has been assigned six ambulance stations and the operation of the central control unit, whilst the ASB operates only one ambulance station. Ambulanz Glöckner is the only independent provider of ambulance services. The DRK thus appears to be in a dominant position in that operational area.

121. As regards the relevant geographical market, namely the *Land* of Rheinland-Pfalz, it appears from the file that the DRK is the medical aid organisation which is entrusted with the public ambulance service in by far the greater part of the Land. The other three medical aid organisations seem to operate on a much smaller scale and there are apparently only two independent providers. It thus seems that the DRK holds in the *Land* of Rheinland-Pfalz a dominant position on the markets both for emergency transport and for non-emergency transport.

122. In the final analysis the question of dominance will also have to be resolved by the referring court. If that court were to find that the DRK alone is not in a

dominant position it would have to examine the hypothesis of a collective dominant position held by the recognised medical aid organisations.

123. For the purposes of the Opinion I will assume that the DRK holds a dominant position in Rheinland-Pfalz.

— The relevant market as a substantial part of the common market

124. Ambulanz Glöckner claims that the relevant geographical market, namely Rheinland-Pfalz, constitutes a substantial part of the common market within the meaning of Article 82 EC. It relies, first, on *Merci Convenzionali Porto di Genova*, where the Court held that the Port of Genoa constituted a substantial part of the common market [58] and, secondly, on *Centre d'insémination de la Crespelle*, where the Court held that by establishing a contiguous series of monopolies territorially limited but together covering the entire territory of a Member State, the national provisions in question created a dominant position in a substantial part of the common market. [59]

125. The Landkreis and the ASB contend that there is no dominant position over a 'substantial part of the common market'. That criterion is in their view intended to exclude from the scope of Community competition law undertakings in a dominant position on local or small regional markets since their dominance does not threaten effective competition in the common market. The medical aid organisations in issue do therefore not fall within Article 82 EC.

126. In *Suiker Unie* the Court established the following basic test:

'For the purpose of determining whether a specific territory is large enough to amount to "a substantial part of the common market" within the meaning of Article [82 EC] the pattern and volume of the production and consumption of the said product as well as the habits and economic opportunities of vendors and purchasers must be considered.' [60]

58 — Case C-179/90 [1991] ECR I-5889, paragraph 15 of the judgment.

59 — Case C-323/93 [1994] ECR I-5077, paragraph 17 of the judgment.

60 — Joined Cases 40/73 etc. *Suiker Unie and Others* v *Commission* [1975] ECR 1663, paragraph 371 of the judgment.

127. That test emphasises the economic importance of a given territory. In some cases the Court has considered even geographically small areas to be a substantial part of the common market. The decisive element in those cases was the particular economic importance of the area in question. In *Merci Convenzionali Porto di Genova* for example the Court relied on the volume of traffic in the Port of Genoa and that port's importance in relation to maritime import and export operations as a whole in the Member State concerned. [61] That reasoning cannot in my view be transposed to the present case. Ambulance services in Rheinland-Pfalz are neither particularly important nor particularly unimportant for the German economy.

128. I consider none the less that the *Land* of Rheinland-Pfalz must be regarded as a substantial part of the common market. In the absence of particular economic characteristics of a given area, geographical factors become more significant.

129. Rheinland-Pfalz covers a territory of almost 20 000 km^2 and has around four million inhabitants. [62] It is thus larger or has more inhabitants than some Member States.

130. The Court has already held that the 'southern part of Germany' and thus an area falling short of the territory of a Member State could constitute 'a substantial part of the common market'. [63] A similar statement can be found in *Bodson* where the group of undertakings controlled by Pompes funèbres générales held an exclusive concession in less than 10% of communes in France, the population of which accounted however for more than one third of the total population. The Court ruled in that case which presents many features similar to the present one:

'Article [82 EC] applies in a case in which a number of communal monopolies are granted to a single group of undertakings whose market strategy is determined by the parent company, in a situation in which those monopolies cover *a certain part of the national territory* ...' (emphasis added). [64]

131. Advocate General Warner indicated in another case that one who had a monopoly

61 — Paragraph 15 of the judgment; see also Case C-242/95 *GT-Link* [1997] ECR I-4449, paragraph 37 and Case C-209/98 *Sydhavnens Sten & Grus* [2000] ECR I-3743, paragraph 64.

62 — See for further information the internet site www.rheinland-pfalz.de.

63 — See *Suiker Unie*, cited in note 60, paragraphs 441 to 451 of the judgment.

64 — Case 30/87, cited in note 41, paragraph 35 of the judgment.

or near monopoly of the Luxembourg market for a particular product should also be subject to Article 82 EC. [65]

132. Furthermore, I consider that the reasoning of *la Crespelle* is of some assistance.

133. It is true that in *la Crespelle* the regional monopolies covered the entire territory of a Member State whilst in the present case the legal regime in issue covers only the territory of the *Land* of Rheinland-Pfalz (even if Ambulanz Glöckner claims that the situation is essentially the same throughout Germany). It is also true that in *la Crespelle* the monopolies were clearly conferred by national legislation. In the present case Paragraph 18(3) of the RettDG 1991 protects the undertakings entrusted with the public ambulance service only indirectly.

134. There is however another difference between the two cases which pleads in favour of applying Article 82 in the present case. It appears that in *la Crespelle* the regional monopolies in issue were held by different economic actors. On a national scale each of those actors was consequently relatively small. In the present case the DRK appears to be entrusted in most areas of Rheinland-Pfalz with the public ambulance service. If we accept the referring court's interpretation of Paragraph 18(3) of the RettDG there is thus a series of contiguous monopolies which are mostly held by *one* medical aid organisation. Contrary to what was stated by the Landkreis and the ASB, the medical aid organisation in issue therefore does not appear to be a minor actor active only on a local or small regional scale.

135. The above survey of the case-law suggests that there is no single formula for establishing whether a dominant position exists 'in a substantial part of the common market'. It also shows why there is no such single formula: the range of possible cases is too diverse, and each case must therefore be analysed on its own facts. However, the survey also leads to the conclusion that, if the dominant position in the present case extends to the whole of the Rheinland-Pfalz (and of course *a fortiori* if it should be found that the situation is replicated across the whole of Germany), then the dominant position exists in a substantial part of the common market.

136. Accordingly, I will assume the following: the relevant markets are the markets for emergency and for patient transport in Rheinland-Pfalz. The DRK is dominant on

65 — See his Opinion in Case 77/77 *BP* v *Commission* [1978] ECR 1513, at p. 1537.

both product markets. That dominant position exists in a substantial part of the common market.

(b) Paragraph 18(3) of the RettDG 1991 and potential abuses of a dominant position

137. Ambulanz Glöckner argues essentially that the provision at issue is contrary to Article 86(1) EC in that it leads to two types of infringements of Article 82 EC. In its view, the disputed provision favours a situation in which the medical aid organisations are unable to satisfy consumer demand for qualified ambulance services at acceptable prices [66] and empowers the public authorities and the medical aid organisations jointly to limit access of competing operators to the market.

138. The other side argues essentially that the mere creation of a dominant position is not caught by Articles 86(1) and 82 EC and that the medical aid organisations have always provided satisfactory services at acceptable prices.

66 — *Höfner and Elser*, cited in note 28.

139. The Court has held that the mere creation of a dominant position by the granting of exclusive rights within the meaning of Article 86(1) EC is not as such contrary to the Treaty. [67] But it has also held that even though Article 86(1) presupposes the existence of undertakings which have certain special or exclusive rights, it does not follow that all the special or exclusive rights are necessarily compatible with the Treaty; that depends on different rules, to which Article 86(1) refers. [68]

140. Recently the Court has restated its position on that issue as follows:

'[T]he mere creation of a dominant position through the grant of exclusive rights within the meaning of Article [86(1) EC] is not in itself incompatible with Article [82 EC]. A Member State will be in breach of the prohibitions laid down by those two provisions only if the undertaking in question, merely by exercising the exclusive rights granted to it, is led to abuse its dominant position or where such rights are liable to create a situation in which that undertaking is led to commit such abuses ...' [69]

67 — *La Crespelle*, cited in note 59, paragraph 18 of the judgment.

68 — *France* v *Commission*, cited in note 44, paragraph 22 of the judgment.

69 — *Pavlov*, cited in note 31, paragraph 127 of the judgment.

141. I will examine, first, whether Paragraph 18(3) of the RettDG 1991 creates a situation in which the medical aid organisations are manifestly not in a position to satisfy demand and, secondly, whether it creates a conflict of interest in which the medical aid organisations are led to abuse their dominant position by limiting the access of independent operators to the market.

— Situation in which dominant undertakings are manifestly not in a position to satisfy demand

142. It follows from *Höfner*[70] that a Member State's decision to grant special or exclusive rights is contrary to the Treaty where the undertaking concerned is manifestly not in a position to satisfy demand and therefore cannot avoid abusing its dominant position by constantly 'limiting production, markets or technical development to the prejudice of consumers' (Article 82(b) EC).

143. The parties strongly disagree on whether that is the case in the present proceedings.

144. Ambulanz Glöckner contends in substance that

— as regards emergency transport, the medical aid organisations were not always able to respect the arrival times prescribed by the RettDG;[71]

— as regards non-emergency patient transport, delays of between one hour and two and a half hours occur which means for example that technical installations in hospitals waiting for patients are used inefficiently;

— the medical aid organisations charge for their services disproportionately high user charges which are the result of mismanagement, the absence of competitive pressure and the guarantee that ultimately all losses will be covered by the State;[72] that is confirmed by the fact that services of independent

70 — Case C-41/90, cited in note 28.

71 — Ambulanz Glockner has submitted to the Court several press reports about delays of emergency transport services in some areas of Rheinland-Pfalz; in one case a person apparently died as a consequence of such a delay.

72 — Ambulanz Glockner has submitted to the Court a reply of a secretary of state in the federal ministry of health to a written question put by a member of the federal parliament. She states that the public ambulance service which falls within the exclusive competence of the Länder suffers from inefficiency which is inherent in the system. The reasons are in her view in particular the monopolistic structures of supply, the principle of full cost coverage and the limited influence of the health insurance sector on user charges.

and thus profit-oriented operators are much less expensive;

— since the introduction of rules such as Paragraph 18(3) of the RettDG 1991 the costs of the public ambulance service in Germany have risen disproportionately; the costs of patient transport in Germany rose from DEM 1.76 billion in 1991 to DEM 3.14 billion in 1997 (increase of 78.41%) and the costs in Rheinland-Pfalz rose from DEM 86 million in 1992 to DEM 128 million in 1999 (increase of 49.75%). [73]

145. The Landkreis, the Vertreter des öffentlichen Interesses and the ASB contend by contrast that

— as regards emergency transport, the medical aid organisations have respected the prescribed arrival times in more than 90% of the cases; isolated cases of delay will always happen and do not as such prove a 'system failure';

— as regards delays in the field of non-emergency transport, Ambulanz Glöckner has not presented any evidence for its contention;

— the higher user charges of the public ambulance services can be explained by the costs of providing services 24 hours a day and throughout the territory of the *Land;* if for social reasons user charges are uniform throughout the *Land* then they will necessarily be higher than the remuneration requested by private undertakings which provide their lucrative services only in densely populated areas during peak times;

— the increase in the costs of patient transport in Germany and in Rheinland-Pfalz is mainly the result of structural improvements in the public ambulance service over the last 10 years: in Rheinland-Pfalz nine additional ambulance stations have been created, the requirements as regards the qualifications of ambulance personnel have been raised and a system of emergency doctors has been set up. Moreover the statistics provided by Ambulanz Glöckner include the costs of conveyance of patients not in need of help in vehicles other than ambulances, which contributed disproportionately to the increase in question.

73 — Ambulanz Glöckner has submitted several sets of statistics to the Court.

146. In my view the Court is not in a position to decide who is right on that issue. To decide whether the DRK or other medical aid organisations are unable to satisfy demand requires difficult economic and factual assessments. In a preliminary reference procedure those assessments are for the referring court.

147. In making those assessments the national courts should in my view take into account the following factors. [74]

148. First, the national courts must bear in mind the respective responsibilities of the national legislature and of the medical aid organisations within Articles 86(1) and 82 EC. A Member State is liable under Article 86(1) only where there is a failure in the system which it has set up, that is to say where an abuse is the consequence of its regulatory or decisional intervention, whereas undertakings enjoying special or exclusive rights are alone responsible for any infringement of the competition rules attributable exclusively to them. Articles 86(1) and 82 will therefore not be infringed where the only reason that a medical aid organisation is 'manifestly not able to satisfy demand' is inefficient management.

149. Secondly, because the granting of special or exclusive rights involves difficult economic assessments and social choices, the Member States must enjoy a certain discretion in deciding whether a monopolist will or will not be able to satisfy demand. The Court has therefore limited its review, and that of the referring court, to national provisions which are *manifestly* inappropriate.

150. Thirdly, rapid and high quality ambulance services are — as the representative of the Landkreis rightly explained — a question of life and death and therefore of paramount importance for society as a whole.

151. The referring court should therefore analyse primarily whether authorisations for independent operators may contribute to shorter arrival times and to generally higher quality services, or whether on the contrary even without such authorisations the public ambulance service is perfectly able to provide the necessary services in all situations and at all times of the day. The decisive factor should in my view be the ability of the public ambulance service to provide rapid and high quality services even

74 — See, for a similar situation, my Opinion in *Albany*, cited in note 32, paragraphs 412 to 414.

at peak hours. If the capacities of the public ambulance service are insufficient at those times (e.g. regular delays of non-emergency transport in towns), I would find it unacceptable systematically to refuse authorisations to independent operators.

152. I consider that the referring court may however attach less importance to the allegedly excessive prices of the public ambulance services. To assess whether prices are excessive is always a difficult exercise and such a finding has rarely, if ever, been made by the Court or the Commission under the competition rules. Price comparisons are also difficult because the public ambulance service with its special obligations has a different cost structure from private undertakings focusing on particularly profitable geographical areas.

153. I conclude therefore that it is for the national court to establish whether Paragraph 18(3) of the RettDG 1991 creates a situation in which the medical aid organisations are manifestly not in a position to satisfy demand. That court should attach particular importance to the capacity of the medical aid organisations to provide rapid and high quality services at peak hours.

— Creation of a conflict of interest

154. Ambulanz Glöckner refers to the judgment in *Raso*[75] and contends that Paragraph 18(3) of the RettDG 1991 creates a conflict of interest in that the medical aid organisations and the public authorities are together enabled to limit the access of their potential competitors to the market. In its view the medical aid organisations and the authorities should not be allowed to take part in the decision-making as regards authorisations for the provision of independent ambulance services.

155. It is settled case-law that Articles 86(1) and 82 EC may be infringed where a State measure creates a conflict of interests between two commercial activities of an undertaking with special or exclusive rights[76] or between a regulatory mission entrusted to such an undertaking and its economic interests.[77]

156. In the present case Ambulanz Glöckner appears to complain more about the second type of conflict of interests, namely a conflict between regulatory powers and economic interests.

75 — Case C-163/96 [1998] ECR I-533.

76 — Case C-260/89 *ERT* [1991] ECR I-2925; *Raso*, cited in note 75.

77 — See, for example, *France* v *Commission*, cited in note 44, paragraph 51 of the judgment; *GB-INNO-BM*, cited in note 44, paragraph 26 of the judgment; Case C-91/94 *Tranchant* [1995] ECR I-3911, paragraph 19 of the judgment.

157. In that regard it will be recalled that the defendant Landkreis consulted the medical aid organisations entrusted with the public ambulance service in the operational area of Pirmasens before taking its decision to refuse the authorisation. We also know that both medical aid organisations had recommended that refusal.

158. That way of proceeding is in my view not prohibited by Articles 86(1) and 82 EC.

159. In the first place, as I have already stated, the national authorities do not act as undertakings when they grant or refuse authorisations. They act only in the exercise of public authority without an economic interest in the outcome of the procedure. They thus fall outside the scope of Articles 86(1) and 82 EC.

160. As regards the medical aid organisations, it is true that they fall within the scope of those Articles and that they have an economic interest in the outcome of the authorisation procedure. But they have a right only to be consulted in the course of the authorisation procedure and the final decision is taken by the public authorities alone. It has not been suggested that the Landkreis is bound by the factual statements or the recommendations of the medical aid organisations. The medical aid organisations are thus not entrusted with regulatory powers within the meaning of the Court's case-law.

161. Moreover, it appears from the RettDG 1991 that the Landkreis enjoys no discretion as regards its decision, but must grant the authorisation, if the ambulance operator concerned fulfils the legal requirements. The main proceedings show that a refusal is then subject to full judicial review. Those are two important further safeguards against biased decisions.

162. I conclude therefore that the mere consultation of the medical aid organisations entrusted with the public ambulance service in the course of the procedure for authorisation of independent ambulance services is not contrary to Articles 86(1) and 82 EC.

(c) Effect on trade between Member States

163. The Landkreis, the ASB, the Vertreter des öffentlichen Interesses and the Austrian Government all maintain that the measure in question does not have appreciable effects on trade between Member States and that therefore the Community competition rules do not apply. In their view, all the elements of the present case are con-

fined not only within a single Member State, but within a territory which is only a part of a Member State. Emergency transport is by definition a locally confined activity, since the patient must be transported as rapidly as possible to the nearest suitable hospital. Cross-border ambulance services take place rarely and are not affected by the provision in issue.

164. Under the Treaty, for Articles 86(1) and 82 EC to apply either the effects of the abuse or the effects of the State measure must be liable to affect trade between Member States. [78]

165. The Court has held in that regard:

'The interpretation and application of the conditions relating to effects on trade between Member States contained in Articles [81] and [82 EC] must be based on the purpose of that condition which is to define, in the context of the law governing competition, the boundary between the areas respectively covered by Community law and the law of the Member States. Thus Community law covers any agreement or any practice which is capable of constituting a threat to freedom of trade between Member States in a manner which might harm the attainment of the objectives of a single market between the Member States, in particular by partitioning the national markets or by affecting the structure of competition within the common market ...' [79]

166. The Court has also explained that it is not necessary to prove an actual effect; a potential effect is sufficient. [80] On the other hand the effect in issue must be 'appreciable' and not just insignificant. [81]

167. It follows also from the case-law that an undertaking may invoke Articles 86 and 82(1) EC against its own State in proceedings which do not involve a concrete cross-border element in its own situation. [82] Perhaps the best example in that respect is *Höfner* in which the Court did not apply the rules on freedom to provide services because the activities at issue in the main proceedings were confined in all respects to one Member State. [83] It did however apply the competition rules since the national provisions at issue potentially affected recruitment of nationals of other Member States. [84]

78 — See, in that sense, *Bodson*, cited in note 41, paragraph 25 of the judgment.

79 — Case 22/78 *Hugin* v *Commission* [1979] ECR 1869, paragraph 17 of the judgment.

80 — *Höfner and Elser*, cited in note 28, paragraph 32 of the judgment.

81 — See, in the context of Article 85 of the EC Treaty (now Article 81 EC), Case C-306/96 *Javico* v *YSLP* [1998] ECR I-1983, paragraph 16 of the judgment.

82 — See for example the facts in Case C-320/91 *Corbeau* [1993] ECR I-2533.

83 — *Höfner and Elser*, cited in note 28, paragraphs 37 to 40 of the judgment.

84 — Ibidem, paragraphs 32 and 33 of the judgment.

168. The Commission — which maintains a neutral position on this issue — states in support of the applicability of Community competition law that the proximity of Rheinland-Pfalz to Belgium, France and Luxembourg makes cross-border transports more likely. It also mentions three situations in which patient transport might be provided over longer distances and across State borders, namely where a patient wishes to be transported for a particular operation to a specialised hospital situated in another Member State, where a migrant worker wishes to be treated in his home country, or in the case of holiday injuries (e.g. skiing accidents).

169. I consider that if the rules at issue were to be interpreted as prohibiting those types of cross-border service then they would indeed have to be regarded as affecting trade in services between Member States.

170. However, if I understand the provision at issue correctly, occasional cross-border transports of patients do not seem to fall within its scope. Paragraph 18(3) of the RettDG 1991 seems to be mainly an obstacle for operators who wish to provide ambulance services in Rheinland-Pfalz on a more permanent basis. It is a rule which renders the access of operators from other Member States to the market in Rheinland-Pfalz more difficult.

171. Does such a rule affect trade between Member States? It might seem at first sight unlikely that ambulance operators from other Member States would ask for authorisations to operate their ambulances in Rheinland-Pfalz. Effects on trade would thus not be appreciable within the meaning of the Court's case-law.

172. Ambulanz Glöckner stated however at the hearing that one operator established in Luxembourg and two operators established in France had already tried to obtain authorisations to provide ambulance services in Rheinland-Pfalz and that those authorisations were refused on the basis of the RettDG 1991. It also stated that operators established in other Member States had lodged complaints with the Commission against the restrictive authorisation systems in place in Rheinland-Pfalz and other parts of Germany.

173. It will be for the referring court to verify whether those statements are correct. It will then also be for the referring court — taking into account the results of its verification — to determine whether in view of the economic characteristics of the two product markets for ambulance services in Rheinland-Pfalz there is a sufficient degree of likelihood that a rule such as Paragraph 18(3) of the RettDG 1991 prevents operators established in other

Member States from either operating ambulances [85] or even establishing themselves [86] in Rheinland-Pfalz.

VIII — Justification under Article 86(2) EC

174. The Landkreis, the ASB, the Vertreter des öffentlichen Interesses and the Austrian Government argue that a rule such as Paragraph 18(3) of the RettDG 1991, even if there were a *prima facie* infringement of Articles 86(1) and 82 EC, would be in any event justified under Article 86(2) EC.

175. In my view there can be no doubt that the medical aid organisations are entrusted with the operation of a service of general economic interest within the meaning of Article 86(2) EC. Services of general economic interest have a special importance in the Community, as is now emphasised by Article 16 EC (formerly Article 7d, introduced by the Treaty of Amsterdam). There is an obvious and strong public interest that every citizen should have access to efficient and high-quality emergency transport and non-emergency patient transport services. The only issue is therefore whether a rule such as Paragraph 18(3) of the RettDG 1991 is necessary to protect the 'performance, in law or in fact, of the particular tasks assigned' to the medical aid organisations.

176. The Landkreis, the ASB and the Vertreter des öffentlichen Interesses argue, first, that the presence of independent operators on the markets for emergency and non-emergency patient transport might cause confusion for accident victims and patients, with potentially fatal consequences. In particular in emergency situations persons who wish to alert emergency ambulances must not be confronted with a confusing choice between several ambulance service providers.

177. I am not convinced by that argument. It is obviously necessary to prevent such dangerous instances of confusion. However, it seems likely that there will not be many cases of conflict because independent operators will normally prefer to provide non-emergency transport services. In any event it should be feasible to coordinate the services provided by independent providers with those of the public ambulance service in a way which excludes confusion in the mind of the public. An important role might be played for example by the central control unit in each area which will have to distribute work in a non-discriminatory way, and which would be reached by a single telephone call.

85 — *Bodson*, cited in note 41, paragraph 25 of the judgment.

86 — See for obstacles to freedom of establishment in the context of the competition rules Case 161/84 *Pronuptia* [1986] ECR 353, paragraph 26 of the judgment.

178. The Landkreis, the ASB, the Vertreter des öffentlichen Interesses and the Austrian Government argue, secondly, that some measure of protection of the public ambulance service against competition from independent operators is necessary for the following economic reasons.

179. The presence of independent operators on the market reduces the revenue of the public ambulance service. Since there is only a finite number of transports to be provided, more transports provided by independent operators will entail a corresponding reduction of transports effectuated by the public ambulance service.

180. It is moreover to be expected that independent profit-oriented operators will prefer to provide their services mainly in densely populated areas where distances are short. It is also to be expected that they will prefer to operate mainly on the market of non-emergency transport. That is because emergency transport requires costly investments in equipment and qualified personnel and cost-efficient planning is difficult. Private operators therefore concentrate their activities on non-emergency transport in densely populated areas and thus engage in a form of 'cherry-picking'.

181. The resulting reduction of revenue of the public ambulance service — which is left with non-emergency transport in remote areas and emergency transport — is not compensated for by a corresponding reduction of its costs. That is because the public ambulance service has a legal obligation to provide its services 24 hours a day and throughout the entire territory. The major part of its costs are fixed standby costs (Vorhaltekosten) which arise independently of whether concrete services are actually provided.

182. It must also be borne in mind that losses of the public ambulance service are not only losses for the medical aid organisations, but will generate costs for society as whole. The public ambulance service is financed ultimately either through taxes or through health insurance costs. In the words of the Austrian Government there is thus a serious risk that the inevitable losses of the public ambulance service are socialised, whilst its potential profits are privatised.

183. Subject to one important reservation, I find those arguments convincing.

184. Article 86(2) seeks to reconcile the Member States' interest in using certain

undertakings as an instrument of economic or social policy with the Community's interest in ensuring compliance with the rules on competition and the internal market. [87]

185. Since it is a provision permitting derogation from the Treaty rules, it must be interpreted strictly. [88] However, when Member States define the services of general economic interest which they entrust to certain undertakings, they cannot be precluded from taking account of national policy objectives. In that regard it must also be borne in mind that Member States retain competence to organise their public health systems.

186. The Court has also established that for the exception in Article 86(2) EC to apply it is not necessary that the survival of the undertakings entrusted with the service of general interest should be threatened. It is sufficient that, in the absence of the special or exclusive rights at issue, it would not be possible for the undertakings concerned to perform the particular tasks entrusted to them [89] or that the maintenance of those rights is necessary to enable the undertakings concerned to perform their tasks under economically acceptable conditions. [90]

187. It follows in my view from that case-law that a Member State is in principle entitled to reserve both emergency and non-emergency transport to the undertakings which provide the public ambulance service. It is true that such a system will involve cross-subsidisation, which in some circumstances might need scrutiny under the competition rules. Indeed two types of cross-subsidisation are involved here: revenues from densely populated areas contribute to the costs of providing ambulance services to patients from remote areas, and revenues from non-emergency transport contribute to the costs of providing emergency transport. I accept however that the system in issue may help to ensure that the public ambulance service works in acceptable economic conditions. Moreover that type of cross-subsidisation is not as dangerous for competition as transfers of resources from a lucrative reserved sector to a sector under competition (that danger exists for example in the postal sector). [91]

188. I have however one important reservation. If authorisations for independent providers are refused even though medical aid organisations entrusted with the public ambulance service are manifestly unable to satisfy demand (for example at peak hours) [92] the economic reasons which I

87 — Case C-157/94 *Commission* v *Netherlands* [1997] ECR I-5699, paragraph 39 of the judgment.

88 — Ibidem, paragraph 37 of the judgment.

89 — Ibidem, paragraph 52 of the judgment.

90 — *Corbeau*, cited in note 82, paragraphs 14 to 16 of the judgment.

91 — See the useful contribution of L. Hancher and J-L. Buendia-Sierra, 'Cross-subsidisation and EC Law', *Common Market Law Review*, 1998, p. 901.

92 — See paragraph 151 above.

have just discussed cannot in my view be invoked to justify a restrictive authorisation policy. In those situations a refusal to grant authorisations to independent operators might be financially advantageous for the medical aid organisations involved. That economic advantage would however be gained at the expense of the main objective of the national legislation at issue, namely to provide the population with efficient and high quality ambulance services. It would also be contrary to the objective of Article 86(2) EC which is the efficient provision of services of general economic interest.

189. I accordingly conclude that a provision such as Paragraph 18(3) of the RettDG 1991 is justified under Article 86(2) EC, in so far as it does not preclude authorisations for independent operators where the medical aid organisations operating the public ambulance service are manifestly not in a position to satisfy demand.

IX — Conclusion

190. For the above reasons the question referred should in my view be answered as follows:

On the assumption that the referring court finds that the DRK alone or several medical aid organisations collectively occupy a dominant position on the markets for emergency transport services and patient transport services in Rheinland-Pfalz, a rule under which private operators of ambulance services are to be refused authorisation to provide independent ambulance services where the grant

of such an authorisation is likely to have adverse effects on the operation or the profitability of the public ambulance service infringes Article 86(1) EC read in conjunction with Article 82 EC and is not justified under Article 86(2) EC where

— that rule is liable to create a situation in which the medical aid organisation(s) entrusted with the public ambulance service are manifestly not in a position to satisfy demand in particular for rapid and high-quality patient transport services at peak hours, and

— in view of the economic characteristics of the markets in question there is a sufficient degree of likelihood that that rule prevents operators established in other Member States from operating ambulances or establishing themselves in Rheinland-Pfalz.