# JUDGMENT OF THE COURT (Fifth Chamber)

25 October 2001 *

In Case C-475/99,

REFERENCE to the Court under Article 234 EC) by the Oberverwaltungsgericht Rheinland-Pfalz (Germany) for a preliminary ruling in the proceedings pending before that court between

**Ambulanz Glöckner**

and

**Landkreis Südwestpfalz,**

joined parties:

**Arbeiter-Samariter-Bund Landesverband Rheinland-Pfalz eV,**

**Deutsches Rotes Kreuz Landesverband Rheinland-Pfalz eV,**

**and**

**Vertreter des öffentlichen Interesses, Mainz,**

* Language of the case: German.

on the interpretation of Articles 85, 86 and 90 of the EC Treaty (now Articles 81 EC, 82 EC and 86 EC),

THE COURT (Fifth Chamber),

composed of: A. La Pergola, President of the Chamber, M. Wathelet (Rapporteur), D.A.O. Edward, S. von Bahr and C.W.A. Timmermans, Judges,

Advocate General: F.G. Jacobs,
Registrar: H.A. Rühl, Principal Administrator,

after considering the written observations submitted on behalf of:

— Ambulanz Glöckner, by R. Steiling and C. Bittner, Rechtsanwälte,

— Landkreis Südwestpfalz, by R. Spies, acting as Agent,

— Arbeiter-Samariter-Bund Landesverband Rheinland-Pfalz eV, by O. Fechner, Landesvorsitzender, and H. Gauf, Stellvertretender Landesvorsitzender,

— Vertreter des öffentlichen Interesses, Mainz, by W. Demmerle, acting as Agent,

— the Austrian Government, by C. Pesendorfer, acting as Agent,

— the Commission of the European Communities, by M. Erhardt and K. Wiedner, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations of Ambulanz Glöckner, represented by R. Steiling and C. Bittner; of the Landkreis Südwestpfalz, represented by R. Spies; of the Arbeiter-Samariter-Bund Landesverband Rheinland-Pfalz eV, represented by H. Gauf and S. Rheinheimer, Landesgeschäftsführer; of the Vertreter des öffentlichen Interesses, Mainz, represented by H.-P. Hennes, acting as Agent; and of the Commission, represented by M. Erhardt at the hearing on 22 February 2001,

after hearing the Opinion of the Advocate General at the sitting on 17 May 2001,

gives the following

## Judgment

1 By order of 8 December 1999, received at the Court Registry on 15 December 1999, the Oberverwaltungsgericht Rheinland-Pfalz (Rhineland-Palatinate Higher Administrative Court) referred to the Court for a preliminary ruling under Article 234 EC a question on the interpretation of Articles 85, 86 and 90 of the EC Treaty (now Articles 81 EC, 82 EC and 86 EC).

2 The question has been raised in proceedings between Ambulanz Glöckner, a private undertaking established in Pirmasens (Germany) and the administrative district Landkreis Südwestpfalz (hereinafter 'the Landkreis') concerning its refusal to renew authorisation for the provision of ambulance transport services.

## Relevant legal provisions

3 In Germany, the public ambulance service is governed by laws adopted at the level of the *Länder*. In the *Land* of Rheinland-Pfalz, the Rettungsdienstgesetz (Law on the public ambulance service), in its version of 22 April 1991 (hereinafter 'the RettDG 1991'), distinguishes between two types of ambulance services: emergency transport (Notfalltransport) and patient transport (Krankentransport). *Emergency transport* consists of the conveyance, with provision of appropriate medical care, of persons with life-threatening injuries or conditions by means of patient transport ambulance (Krankentransportwagen) or emergency ambulance (Rettungswagen). *Patient transport* consists of the conveyance of persons who are ill, or injured or otherwise in need of help but who are not emergency patients: they are conveyed, with appropriate medical care, by Krankentransportwagen.

4 Responsibility for the public ambulance service lies in principle with the *Land*, the administrative districts of the each *Land* ('Landkreise') and the towns which are administrative districts in their own right ('Kreisfreie Städte'). However, according to Paragraph 5(1) of the RettDG 1991, the competent authority may assign the operation of the public ambulance service to 'recognised medical aid organisations' (hereinafter 'the medical aid organisations'), which are non-profit-making, whilst exercising supervision, by giving directions and bearing the costs, if and in so far as those organisations are able and willing to ensure constant provision of the public ambulance service. Under Paragraph 5(3), that service may be assigned to other operators only if the medical aid organisations unwilling or unable to operate it.

5 In the *Land* of Rhineland-Palatinate, the competent districts and towns, with the exception of the town of Trier where the town fire brigade operates the service, have assigned the public ambulance service to four medical aid organisations: the Arbeiter-Samariter-Bund Landesverband Rheinland-Pfalz eV (Workers Samaritans' Federation of the *Land* of Rhineland-Palatinate, hereinafter 'the ASB'), the Deutsches Rotes Kreuz Landesverband Rheinland-Pfalz eV (German Red Cross of the *Land* of Rhineland-Palatinate, hereinafter 'the DRK'), the Johanniter-Unfall-Hilfe (St. John's Accident Assistance) and the Malteser-Hilfsdienst (Maltese Aid Service).

6 Until 1989, the Personenbeförderungsgesetz (Law on the conveyance of persons), a federal law applicable throughout the Federal Republic of Germany, covered the sector of ambulance services, which was regarded as a mode of conveyance of persons by hired vehicle. In order to engage in that occupation, providers of ambulance services needed an authorisation, the grant of which 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. This means that medical aid organisations, responsible for providing the public ambulance service, which must be available throughout the territory concerned 24 hours a day, coexisted with private independent operators, who were mainly engaged in non-emergency transport of patients during day-time.

7 In 1989, the Personenbeförderungsgesetz was amended in such a way as to remove the ambulance services from its scope. The RettDG 1991 now governs not only the emergency public ambulance service but also the provision of ambulance services in general. Under Paragraph 18(1) of the RettDG 1991, as under the old federal legislation, the issue of authorisation to provide patient

transport services remains subject to conditions relating to the efficiency and safety of the operation and to assurances as to the reliability and professional qualifications of the operator. Paragraph 18(3) of the RettDG 91 also provides:

'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 ... . 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 changes in the expenditure and revenue situation ...'.

8 The national court interprets that provision as granting the medical aid organisations a *de facto* monopoly on the market for emergency and patient transport services, since the assessment which it requires, to determine whether or not there is full utilisation of the capacities available to the medical aid organisations, always results in practice in the rejection of new applications, owing to the extent of the aid and rescue resources kept available by those organisations. Proper fulfilment of a task consisting in providing an emergency medical service throughout the relevant territory, 24 hours a day, requires the maintenance of aid and rescue resources sufficient to cope with emergencies and catastrophes. Since full utilisation of capacities is not therefore conceivable, it would not be useful or necessary to authorise independent operators to provide ambulance services since that would reduce utilisation of the public ambulance service and negatively affect its expenditure and revenues.

9 The Landkreis and the ASB consider that Paragraph 18(3) of the RettDG 1991 lends itself to a different interpretation, to the effect that it precludes the grant of authorisations to independent operators only where this is likely to have considerable adverse effects on the public ambulance service.

10 It is to be remembered in this regard that it is not for the Court of Justice to rule on the interpretation of provisions of national law but that it must take account, under the division of jurisdiction between the Community courts and the national courts, of the factual and legislative context, as described in the order for reference, in which the question put to it is set.

## The main proceedings

11 In 1990, thus before entry into force of the RettDG 1991 and still under the previous federal legislation, Ambulanz Glöckner was granted an authorisation to provide patient transport services which was due to expire in October 1994.

12 In July 1994, it applied for a renewal of its authorisation to the Landkreis, which then invited the two medical aid organisations entrusted with the public ambulance service in the Pirmasens area, namely the ASB and the DRK, to express their views on the effects which the requested authorisation could have.

13 Both organisations informed the Landkreis that their own emergency assistance facilities in the area were not being fully exploited and were operating at a loss, so that the addition of a new operator would require them either to increase user charges or to reduce their services. Consequently, the Landkreis refused the renewal of the authorisation for Ambulanz Glöckner on the basis of Paragraph 18(3) of the RettDG 1991, stating that in 1993 in the relevant area the public ambulance service had operated at only 26% of its capacity.

14 After lodging an unsuccessful objection against that decision, Ambulanz Glöckner brought an action before the Verwaltungsgericht (Administrative Court) Neustadt, which, by judgment of 28 January 1998, ordered the Landkreis to issue the authorisation applied for. That court held essentially that Paragraph 18(3) of the RettDG 1991 had to be interpreted to the effect that the legislature of the *Land* sought in principle to enable private operators to be authorised to provide ambulance transport services in parallel with the public ambulance service, even if that involved increases in costs. Since Ambulanz Glöckner had operated ambulance services for more than seven years, it was clear, according to the national court, that its activity was not prejudicial to the operation or existence of the public ambulance service.

15 The Landkreis lodged an appeal against that judgment before the Oberverwaltungsgericht Rheinland-Pfalz.

16 In its order for reference, that court inquires whether the conditions laid down in Article 90(1) of the Treaty for the grant to undertakings of special or exclusive rights are fulfilled. It states that the medical aid organisations must be regarded as undertakings which hold exclusive or special rights within the meaning of that provision, by reason of the task of providing an emergency ambulance service conferred on them. The additional allocation of the market in ambulance services, in 1991, also constitutes a 'measure' within the meaning of Article 90(1). However, according to the national court, reasons related to the pursuit of a task of general economic interest, within the meaning of Article 90(2) of the Treaty, do not justify exclusion of competition for ambulance services. That view stems from the fact that those services were governed by free competition until 30 June 1991, without any problems arising for the public with regard to provision of such services.

17 In view of that situation, the national court decided to stay proceedings and to refer the following question to the Court of Justice 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 Articles 81 and 82 EC?'

*Applicability of Article 90(1) of the Treaty (now Article 86(1) EC)*

18 It must be determined, before the above question is examined, whether Article 90(1) of the Treaty is applicable to medical aid organisations, such as those involved in the present case, to which the competent public authorities have delegated the task of providing the public ambulance service, having regard to the special protection afforded to them by Paragraph 18(3) of the RettDG 1991. In other words, it must be established (i) whether those medical aid organisations constitute undertakings and (ii) whether they hold special or exclusive rights.

19 As regards the first of those points, the concept of an undertaking, in the context of competition law, covers any entity engaged in an economic activity, regardless of the legal status of the entity or the way in which it is financed (Joined Cases C-180/98 to C-184/98 *Pavlov and Others* [2000] ECR I-6451, paragraph 74). Any activity consisting in offering goods and services on a given market is an economic activity (*Pavlov and Others*, paragraph 75).

20 In the present case, the medical aid organisations provide services, for remuneration from users, on the market for emergency transport services and patient transport services. Such activities have not always been, and are not necessarily, carried on by such organisations or by public authorities. According to the documents before the Court, in the past Ambulanz Glöckner has itself provided both types of service. The provision of such services therefore constitutes an economic activity for the purposes of the application of the competition rules laid down by the Treaty.

21 Public service obligations may, of course, render the services provided by a given medical aid organisation less competitive than comparable services rendered by other operators not bound by such obligations, but that fact cannot prevent the activities in question from being regarded as economic activities.

22 As regards the provision of emergency transport services and patient transport services, entities such as the medical aid organisations must therefore be treated as undertakings within the meaning of the competition rules laid down by the Treaty.

23 As regards the second point, it should be observed that, under Paragraph 18(3) of the RettDG 1991, the authorisation needed to provide ambulance transport services may be refused by the competent authority where its use is likely to have adverse effects on the operation and profitability of the public ambulance service, the running of which has been entrusted to the medical aid organisations.

24 In the latter case, the reservation of patient transport services to the medical aid organisations entrusted with the public ambulance service is sufficient for that measure to be characterised as a special or exclusive right within the meaning of

Article 90(1) of the Treaty, for protection is conferred by a legislative measure on a limited number of undertakings which may substantially affect the ability of other undertakings to exercise the economic activity in question in the same geographical area under substantially equivalent conditions.

25 Consequently, it must be held that Paragraph 18(3) of the RettDG 1991 has conferred on medical aid organisations a special or exclusive right within the meaning of Article 90(1) of the Treaty.

*Infringement of Article 90(1) of the Treaty, read in conjunction with Article 85(1) of the EC Treaty (now Article 81(1) EC)*

26 Ambulanz Glöckner contends that Paragraph 18(3) of the RettDG 1991 is incompatible with Article 90(1) of the Treaty, read together with Article 85(1)(c) thereof, in that it allows medical aid organisations, consulted on any application for access to the market made by an independent operator, to share out the market for patient transport services through concertation amongst themselves and with the public authorities.

27 As far as that contention is concerned, it must be observed that the order for reference does not provide any indication of the existence of any agreement, prohibited by Article 85(1) of the Treaty, between the medical aid organisations.

28 Nor, in any event, is it established that the public authorities, asked to issue an authorisation for the provision of ambulance services other than those forming part of the public ambulance service, act in concert with those medical aid organisations. The latter are, admittedly, consulted by the competent authorities

and this fact, as is clear from paragraph 43 of this judgment, may be taken into account for the purposes of determining the existence of any abuse of a dominant position, pursuant to Article 90(1) of the Treaty, in conjunction with Article 86 thereof. However, as the Advocate General points out in point 103 of his Opinion, the decision to grant or refuse the authorisation is taken unilaterally by the competent authorities under their sole responsibility, according to the conditions laid down by the RettDG 1991.

29 There is therefore no infringement of Article 90(1) of the Treaty, in conjunction with Article 85(1)(c) thereof.

*Infringement of Article 90(1) of the Treaty, in conjunction with Article 86 of the EC Treaty (now Article 82 EC)*

30 The national court is asking essentially whether a provision such as Paragraph 18(3) of the RettDG 1991 is liable to create a situation in which medical aid organisations are led to commit abuses of a dominant position contrary to Article 86 of the Treaty.

Existence of a dominant position on a substantial part of the common market

31 In order to reply to this question, the national court must first determine whether the medical aid organisations in question actually occupy a dominant position on a substantial part of the common market, which presupposes a definition both of the market for the services in question and its geographical extent.

32 The Commission argues that there are two different service markets: the market for emergency transport and the market for patient transport.

33 That analysis must be upheld. Whilst the services in question are related, they are still not interchangeable or substitutable by reason of their characteristics, their prices or their intended use. Not only do non-emergency transport services not necessarily offer a valid substitute for emergency transport services, which require highly qualified personnel and particularly sophisticated equipment 24 hours a day, but emergency transport, which is particularly costly, cannot be regarded as a valid substitute for non-emergency transport.

34 As regards the geographical extent of the relevant market, the national court's attention must be drawn to the need to take into account the market on which conditions of competition are sufficiently homogeneous, that is to say an area in which the objective conditions of competition applying to the services in question and in particular consumer demand are similar for all economic agents (Case 27/76 *United Brands* v *Commission* [1978] ECR 207, paragraph 44).

35 In the instant case, it is for the national court to determine whether that market

— is limited to the operational area in question, to which the application for authorisation relates,

— or whether it covers all of the *Land* of Rheinland-Pfalz, as the Commission suggests, since the legislative framework, the organisational structures and the user charges for the public ambulance service are the same throughout that *Land*,

— or whether it covers the entire territory of the Federal Republic of Germany, as Ambulanz Glöckner contends, since the laws governing the provision of ambulance services in the various *Länder* are similar, something which is contested by the Vertreter des öffentlichen Interesses, Mainz.

36 Once it has determined the services market and its geographical extent, it will also be the task of the national court to determine, if need be, whether any individual dominant position, or any collective dominant position, covered by Article 86 of the Treaty, exists and to examine whether such a position exists on a 'substantial part of the common market', which is a matter of fact to be determined by the national court.

37 In that regard, it might be appropriate for the national court to determine the correctness of the apparent facts set out in point 121 of the Advocate General's Opinion regarding the activities of the DRK over a large part of the *Land* of Rheinland-Pfalz, which, if confirmed, could establish that that medical aid organisation occupies a dominant position on the markets in emergency transport services and patient transport services.

38 In the event that the national court were in fact to find that a dominant position does exist, at any rate throughout the *Land* of Rheinland-Pfalz, it would then be necessary to consider whether such a position affects a substantial part of the common market, as the Advocate General explains in point 129 of his Opinion,

given that Rheinland Pfalz covers a territory of almost 20 000 km$^2$ and has a high number of inhabitants, around four million, which is higher than the population of some Member States.

Abuse of a dominant position

39 It must be borne in mind that the mere creation of a dominant position through the grant of special or exclusive rights within the meaning of Article 90(1) of the Treaty is not in itself incompatible with Article 86 of the Treaty. 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 special or exclusive rights conferred upon 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 (see *Pavlov*, cited above, paragraph 127).

40 It is settled case-law that an abuse within the meaning of Article 86 of the Treaty is committed where, without any objective necessity, an undertaking holding a dominant position on a particular market reserves to itself an ancillary activity which could be carried out by an other undertaking as part of its activities on a neighbouring but separate market, with the possibility of eliminating all competition from that undertaking (judgment in Case C-18/88 *GB-INNO-BM* [1991] ECR I-5941, paragraph 18). Where the extension of the dominant position of an undertaking to which the State has granted special or exclusive rights results from a State measure, such a measure constitutes an infringement of Article 90 in conjunction with Article 86 of the Treaty (*GB-INNO-BM*, paragraph 21, and Case C-203/96 *Dusseldorp and Others* [1998] ECR I-4075, paragraph 61).

41 In the present case, the argument put forward by Ambulanz Glöckner is indeed that it is excluded from the market for patient transport as a result of the application of Paragraph 18(3) of the RettDG 1991, which, in its submission,

enables the medical aid organisations, acting in concertation with the public authorities, to restrict access to that market.

42 The Commission also contends that the extension of the dominant position on the urgent transport market to the related, but separate, market for patient transport is due to the changes made in the federal legislation governing the latter type of transport, then in the legislation of the *Land* of Rheinland-Pfalz and, in particular, to the adoption of Paragraph 18(3) of the RettDG 1991. Such a restriction of competition, it contends, constitutes a breach of Article 90 of the Treaty in conjunction with Article 86 thereof.

43 As far as those arguments are concerned, it must be concluded that, in enacting Paragraph 18(3) of the RettDG 1991, the application of which involves prior consultation of the medical aid organisations in respect of any application for authorisation to provide non-emergency patient transport services submitted by an independent operator, the legislature of the *Land* of Rheinland-Pfalz gave an advantage to those organisations, which already had an exclusive right on the urgent transport market, by also allowing them to provide such services exclusively. The application of Paragraph 18(3) of the RettDG 1991 therefore has the effect of limiting 'markets... to the prejudice of consumers' within the meaning of Article 86(b) of the Treaty, by reserving to those medical aid organisations an ancillary transport activity which could be carried on by independent operators.

Effect on trade between Member States

44 In order for a measure such as Paragraph 18(3) of the RettDG 1991 to be held to be incompatible with Article 90(1) of the Treaty, read in conjunction with Article 86 thereof, it must also be established that its implementation affects trade between Member States.

45 The Landkreis, the ASB, the Vertreter des öffentlichen Interesses, Mainz, and the Austrian Government all maintain that the measure in question does not have any appreciable effect on trade between Member States, since authorisation to transport patients by ambulance is issued only for a specific sector. Furthermore, this type of transport is, by definition, a locally-confined activity and cross-border ambulance services take place only rarely.

46 The Commission, whilst taking the view that this question is a matter for determination by the national court, submits that, owing to the proximity of the *Land* of Rheinland-Pfalz to Belgium, France and Luxembourg, transport across State borders is not to be excluded. There are also probable cases in which patient transport might be provided over long distances, in which sick or injured person might wish to be taken to another Member State or are repatriated to their home country.

47 As far as this question is concerned, according to the case-law of the Court, the interpretation and application of the condition relating to effects on trade between Member States contained in Articles 85 and 86 of the Treaty 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 on the objectives of a single market between the Member States, in particular by sealing off national markets or by affecting the structure of competition within the common market (Case 22/78 *Hugin* v *Commission* [1979] ECR 1869, paragraph 17).

48 If an agreement, decision or practice is to be capable of affecting trade between Member States, it must be possible to foresee with a sufficient degree of probability, on the basis of a set of objective factors of law or of fact, that they may have an influence, direct or indirect, actual or potential, on the pattern of trade between Member States in such a way as to cause concern that they might hinder the attainment of a single market between Member States. Moreover, that

effect must not be insignificant (Case C-306/96 *Javico* [1998] ECR I-1983, paragraph 16).

49 In the case of services, that effect may consist, as the Court has held, in the activities in question being conducted in such a way that their effect is to partition the common market and thereby restrict freedom to provide services, which constitutes one of the objectives of the Treaty (Case 30/87 *Bodson* [1988] ECR 2479, paragraph 24). Similarly, trade between Member States may be affected by a measure which prevents an undertaking from establishing itself in another Member State with a view to providing services there on the market in question (see, to that effect, Case 161/84 *Pronuptia* [1986] ECR 353, paragraph 26).

50 It is thus for the national court to determine whether, having regard to the economic characteristics of the emergency transport market and the patient transport market, there is a sufficient degree of probability that a rule such as Paragraph 18(3) of the RettDG 1991 will actually prevent operators established in Member States other than the Member State in question either from providing ambulance transport services in that Member State or from establishing themselves there.

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

51 If, in view of the foregoing, it is established that Paragraph 18(3) of the RettDG 1991 is contrary to Article 90(1) of the Treaty, read in conjunction with Article 86 thereof, it will then be necessary to examine whether that national provision may be justified by the existence of a task of operating a service of general economic interest, within the meaning of Article 90(2) of the Treaty.

52 The Landkreis, the ASB, the Vertreter des öffentlichen Interesses, Mainz, and the Austrian Government argue that some measure of protection of the public ambulance service against competition from independent operators is necessary, even on the non-emergency transport market.

53 They argue that emergency transport services, which must be provided 24 hours a day throughout the territory, require costly investments in equipment and qualified personnel. It is necessary to avoid a situation in which those costs cannot be offset, at least partially, by revenue from non-emergency transport. Not only does the very presence of independent operators in this market have the effect of reducing revenue from the public ambulance service, but it is also to be expected that those operators, seeking profits, will prefer to concentrate their services in densely populated areas or on short distances, so that, besides emergency transport, the medical aid organisations would be left only with non-emergency transport in remote areas. The Austrian Government also points out that, since the public ambulance service is financed ultimately either through taxes or through health insurance contributions there is a serious risk that the inevitable losses of the public ambulance service will be socialised, whilst its potential profits will go to the independent operators.

54 They also contend that it is likewise in the general interest for prices not to vary according to the areas served.

55 With regard to those arguments, the medical aid organisations are incontestably entrusted with a task of general economic interest, consisting in the obligation to provide a permanent standby service of transporting sick or injured persons in emergencies throughout the territory concerned, at uniform rates and on similar quality conditions, without regard to the particular situations or to the degree of economic profitability of each individual operation.

56 However, Article 90(2) of the Treaty, read in conjunction with paragraph (1) of that provision, allows Member States to confer, on undertakings to which they entrust the operation of services of general economic interest, exclusive rights which may hinder the application of the rules of the Treaty on competition in so far as restrictions on competition, or even the exclusion of all competition, by other economic operators are necessary to ensure the performance of the particular tasks assigned to the undertakings holding the exclusive rights (Case C-320/91 *Corbeau* [1993] ECR I-2533, paragraph 14).

57 The question to be determined, therefore, is whether the restriction of competition is necessary to enable the holder of an exclusive right to perform its task of general interest in economically acceptable conditions. The Court has held that the starting point in making that determination must be the premiss that the obligation, on the part of the undertaking entrusted with such a task, to perform its services in conditions of economic equilibrium presupposes that it will be possible to offset less profitable sectors against the profitable sectors and hence justifies a restriction of competition from individual undertakings in economically profitable sectors (*Corbeau*, paragraphs 16 and 17).

58 In the case before the national court, for the reasons advanced by the Landkreis, the ASB, the Vertreter des öffentlichen Interesses, Mainz, and the Austrian Government, which are set forth in paragraph 53 above and which are for the national court to assess, it appears that the system put in place by the RettDG 1991 is such as to enable the medical aid organisations to perform their task in economically acceptable conditions. In particular, the evidence placed before the Court shows that the revenue from non-emergency transport helps to cover the costs of providing the emergency transport service.

59 It is true that, in paragraph 19 of *Corbeau*, the Court held that the exclusion of competition is not justified in certain cases involving specific services, severable from the service of general interest in question, if those services do not compromise the economic equilibrium of the service of general economic interest performed by the holder of the exclusive rights.

60 However, that is not the case with the two services now under consideration, for two reasons in particular. First, unlike the situation in *Corbeau*, the two types of service in question, traditionally assumed by the medical aid organisations, are so closely linked that it is difficult to sever the non-emergency transport services from the task of general economic interest constituted by the provision of the public ambulance service, with which they also have characteristics in common.

61 Second, the extension of the medical aid organisations' exclusive rights to the non-emergency transport sector does indeed enable them to discharge their general-interest task of providing emergency transport in conditions of economic equilibrium. The possibility which would be open to private operators to concentrate, in the non-emergency sector, on more profitable journeys could affect the degree of economic viability of the service provided by the medical aid organisations and, consequently, jeopardise the quality and reliability of that service.

62 However, as the Advocate General explains in point 188 of his Opinion, it is only if it were established that the medical aid organisations entrusted with the operation of the public ambulance service were manifestly unable to satisfy demand for emergency ambulance services and for patient transport at all times that the justification for extending their exclusive rights, based on the task of general interest, could not be accepted.

63 In this regard, Ambulanz Glöckner contends that Paragraph 18(3) of the RettDG 1991 does indeed promote the creation of a situation in which the medical aid organisations are not always able to satisfy all demand for patient transport services at acceptable prices (see, by analogy, Case C-41/90 *Höfner and Elser* [1991] ECR I-1979, paragraph 31, and Case C-55/96 *Job Centre* [1997] ECR I-7119, paragraph 35). On the other hand, the Landkreis and the ASB maintain that the public ambulance service is incontestably able to satisfy both demand for emergency transport and that for patient transport, even without private undertakings.

64 It is for national court to determine whether the medical aid organisations which occupy a dominant position on the markets in question are in fact able to satisfy demand and to fulfil not only their statutory obligation to provide the public emergency ambulance services in all situations and 24 hours a day but also to offer efficient patient transport services.

65 Consequently, a provision such as Paragraph 18(3) of the RettDG 1991 is justified under Article 90(2) of the Treaty provided that it does not bar the grant of an authorisation to independent operators where it is established that the medical aid organisations entrusted with the operation of the public ambulance service are manifestly unable to satisfy demand in the area of emergency transport and patient transport services.

66 In view of the foregoing, the answer to be given to the question referred for a preliminary ruling must be that:

— a national provision such as Paragraph 18(3) of the RettDG 1991, under which the authorisation necessary for providing ambulance transport services will be refused by the competent authority if its use might prejudice the functioning and profitability of the public emergency ambulance service, the operation of which has been an entrusted to medical aid organisations like those involved in the main proceedings, is of a nature such as to confer on the latter organisations a special or exclusive right within the meaning of Article 90(1) of the Treaty;

— where the decision to grant or refuse that authorisation is taken unilaterally by the competent authorities entirely on their own responsibility, according to the conditions laid down by law and in the absence of any agreement or

concertation by those authorities with the medical aid organisations themselves, or between those organisations, there is no breach of Article 90(1) of the Treaty, in conjunction with Article 85(1)(c) thereof;

— a national provision such as Paragraph 18(3) of the RettDG 1991 is contrary to Article 90(1) of the Treaty read in conjunction with Article 86 thereof, in so far as it is established that:

— the medical aid organisations occupy a dominant position on the market for emergency transport services,

— that dominant position exists on a substantial part of the common market, and

— there is a sufficient degree of probability, having regard to the economic characteristics of the market in question, that that provision actually prevents undertakings established in Member States other than the Member State in question from carrying out ambulance transport services there, or even from establishing themselves there;

— however, a provision such as Paragraph 18(3) of the RettDG 1991 is justified under Article 90(2) of the Treaty provided that it does not bar the grant of an authorisation to independent operators where it is established that the medical aid organisations entrusted with the operation of the public emergency ambulance service are manifestly unable to satisfy demand in the area of emergency ambulance and patient transport services.

## Costs

67 The costs incurred by the Austrian Government and by the Commission, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT (Fifth Chamber),

in answer to the questions referred to it by the Oberverwaltungsgericht Rheinland-Pfalz by order of 8 December 1999, hereby rules:

— **A national provision such as Paragraph 18(3) of the Rettungsdienstgesetz, as enacted on 22 April 1991, under which the authorisation necessary for providing ambulance transport services will be refused by the competent authority if its use might prejudice the functioning and profitability of the**

public emergency ambulance service, the operation of which has been an entrusted to medical aid organisations like those involved in the main proceedings, is of a nature such as to confer on the latter organisations a special or exclusive right within the meaning of Article 90(1) of the Treaty (now Article 86(1) EC);

— where the decision to grant or refuse that authorisation is taken unilaterally by the competent authorities entirely on their own responsibility, according to the conditions laid down by law and in the absence of any agreement or concertation by those authorities with the medical aid organisations themselves, or between those organisations, there is no breach of Article 90(1) of the Treaty, in conjunction with Article 85(1)(c) thereof (now Article 81(1)(c) EC);

— a national provision such as Paragraph 18(3) of the Rettungsdienstgesetz, as enacted on 22 April 1991, is contrary to Article 90(1) of the Treaty read in conjunction with Article 86 thereof (now Article 82 EC), in so far as it is established that:

— the medical aid organisations such as those in question in the main proceedings occupy a dominant position on the market for emergency transport services,

— that dominant position exists on a substantial part of the common market, and

— there is a sufficient degree of probability, having regard to the economic characteristics of the market in question, that the provision actually prevents undertakings established in Member States other than the Member State in question from carrying out ambulance transport services there, or even from establishing themselves there;

— however, a provision such as Paragraph 18(3) of the Rettungsdienstgesetz 1991 is justified under Article 90(2) of the Treaty provided that it does not bar the grant of an authorisation to independent operators where it is established that the medical aid organisations entrusted with the operation of the public emergency ambulance service are manifestly unable to satisfy demand in the area of emergency ambulance and patient transport services.

von Bahr Edward La Pergola

Wathelet Timmermans

Delivered in open court in Luxembourg on 25 October 2001.

R. Grass

Registrar

A. La Pergola

President of the Fifth Chamber