

JUDGMENT OF THE COURT
19 March 1991 *

In Case C-202/88,

French Republic, represented by Jean-Pierre Puissochet, Director of Legal Affairs in the Ministry for Foreign Affairs, acting as Agent, and by Géraud de Bergues, Assistant Secretary for Foreign Affairs in the same Ministry, acting as deputy Agent, with an address for service in Luxembourg at the French Embassy, 9 Boulevard Prince-Henri,

applicant,

supported by

Italian Republic, represented by Luigi Ferrari Bravo, Head of the Legal Affairs Department, and by Ivo M. Braguglia, Avvocato dello Stato, acting as Agents, with an address for service in Luxembourg at the Italian Embassy, 5 Rue Marie-Adélaïde,

Kingdom of Belgium, represented by Eduard Marissens, of the Brussels Bar, with an address for service in Luxembourg at the Chambers of Lucy Dupong, 14A Rue des Bains,

Federal Republic of Germany, represented by Martin Seidel, Ministerialrat in the Federal Ministry for Economic Affairs, acting as Agent, with an address for service in Luxembourg at the Embassy of the Federal Republic of Germany, 20-22 Avenue Émile-Reuter,

and

Hellenic Republic, represented by Nikos Frangakis, Legal Adviser in the office of the Greek Permanent Representative to the European Communities, by Stamatina Vodina, Advocate, a member of the Legal Department of the office of the Greek Permanent Representative to the European Communities, and by Galateia Alexaki, Advocate, Legal Assistant in the Ministry for Economic Affairs, acting as Agents,

* Language of the case French

with an address for service in Luxembourg at the Greek Embassy, 117 Val Sainte-Croix,

interveners,

v

Commission of the European Communities, represented by Jean-Louis Dewost, Director General of the Legal Department, Götz zur Hausen, Legal Adviser, and Luís Antunes, a member of the Commission's Legal Department, acting as Agents, with an address for service in Luxembourg at the office of Guido Berardis, a member of the Legal Department, Wagner Centre, Kirchberg,

defendant,

APPLICATION for the partial annulment of Commission Directive 88/301/EEC of 16 May 1988 on competition in the markets in telecommunications terminal equipment,

THE COURT,

composed of: O. Due, President, G. F. Mancini, T. F. O'Higgins, J. C. Moitinho de Almeida and G. C. Rodríguez Iglesias (Presidents of Chambers), C. N. Kakouris, R. Joliet, F. A. Schockweiler and M. Zuleeg, Judges,

Advocate General: G. Tesauero,
Registrar: J.-G. Giraud,

having regard to the Report for the Hearing,

after hearing oral arguments by the parties at the hearing on 26 October 1989,

after hearing the Opinion of the Advocate General at the sitting on 13 February 1990,

gives the following

Judgment

1 By application lodged at the Court Registry on 22 July 1988, the French Republic brought an action before the Court under the first paragraph of Article 173 of the EEC Treaty for the annulment of Articles 2, 6, 7 and, in so far as necessary, Article 9 of Commission Directive 88/301/EEC of 16 May 1988 on competition in the markets in telecommunications terminal equipment (Official Journal 1988 L 131, p. 73). The Italian Republic, the Kingdom of Belgium, the Federal Republic of Germany and the Hellenic Republic have intervened in the proceedings in support of the form of order sought by the French Republic.

2 Directive 88/301 was adopted on the basis of Article 90(3) of the Treaty. According to Article 2 of that directive, Member States which have granted special or exclusive rights to undertakings for the importation, marketing, connection, bringing into service of telecommunications terminal equipment and/or maintenance of such equipment are to ensure that those rights are withdrawn and are to inform the Commission of the measures taken or draft legislation introduced to that end.

3 According to Article 3, Member States are to ensure that economic operators have the right to import, market, connect, bring into service and maintain terminal equipment. However, Member States may:

in the absence of technical specifications, refuse to allow terminal equipment to be connected and brought into service where such equipment does not, according to a reasoned opinion of the body referred to in Article 6, satisfy the essential requirements laid down in Article 2(17) of Council Directive 86/361/EEC of 24 July 1986 on the initial stage of the mutual recognition of type approval for telecommunications terminal equipment (Official Journal 1986 L 217, p. 21);

require economic operators to possess the technical qualifications needed to connect, bring into service and maintain terminal equipment on the basis of objective, non-discriminatory and publicly available criteria.

- 4 According to Article 6 of the directive, Member States are to ensure that, from 1 July 1989, responsibility for drawing up specifications, monitoring their application and granting type-approval is entrusted to a body independent of public or private undertakings offering goods and/or services in the telecommunications sector.
- 5 Article 7 requires Member States to take the necessary steps to make it possible for customers to terminate, with maximum notice of one year, leasing or maintenance contracts relating to terminal equipment which at the time when the contracts were concluded were subject to exclusive or special rights granted to certain undertakings.
- 6 Finally, according to Article 9, Member States are to provide the Commission at the end of each year with a report allowing it to monitor compliance with the provisions of Articles 2, 3, 4, 6 and 7.
- 7 For a fuller account of the facts of the case, the course of the procedure and the submissions and arguments of the parties, reference is made to the Report for the Hearing, which are mentioned or discussed hereinafter only in so far as is necessary for the reasoning of the Court.
- 8 The French Government relies on four pleas in law, alleging misuse of procedure, lack of powers of the Commission, breach of the principle of proportionality and infringement of essential procedural requirements. As part of its plea in law alleging lack of powers, the French Government also claims that the Commission has misapplied the rules of the Treaty. Since that allegation in fact constitutes a separate plea, it will be considered on its own.

I — Legal background to the dispute

- 9 The pleas in law and arguments put forward in this case relate essentially to the interpretation of Article 90 of the Treaty. According to paragraph (3) of that

article, on the basis of which the contested regulation was adopted, 'the Commission shall ensure the application of the provisions of this article and shall, where necessary, address appropriate directives or decisions to Member States'.

- 10 In the case of public undertakings and undertakings to which Member States grant special or exclusive rights, Article 90(1) prohibits the Member States generally from enacting or maintaining in force any measure contrary to the rules contained in the Treaty, in particular to those rules provided for in Article 7 and Articles 85 to 94.
- 11 Article 90(2) provides that undertakings entrusted with the operation of services of general economic interest are to be subject to those rules, in particular to the rules on competition, in so far as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them, on condition, however, that the development of trade is not affected to such an extent as would be contrary to the interests of the Community.
- 12 In allowing derogations to be made from the general rules of the Treaty on certain conditions, that provision seeks to reconcile the Member States' interest in using certain undertakings, in particular in the public sector, as an instrument of economic or fiscal policy with the Community's interest in ensuring compliance with the rules on competition and the preservation of the unity of the Common Market.
- 13 In paragraph 11 of the preamble to the contested directive, the Commission states that the conditions for applying the exception in Article 90(2) of the Treaty are not fulfilled. Neither the French Government nor the interveners have challenged that. It follows that this dispute falls within the scope of paragraphs (1) and (3) of Article 90 of the Treaty.
- 14 Inasmuch as it makes it possible for the Commission to adopt directives, Article 90(3) of the Treaty empowers it to lay down general rules specifying the obligations arising from the Treaty which are binding on the Member States as regards the undertakings referred to in Article 90(1) and (2).

- 15 Accordingly, the parties' pleas in law and arguments must be considered in the light of the question whether in this case the Commission has remained within the bounds of the legislative power thus conferred upon it by the Treaty.

II — Misuse of procedure

- 16 In its first plea in law the French Government claims that the Commission adopted the contested directive pursuant to Article 90(3) of the Treaty instead of initiating the procedure provided for in Article 169. In its view, Article 90(3) is intended to enable the Commission to inform the Member States, in cases where it is unclear how compliance with the Treaty is to be achieved, of the means which must be used in order to ensure such compliance. In contrast, recourse must be made to Article 169 where it is clear that a measure is wholly contrary to the Treaty and must be brought to an end forthwith.
- 17 It must be held in that regard that Article 90(3) of the Treaty empowers the Commission to specify in general terms the obligations arising under Article 90(1) by adopting directives. The Commission exercises that power where, without taking into consideration the particular situation existing in the various Member States, it defines in concrete terms the obligations imposed on them under the Treaty. In view of its very nature, such a power cannot be used to make a finding that a Member State has failed to fulfil a particular obligation under the Treaty.
- 18 However, it appears from the content of the directive at issue in this case that the Commission merely determined in general terms obligations which are binding on the Member States under the Treaty. The directive therefore cannot be interpreted as making specific findings that particular Member States failed to fulfil their obligations under the Treaty, with the result that the plea in law relied upon by the French Government must be rejected as unfounded.

III — Competence of the Commission

- 19 In its second plea in law the French Government, supported by the interveners, argues that by adopting a directive providing simply for the withdrawal of special

and exclusive rights for the importation, marketing, connection, bringing into service and/or maintenance of telecommunications terminal equipment, the Commission exceeded the supervisory powers conferred upon it by Article 90(3) of the Treaty. In the French Government's view, that provision presupposes the existence of special and exclusive rights. Accordingly, to take the view that the maintenance of those rights constitutes in itself a measure within the meaning of Article 90 disregards the scope of that article.

- 20 The Belgian and French Governments further consider that a policy on the restructuring of the telecommunications sector, as envisaged by the Directive, fell within the sole competence of the Council, acting under Article 100a. The Belgian and Italian Governments maintain in addition that the directive is contrary to Article 87 of the Treaty inasmuch as only the Council is empowered to lay down rules for the application of Articles 85 and 86 of the Treaty in specific sectors.
- 21 As far as the first argument is concerned, it must be held in the first place that the supervisory power conferred on the Commission includes the possibility of specifying, pursuant to Article 90(3), obligations arising under the Treaty. The extent of that power therefore depends on the scope of the rules with which compliance is to be ensured.
- 22 Next, it should be noted that even though that article 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 90(1) refers.
- 23 As regards the allegation that the Commission has encroached on the powers conferred on the Council by Articles 87 and 100a of the Treaty, those provisions have to be compared with Article 90, taking into account their respective subject-matter and purpose.
- 24 Article 100a is concerned with the adoption of measures for the approximation of the provisions laid down by law, regulation or administrative action in Member

States which have as their object the establishment and functioning of the internal market. Article 87 is concerned with the adoption of any appropriate regulations or directives to give effect to the principles set out in Articles 85 and 86, that is to say the competition rules applicable to all undertakings. As for Article 90, it is concerned with measures adopted by the Member States in relation to undertakings with which they have specific links referred to in the provisions of that article. It is only with regard to such measures that Article 90 imposes on the Commission a duty of supervision which may, where necessary, be exercised through the adoption of directives and decisions addressed to the Member States.

25 It must therefore be held that the subject-matter of the power conferred on the Commission by Article 90(3) is different from, and more specific than, that of the powers conferred on the Council by either Article 100a or Article 87.

26 It should also be noted that, as the Court held in Joined Cases 188 to 190/80 (*France, Italy and United Kingdom v Commission* [1982] ECR 2545, at paragraph 14), the possibility that rules containing provisions which impinge upon the specific sphere of Article 90 might be laid down by the Council by virtue of its general power under other articles of the Treaty does not preclude the exercise of the power which Article 90 confers on the Commission.

27 The plea in law alleging lack of powers on the part of the Commission must therefore be rejected.

IV — The principle of proportionality

28 In claiming that there has been a breach of the principle of proportionality the French Government alleges that the Commission failed to use appropriate means to bring to an end any abuse by telecommunications undertakings of their special or exclusive rights. As a result, that plea in law merges with the pleas in law alleging a misuse of procedure and lack of powers which have been dismissed; it therefore does not have to be considered separately.

V — Application of the rules of the Treaty

29 The French Government and the interveners allege that Articles 2, 6, 7 and 9 of the directive are unlawful, on the ground that those provisions are wrongly based on an infringement by the Member States of Articles 30, 37, 59 and 86 of the Treaty.

30 On the basis of the observations set out above, that complaint must be construed as being directed against the misapplication by the Commission of the aforesaid provisions of the Treaty. Articles 2, 6, 7 and 9 of Directive 88/301 must therefore be considered in the light of the grounds on which they are based.

1. Legality of Article 2 of Directive 88/301 (withdrawal of special and exclusive rights)

31 Article 2 of the contested directive requires Member States which have granted undertakings special or exclusive rights regarding the importation, marketing, connection, bringing into service of telecommunications terminal equipment and/or maintenance of such equipment to withdraw those rights and to inform the Commission of the measures taken or draft legislation introduced to that end.

32 It follows that the directive is concerned with exclusive rights, on the one hand, and special rights, on the other. It is appropriate to follow that classification in considering this complaint.

33 With regard to exclusive importation and marketing rights, it should be borne in mind that, as the Court has consistently held (see, in particular, the judgment in Case 8/74 *Procureur du Roi v Dassonville* [1974] ECR 837, at paragraph 5), the prohibition of measures having an effect equivalent to quantitative restrictions laid down in Article 30 of the Treaty applies to all trading rules enacted by Member States which are capable of hindering, directly or indirectly, actually or potentially, intra-Community trade.

- 34 In that regard it should be noted first that the existence of exclusive importing and marketing rights deprives traders of the opportunity of having their products purchased by consumers.
- 35 It should be pointed out, secondly, that the terminals sector is characterized by the diversity and technical nature of the products concerned and by the ensuing constraints. In those circumstances there is no certainty that the holder of the monopoly can offer the entire range of models available on the market, inform customers about the state and operation of all the terminals and guarantee their quality.
- 36 Accordingly, exclusive importation and marketing rights in the telecommunications terminal sector are capable of restricting intra-Community trade.
- 37 With regard to the question whether such rights can be justified, it should be noted that in Article 3 of the contested directive the Commission specified the extent and the limits of the withdrawal of special and exclusive rights so as to take into account certain requirements such as those listed in Article 2(17) of Council Directive 86/361, namely user safety, safety of employees of public telecommunications network operators, protection of public telecommunications networks from harm and interworking of terminal equipment in justified cases.
- 38 For its part, the French Government has not challenged Article 3 of the contested directive, nor has it argued that there are other essential requirements which the Commission should have complied with in this case.
- 39 In those circumstances, the Commission was right to consider exclusive importation and marketing rights in the telecommunications terminal sector incompatible with Article 30 of the Treaty.

- 40 So far as concerns exclusive rights regarding the connection, bringing into service and maintenance of telecommunications terminal equipment, paragraph 6 of the preamble to the directive states that:
- ‘... The retention of exclusive rights in this field would be tantamount to retention of exclusive marketing rights ...’.
- 41 In that regard it should be borne in mind, in the first place, that, as the Court has consistently held, Articles 2 and 3 of the Treaty set out to establish a market characterized by the free movement of goods where the terms of competition are not distorted (see, in particular, the judgment in Case 229/83 *Leclerc v Au Blé Vert* [1985] ECR 1, at paragraph 9). Article 30 et seq. must therefore be interpreted in the light of that principle, which means that the competition aspect of Article 3(f) of the Treaty has to be taken into account.
- 42 Next, it should be noted that in a market which exhibits the characteristics described above (see paragraph 35), there is no certainty that a holder of exclusive rights regarding the connection, bringing into service and maintenance of terminal equipment can guarantee the reliability of those services for every type of terminal available on the market and thereby enable them all to be used, nor that he will have any incentive to do so. Accordingly, when the exclusive marketing right has been withdrawn, an economic agent must himself be able to connect, bring into service and maintain equipment in order to be able to carry on his marketing activity in conditions of competition which are not distorted.
- 43 Accordingly, the Commission rightly regarded exclusive rights regarding the connection, bringing into service and maintenance of telecommunications terminal equipment as incompatible with Article 30.
- 44 It follows from the foregoing that the Commission was justified in requiring the withdrawal of exclusive rights regarding the importation, marketing, connection, bringing into service of telecommunications terminal equipment and/or maintenance of such equipment.

- 45 As far as special rights are concerned, it should be noted that neither the provisions of the directive nor the preamble thereto specify the type of rights which are actually involved and in what respect the existence of such rights is contrary to the various provisions of the Treaty.
- 46 It follows that the Commission has failed to justify the obligation to withdraw special rights regarding the importation, marketing, connection, bringing into service and/or maintenance of telecommunications terminal equipment.
- 47 Accordingly, Article 2 must be declared void in so far as it concerns the withdrawal of those rights.

2. Legality of Article 6 of Directive 88/301 (drawing up specifications, monitoring their application and granting type-approval for terminal equipment)

- 48 According to Article 6 of the contested directive, Member States are to ensure that from 1 July 1989 responsibility for drawing up the specifications referred to in Article 5 of the directive, monitoring their application and granting type-approval is entrusted to a body independent of public or private undertakings offering goods and/or services in the telecommunications sector.
- 49 Paragraph 9 of the preamble to the directive states that:
- ‘... To ensure that [technical specifications and type-approval procedures] are applied transparently, objectively and without discrimination, the drawing-up and application of such rules should be entrusted to bodies independent of competitors in the market in question . . . ’.
- 50 Paragraph 17 of the preamble to the directive states that:

‘Monitoring of type-approval specifications and rules cannot be entrusted to a competitor in the terminal equipment market in view of the obvious conflict of interest. Member States should therefore ensure that the responsibility for drawing up type-approval specifications and rules is assigned to a body independent of the operator of the network and of any other competitor in the market for terminals.’

51 It should be observed that a system of undistorted competition, as laid down in the Treaty, can be guaranteed only if equality of opportunity is secured as between the various economic operators. To entrust an undertaking which markets terminal equipment with the task of drawing up the specifications for such equipment, monitoring their application and granting type-approval in respect thereof is tantamount to conferring upon it the power to determine at will which terminal equipment may be connected to the public network, and thereby placing that undertaking at an obvious advantage over its competitors.

52 Consequently, the Commission was justified in seeking to entrust responsibility for drawing up technical specifications, monitoring their application and granting type-approval to a body independent of public or private undertakings offering competing goods and/or services in the telecommunications sector.

3. Legality of Article 7 of Directive 88/301 (termination of leasing or maintenance contracts)

53 Article 7 of the contested directive requires Member States to take the necessary steps to make it possible to terminate, with maximum notice of one year, leasing or maintenance contracts which concern terminal equipment subject to exclusive or special rights granted to certain undertakings at the time of the conclusion of the contracts.

54 Paragraph 18 in the preamble to the directive states that:

‘The holders of special or exclusive rights in the terminal equipment in question have been able to impose on their customers long-term contracts preventing the introduction of free competition from having a practical effect within a reasonable period. Users must therefore be given the right to obtain a revision of the duration of their contracts.’

- 55 In that regard, it should be noted that Article 90 of the Treaty confers powers on the Commission only in relation to State measures (see paragraph 24) and that anti-competitive conduct engaged in by undertakings on their own initiative can be called in question only by individual decisions adopted under Articles 85 and 86 of the Treaty.
- 56 It does not appear either from the provisions of the directive or from the preamble thereto that the holders of special or exclusive rights were compelled or encouraged by State regulations to conclude long-term contracts.
- 57 Article 90 cannot therefore be regarded as an appropriate basis for dealing with the obstacles to competition which are purportedly created by the long-term contracts referred to in the directive. It follows that Article 7 must be declared void.

4. *Legality of Article 9 of Directive 88/301 (annual report)*

- 58 Article 9, which requires Member States to provide the Commission at the end of each year with a report allowing it to monitor compliance with certain provisions of the directive, must also be declared void in so far as it refers to the provisions of Article 2 which are concerned with special rights and to Article 7 of the contested directive.

VI — **Infringement of essential procedural requirements**

- 59 The French Government further claims that the contested directive does not contain an adequate statement of reasons.
- 60 It should be pointed out *in limine* that that plea in law must be considered only in so far as it relates to aspects of the contested directive which have not already been declared invalid.

- 61 In that regard, it should be noted that the reasons which led the Commission to require the withdrawal of exclusive rights regarding the importation, marketing, connection, bringing into service and maintenance of terminal equipment are sufficiently clear from the preamble to the directive. The same is true as regards the obligations imposed on the Member States by Article 6 of the contested directive.
- 62 The plea in law alleging infringement of essential procedural requirements therefore cannot be upheld.

VII — Costs

- 63 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs. However, the first subparagraph of Article 69(3) provides that the Court may order the parties to bear their own costs in whole or in part; each party succeeds on some and fails on other heads. As the French Republic has only been partially successful, each of the parties, including the interveners, is to bear its own costs.

On those grounds,

THE COURT

hereby:

- (1) Declares Article 2 of Commission Directive 88/301/EEC of 16 May 1988 on competition in the markets in telecommunications terminal equipment void in so far as it requires Member States which grant undertakings special rights regarding the importation, marketing, connection or bringing into service of terminal equipment and/or maintenance of such equipment to withdraw such rights and to inform the Commission of the measures taken or draft legislation introduced to that end;
- (2) Declares void Article 7 of the directive;
- (3) Declares Article 9 of the directive void in so far as it refers to the provisions of Article 2 which are concerned with special rights and to Article 7 of the directive;

- (4) Dismisses the remainder of the application;**
- (5) Orders the parties to bear their own costs.**

Due	Mancini	O'Higgins	Moitinho de Almeida	
Rodríguez Iglesias	Kakouris	Joliet	Schockweiler	Zuleeg

Delivered in open court in Luxembourg on 19 March 1991.

J.-G. Giraud
Registrar

O. Due
President