JUDGMENT OF THE COURT (Sixth Chamber)
5 October 1988 *

In Case 247/86

REFERENCE to the Court under Article 177 of the EEC Treaty by the tribunal de grande instance (Regional Court), Strasbourg, for a preliminary ruling in the proceedings pending before that court between

Société alsacienne et lorraine de télécommunications et d'électronique (Alsatel)

and

SA Novasam,

on the interpretation of Article 86 of the EEC Treaty,

THE COURT (Sixth Chamber)

composed of: O. Due, President of Chamber, G. C. Rodríguez Iglesias, T. Koopmans, K. Bahlmann and C. N. Kakouris, Judges,

Advocate General: G. F. Mancini
Registrar: B. Pastor, Administrator

after considering the observations submitted on behalf of

Alsatel, the plaintiff in the main proceedings, by M. Meyer,

SA Novasam, the defendant in the main proceedings, by L. Anstett-Gardea,

the Commission of the European Communities, by its Legal Adviser C. Durand and by N. Coutrelis,

* — Language of the Case: French.

having regard to the Report for the Hearing and further to the hearing on 17 November 1987,

after hearing the Opinion of the Advocate General delivered at the sitting on 31 May 1988,

gives the following:

Judgment

1 By a judgment of 17 September 1986, as explained and supplemented by a decision of 10 December 1986, which were received at the Court on 2 October and 29 December respectively, the tribunal de grande instance, Strasbourg, referred to the Court for a preliminary ruling under Article 177 of the EEC Treaty a question on the interpretation of Article 86 of the EEC Treaty.

2 That question arose in a dispute between Alsatel, the plaintiff in the main proceedings, and Novasam, a temporary employment agency, the defendant in the main proceedings, concerning Alsatel's claim for compensation amounting to three-quarters of the annual payments outstanding under three contracts for the rental and maintenance of telephone installations that were terminated by the defendant. The installations in question, each of which comprises several telephones, are 'complex' installations.

3 It is apparent from the order for reference that the contracts for the rental and maintenance of telephone equipment which the plaintiff offers to subscribers are concluded for an initial duration of 15 years, but are to be renewed for a further term of 15 years if, as a result of one or more modifications to the installation, the initial rental is increased by 25% or more.

4 According to the national court, the contract binds the customer to deal exclusively with Alsatel for any changes, moves, extensions, putting lines into service

and, in general, any modifications of the installation. That obligation in practice prohibits customers from dealing with another supplier of equipment throughout the duration of the contract. Any modifications to the installation entail supplements to the contract, for which the price is not determined and may, in view of the exclusive-dealing clause imposed on customers, be fixed unilaterally by the plaintiff.

5 The defendant contended that the contracts which had been terminated were contrary to the competition rules of the EEC Treaty, whereupon the national court decided to stay the proceedings and referred to the Court the following question for a preliminary ruling:

'In view of Alsatel's major share of the regional market, are the contracts drawn up by it evidence of its abuse of a dominant position within the meaning of Article 86 of the EEC Treaty?'

6 Reference is made to the Report for the Hearing for a fuller account of the facts of the case, the course of the procedure and the observations submitted to the Court, which are mentioned or discussed hereinafter only in so far as is necessary for the reasoning of the Court.

7 In view of the fact that the Commission and the defendant have asked the Court to consider the problems raised not only from the point of view of Article 86 of the Treaty, which is the only article referred to in the national court's question, but also from the point of view of Article 85 of the Treaty, it must be pointed out at once that this course of action is not open to the Court.

8 It is apparent from the documents before the Court that in this case the national court, which alone is competent under the system established by Article 177 to assess the relevance of questions concerning the interpretation of Community law in order to resolve the dispute before it, has refused by implication, inasmuch as it has referred only to Article 86 in its question, to seek from the Court a ruling on the interpretation of Article 85 of the Treaty, notwithstanding an express request to that effect made by the defendant during the main proceedings.

9 In order to answer the question submitted, it must be borne in mind in the first place that Article 86 of the Treaty prohibits any abuse of a dominant position within the common market or in a substantial part of it in so far as it may affect trade between Member States. According to the defendant and the Commission, the clauses concerning duration and rental imposed by the plaintiff in the contracts which it concludes constitute an abuse of a dominant position.

10 Although the obligation imposed on customers to deal exclusively with the installer as regards any modification of the installation may be justified by the fact that the equipment remains the property of the installer, the fact that the price of the supplements to the contract entailed by those modifications is not determined but is unilaterally fixed by the installer and the automatic renewal of the contract for a 15-year term if as a result of those modifications the rental is increased by more than 25% may constitute unfair trading conditions prohibited as abusive practices by Article 86 of the Treaty if all the conditions for the application of that provision are met.

11 The first condition for the application of that provision is that trade between Member States must be affected. The interpretation of that condition, which is set out in Articles 85 and 86 of the Treaty, must be based on its purpose, which is to determine the scope of application of Community competition law. Community law applies to any agreement, decision or concerted practice which may influence, directly or indirectly, actually or potentially, patterns of trade between the Member States and thereby hinder the economic interpenetration intended by the Treaty. That condition would be satisfied, in particular, if the contractual clauses referred to above had the effect of restricting imports of telephone equipment from other Member States, thereby partitioning the market. There is nothing in the documents before the Court which suggests that such is the case. However, it is for the national court to make the necessary findings of fact in that regard.

12 The second condition laid down by Article 86 is that there must be a dominant position within the common market or in a substantial part of it. The Court has defined such a dominant position (see the judgment of 9 November 1983 in Case 322/81 *Michelin* v *Commission* [1983] ECR 3461) as a position of economic

strength enjoyed by an undertaking which enables it to hinder the maintenance of effective competition on the relevant market by allowing it to behave to an appreciable extent independently of its competitors and customers.

13 In order to ascertain whether a dominant position of that kind exists in a case such as this, it is necessary to assess the economic strength of the undertaking in question on the relevant market, that market to be defined from the point of view of both the activities concerned and its geographical extent.

14 For those purposes, it is necessary to take account of the following facts to be found in the documents before the Court: the contracts which have given rise to the main proceedings are concerned with the rental and maintenance of telephone installations; because of the telecommunications monopoly in France, telephone installations may be provided only by the postal and telecommunications authorities or by private installers such as Alsatel to whom the exercise of the monopoly is in part delegated; those private installers must be approved by the authorities; finally, the authorizations granted are valid throughout the country.

15 It follows that the framework within which the conditions of competition are sufficiently homogeneous to enable the economic strength of the undertaking in question to be assessed is the market in telephone installations throughout France.

16 The Commission has none the less argued that within the market in telephone installations as a whole it is possible to identify, from the point of view of the activities concerned, a market in the rental and maintenance of telephone equipment, and that on that market competition between installers operates primarily at the local and regional level, particularly in view of the importance of the maintenance factor. It is therefore on that geographical sub-market that the position of installers should be assessed in order to ascertain whether or not they occupy a dominant position on the market for the rental and maintenance of telephone installations.

17 In ascertaining whether the economic strength of an undertaking is sufficient to enable it to hinder the maintenance of effective competition it is impossible to isolate the rental and maintenance market as the relevant market when it is apparent that users have a choice between a rental and maintenance contract and the purchase of the same equipment. The Commission's argument that those two possibilities are not interchangeable, which is based on the point of view solely of users who have already opted for a rental and maintenance contract, cannot be accepted.

18 There is nothing in the documents before the Court which suggests that the plaintiff enjoys a dominant position throughout France. The only fact which is referred to in the order for reference with regard to the plaintiff's economic strength is the large share it holds of the regional market.

19 A finding of that kind is insufficient to establish that the undertaking in question occupies a dominant position. In the first place, the Court has consistently held that while the fact that an undertaking holds a very large market share may indeed be important evidence of the existence of a dominant position, that factor, taken separately, is not necessarily decisive but must be taken into consideration together with other factors (see the judgment of 13 February 1979 in Case 85/76 *Hoffmann-La Roche* v *Commission* [1979] ECR 461). Secondly, it is apparent from the foregoing that in circumstances such as those of the present case the economic strength of an undertaking can be assessed only in the geographical context of the national territory as a whole.

20 If the large share of the regional market held by the plaintiff was the result of an agreement between authorized installers to share out regional markets between them, such an agreement ought to be caught by Article 85 of the Treaty. It is only if such an allocation of markets were carried out by a number of undertakings belonging to the same group that Article 86 could be applicable, as the Court has consistently held (see the judgments of 8 June 1971 in Case 78/70 *Deutsche Grammophon* v *Metro* [1971] ECR 487, and of 16 December 1975 in Joined Cases 40 to 48, 50, 54 to 56, 111, 113 and 114/73 *Suiker Unie* v *Commission* [1975] ECR 1663).

21 However, the Commission has suggested that the Court should consider whether parallel behaviour on the part of several independent undertakings, in particular with regard to prices and trading conditions, which does not leave their customers any possibility of negotiating the terms of the contracts to be concluded may place those undertakings collectively in a dominant position coming within the scope of Article 86 of the Treaty.

22 The Court cannot consider that possibility when it is unconnected with the facts before the national court and is based solely on information in the Commission's possession which, on its own admission, is not sufficiently precise. If the Commission considers that there is evidence of the existence of practices that are contrary to the competition rules in the Treaty, it must exercise the powers of investigation which it has in order to ensure the application of those rules.

23 The answer to the question submitted by the national court must therefore be that contractual practices, even if abusive ones, on the part of an undertaking supplying telephone installations which has a large share of a regional market in a Member State do not fall within the prohibition in Article 86 of the EEC Treaty where that undertaking does not occupy a dominant position on the relevant market, in this case the domestic market in telephone installations.

Costs

24 The costs incurred by the Commission of the European Communities, which has submitted observations to the Court, are not recoverable. As these proceedings are, in so far as the parties to the main proceedings are concerned, in the nature of 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 (Sixth Chamber),

in answer to the question referred to it by the tribunal de grande instance, Strasbourg, by judgment of 17 September 1986, as explained and supplemented by the decision of 10 December 1986, hereby rules:

Article 86 of the EEC Treaty must be interpreted as meaning that contractual practices, even if abusive ones, on the part of an undertaking supplying telephone installations which has a large share of a regional market in a Member State do not fall within the prohibition in that article where that undertaking does not occupy a dominant position on the relevant market, in this case the domestic market in telephone installations.

Due Rodríguez Iglesias

Koopmans Bahlmann Kakouris

Delivered in open court in Luxembourg on 5 October 1988.

J.-G. Giraud
Registrar

O. Due
President of the Sixth Chamber