

Joined Cases C-241/91 P and C-242/91 P

Radio Telefis Eireann (RTE) and Independent Television Publications Ltd (ITP)

v

Commission of the European Communities

(Competition — Abuse of a dominant position — Copyright)

Opinion of Advocate General Gulmann delivered on 1 June 1994	I - 747
Judgment of the Court, 6 April 1995	I - 808

Summary of the Judgment

- 1. Competition — Dominant position — Concept — Monopoly of broadcasting companies over information relating to weekly programme listings
(EEC Treaty, Art. 86)*
- 2. Competition — Dominant position — Copyright — Weekly listings of television programmes — Exercise of copyright — Abuse — Conditions
(EEC Treaty, Art. 86)*

3. *Appeals — Grounds — Mistaken assessment of the facts — Inadmissible (EEC Treaty, Art. 168a; Statute of the Court of Justice of the EEC, Art. 51)*
4. *Competition — Dominant position — Effect on trade between Member States — Criteria (EEC Treaty, Art. 86)*
5. *International agreements — Agreements concluded by Member States — Agreements predating the EEC Treaty — Justification of restrictions on intra-Community trade — Not permissible — Agreement ratified by a Member State already bound by the EEC Treaty — Effects on the powers of the Community — No effects (EEC Treaty, Arts 234 and 236)*
6. *Competition — Administrative proceedings — Discontinuance of infringements — Power of the Commission — Orders addressed to undertakings (Regulation No 17 of the Council, Art. 3)*
7. *Competition — Administrative proceedings — Discontinuance of infringements — Burdens imposed on undertakings — Proportionality — Criteria (Regulation No 17 of the Council, Art. 3)*
8. *Competition — Administrative proceedings — Decision finding that there has been an infringement — Statement of reasons — Obligation — Scope (EEC Treaty, Art. 190)*

1. Broadcasting companies are in a dominant position within the meaning of Article 86 of the Treaty when, by reason of their *de facto* monopoly over the information relating to the listings of their programmes, which are received in most households in one Member State and in a substantial portion of households in the adjoining part of another Member State, they are in a position to prevent effective competition on the market in weekly television magazines in the areas concerned.

2. The conduct of an undertaking in a dominant position, consisting of the exercise

of a right classified by national law as 'copyright', cannot, by virtue of that fact alone, be exempt from review in relation to Article 86 of the Treaty.

In the absence of Community standardization or harmonization of laws, determination of the conditions and procedures for granting protection of an intellectual property right is admittedly a matter for national rules and the exclusive right of reproduction forms part of the author's rights, with the result that refusal to grant a licence, even if it is the act of an

undertaking holding a dominant position, cannot in itself constitute abuse of a dominant position.

of Justice of the EEC, an appeal may rely only on grounds relating to infringement of rules of law, to the exclusion of any appraisal of the facts.

However, the exercise of an exclusive right by a proprietor may, in exceptional circumstances, involve abusive conduct. Such will be the case when broadcasting companies rely on copyright conferred by national legislation to prevent another undertaking from publishing on a weekly basis information (channel, day, time and title of programmes) together with commentaries and pictures obtained independently of those companies, where, in the first place, that conduct prevents the appearance of a new product, a comprehensive weekly guide to television programmes, which the companies concerned do not offer and for which there is a potential consumer demand, conduct which constitutes an abuse under heading (b) of the second paragraph of Article 86 of the Treaty; where, second, there is no justification for that refusal either in the activity of television broadcasting or in that of publishing television magazines; and where, third, the companies concerned, by their conduct, reserve to themselves the secondary market of weekly television guides by excluding all competition from the market through denial of access to the basic information which is the raw material indispensable for the compilation of such a guide.

3. Pursuant to Article 168a of the Treaty and Article 51 of the Statute of the Court

4. In order to satisfy the condition that trade between Member States must be affected within the meaning of Article 86 of the Treaty, it is not necessary that the conduct in question should in fact have substantially affected that trade. It is sufficient to establish that the conduct is capable of having such an effect. This will be the case where an undertaking excludes all potential competitors on the geographical market consisting of one Member State and part of another Member State and thus modifies the structure of competition on that market, thereby affecting potential commercial exchanges between those Member States.

5. The provisions of an agreement concluded prior to entry into force of the Treaty or prior to a Member State's accession, to which Article 234 of the Treaty applies, cannot be relied on in intra-Community relations if the rights of non-member countries are not involved. Where an agreement has been ratified by a Member State already bound by the Treaty, it cannot be relied on to limit the powers of the Community, as provided for in the Treaty, since the latter can be amended only in accordance with the procedure laid down in Article 236.

6. Article 3 of Regulation No 17 is to be applied according to the nature of the infringement found and may include an order to do certain acts or things which, unlawfully, have not been done as well as an order to bring an end to certain acts, practices or situations which are contrary to the Treaty.
7. In the context of the application of Article 3 of Regulation No 17, the principle of proportionality means that the burdens imposed on undertakings in order to bring an infringement of competition law to an end must not exceed what is appropriate and necessary to attain the objective sought, namely re-establishment of compliance with the rules infringed.
8. Commission decisions intended to find infringements of competition rules, issue directions and impose pecuniary sanctions must state the reasons on which they are based, in accordance with Article 190 of the Treaty, which requires the Commission to set out the reasons which prompted it to adopt a decision, so that the Court can exercise its power of review and Member States and nationals concerned know the basis on which the Treaty has been applied. The Commission cannot, however, be required to discuss all the matters of fact and law which may have been dealt with during the administrative proceedings.