

JUDGMENT OF THE COURT (Fifth Chamber)
13 December 1991 *

In Case C-18/88,

REFERENCE to the Court under Article 177 of the EEC Treaty by the Vice-President of the Tribunal de Commerce (Commercial Court), Brussels, for a preliminary ruling in the proceedings pending before that court between:

Régie des Télégraphes et des Téléphones (RTT)

and

GB-Inno-BM SA,

on the interpretation of Articles 30 and 86 of the EEC Treaty,

THE COURT (Fifth Chamber),

composed of: R. Joliet, President of the Chamber, Sir Gordon Slynn, J. C. Moitinho de Almeida, G. C. Rodríguez Iglesias and M. Zuleeg, Judges,

Advocate General: M. Darmon,
Registrar: B. Pastor, Administrator,

after considering the written observations submitted on behalf of:

— Régie des Télégraphes et Téléphones, by Eduard Marissens, of the Brussels Bar,

* Language of the case: French.

— GB-Inno-BM SA, by Louis van Bunnem, of the Brussels Bar,

— the Commission of the European Communities, by Eric L. White and Edith Buissart, members of its Legal Service, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations of the Régie des Télégraphes et Téléphones, GB-Inno-BM SA and the Commission, at the hearing on 25 January 1989,

after hearing the Opinion of the Advocate General at the sitting on 15 March 1989,

gives the following

Judgment

- 1 By order of 11 January 1988, which was received at the Court on 18 January 1988, the Vice-President of the Commercial Court, Brussels, referred to the Court for a preliminary ruling under Article 177 of the EEC Treaty three questions on the interpretation of Articles 30 and 86 of the Treaty for the purpose of assessing the compatibility with those provisions of national rules giving the public undertaking which is responsible, subject to the authority of the Minister, for the establishment and operation of the public telephone network and which sells telephone equipment the power to grant type-approval to telephone equipment which it did not supply itself with a view to the connection of that equipment to the network.
- 2 Those questions were raised in a dispute between the Régie des Télégraphes et des Téléphones (hereinafter referred to as 'RTT') and the company GB-Inno-BM (hereinafter referred to as 'GB'), which sells in its shops non-approved telephones for use as second telephones to be connected to an existing installation at prices far lower than those charged by the RTT for such equipment.

3 On the basis of Articles 54 and 55 of the Law on Commercial Practices of 14 July 1971 (*Moniteur Belge* of 30 July 1971), which prohibits all acts contrary to fair trading and which enables the President of the Commercial Court to order that such an act shall cease, the RTT has brought proceedings for an order that GB cease selling telephones, largely of Far Eastern origin, without informing purchasers, by appropriate advertising or any other effective means, that the telephones are not approved. The RTT claims that, by selling the telephones in question without informing the purchasers that they are not approved, GB is encouraging the purchasers to connect — or have connected — the non-approved telephones to the network, which, it says, impairs the functioning of the network.

4 In its defence in those proceedings, GB argued that since Articles 13, 91 and 93 of the Ministerial Order of 20 September 1978 laying down, in particular, the conditions governing the connection of telephones (*Moniteur Belge* of 29 September 1978, p. 11166), as last amended on 24 September 1986, which contain provisions governing the type-approval procedure, are illegal, it would be improper to impose on a trader the duty of pointing out that the telephones sold are not approved, and to prohibit him from selling them without providing that information. Furthermore GB has lodged a counterclaim for a declaration that the RTT has infringed Article 86 of the Treaty. GB contends that, by bringing the aforementioned action, the result of which would be to set up an obstacle to competition from retailers of non-approved telephone equipment so as to favour the sale of its own equipment or of equipment approved by itself, the RTT has abused its monopoly situation.

5 It is apparent from the file that Article 1 of the Belgian Law of 13 October 1930, which consolidates the various legislative provisions governing telegraph and telephone communications, gives the RTT a monopoly over the establishment and operation of telegraph and telephone lines and offices for use by the public.

6 Under the first paragraph of Article 13 of the Ministerial Order of 20 September 1978, 'unless authorized by the RTT in writing, a subscriber shall not connect any wire, apparatus or object to the equipment which he is permitted to use, nor open or dismantle the equipment, or alter in any way the position or use of the equipment or wires'.

- 7 Article 91 of the said Ministerial Order provides that equipment connected to the circuits made available to the public upon their becoming subscribers must be supplied or approved by the RTT. Under that same provision, it is for the RTT to determine the disposition of subscriber's circuits and their technical characteristics. The technical specifications adopted by the RTT under Article 91 are set out in a document entitled 'Specifications No RN/SP 208', the edition currently in force being that of 21 April 1987. A copy of the said specifications, which are applicable to the second or third telephones connected up in addition to the first standard RTT telephone, is provided to any applicant for type-approval.

- 8 It is also apparent from the file that as regards the equipment sold by the RTT, the technical specifications to be complied with are laid down in the General Conditions that it imposes on its suppliers. Accordingly, that equipment does not have to be subject to a specific type-approval procedure in order to be connected up to the public network.

- 9 The file also shows that as regards telephones the RTT has reserved to itself the right to supply the first telephone but has abandoned, during recent years, the exclusive position that it formerly held in respect of additional telephones. However, Article 93 of the aforementioned Ministerial Order of 20 September 1978 also provides that the RTT may, at any time, reassert the right to supply equipment which is left to the private sector and may thereupon require that equipment in use be withdrawn from service.

- 10 In those circumstances the Vice-President of the Commercial Court, Brussels, has stayed the proceedings pending a preliminary ruling on the following questions:

'(1) Interpretation of Article 30 of the Treaty:

In so far as the Régie des Télégraphes et Téléphones (RTT), in addition to operating the public network in Belgium, also sells equipment intended to be

connected to the network, to what extent is Article 13 of the Ministerial Order of 20 September 1978 compatible with Article 30 of the Treaty where:

- A. it empowers the RTT to decide whether equipment not supplied and sold by it is to be approved for connection to the public network, and therefore leaves to the discretion of the RTT the establishing of the technical and administrative criteria that such equipment must meet in order for the RTT to grant its approval?

- B. although the RTT is a competitor on the Belgian market with private sector suppliers and importers in Belgium, no procedure involving the hearing of both parties would appear to exist as regards the setting of the standards and as regards ascertaining whether the equipment meets those standards, and no opportunity is given to the subscriber or to the importer of the equipment in question to establish that during the procedure for the granting of the approval no arbitrary or discriminatory action was taken, and no appeal lies against a decision taken by the RTT?

(2) To what extent does the fact that the subscriber is made liable for the costs incurred by the RTT by reason of an infringement of the first paragraph of Article 13 of the Ministerial Order in question, including the costs of seeking out and eliminating any interference caused by a non-authorized piece of equipment constitute a measure equivalent to a quantitative restriction where no procedure exists for both parties to be heard by an independent body to assess whether and to what extent a causal link exists and, therefore, a user or subscriber desiring to connect a piece of equipment in such a manner will be inclined, so as to avoid any risk, to buy from the RTT itself?

(3) Interpretation of Article 86 of the Treaty:

To what extent does the monopoly given to the RTT to grant authorizations for connection to the public network and to lay down the detailed rules governing the connection of equipment not supplied or sold by it, with the related power for the RTT arbitrarily to determine the standards which the

equipment must meet, constitute a practice prohibited by Article 86(b) and (c) of the Treaty?’

- 11 Reference is made to the Report for the Hearing for a fuller account of the relevant Belgian legislation, the facts and the background to the case, the procedure and the written observations submitted to the Court, which are mentioned or discussed hereinafter only in so far as is necessary for the reasoning of the Court.
- 12 In its order for reference, the Commercial Court, Brussels, noted at the outset that neither the RTT's legal monopoly over the public network, nor the fact that telephone installations must meet certain technical requirements in order to be connected to the public network was in question. It pointed out that Belgian legislation leaves it to the RTT to determine the technical requirements that equipment must satisfy in order to be connected to the network and also to assess whether those requirements have been met. It observed that that situation became highly debateable where the RTT, which itself sells equipment intended to be connected to the network, is competing with the company against which it has brought an action on the ground that that company has sold telephones without informing the consumers that those telephones were not approved. The Commercial Court considered that it needed to submit to the Court questions as to the conformity with the Treaty of provisions that place the RTT in a situation where it is both judge and party, on the grounds that if those provisions were to be found to be illegal, 'any prohibition and any measure demanded on the basis of them would constitute an unacceptable distortion of competition and an abuse of economic power by means of the RTT's uncontested monopoly over the operation of the network'.
- 13 Although the national court considered the question of the compatibility of the national legislation with the Treaty rules on the free movement of goods and on competition, it is apparent, in view of the grounds of the order making the reference mentioned above, that the questions raised by the national court should be examined by interpreting the rules on competition.

The competition rules

- 14 The national court asks whether Articles 3(f), 90 and 86 of the EEC Treaty preclude a Member State from granting to the company operating the public telecommunications network the power to lay down the standards for telephone equipment and to check that economic operators meet those standards when it is competing with those operators on the market for terminals.
- 15 Under Belgian law, the RTT holds a monopoly for the establishment and operation of the public telecommunications network. Moreover, only equipment supplied by the RTT or approved by it can be connected to the network. The RTT thus has the power to grant or withhold authorization to connect telephone equipment to the network, the power to lay down the technical standards to be met by that equipment, and the power to check whether the equipment not produced by it is in conformity with the specifications that it has laid down.
- 16 At the present stage of development of the Community, that monopoly, which is intended to make a public telephone network available to users, constitutes a service of general economic interest within the meaning of Article 90(2) of the Treaty.
- 17 The Court has consistently held that an undertaking vested with a legal monopoly may be regarded as occupying a dominant position within the meaning of Article 86 of the Treaty and that the territory of a Member State to which that monopoly extends may constitute a substantial part of the common market (judgments in Case C-41/90 *Höfner* [1991] ECR I-1979, paragraph 28, and in Case C-260/89 *ERT* [1991] ECR I-2925, paragraph 31).
- 18 The Court has also held that an abuse within the meaning of Article 86 is committed where, without any objective necessity, an undertaking holding a dominant position on a particular market reserves to itself an ancillary activity

which might be carried out by another undertaking as part of its activities on a neighbouring but separate market, with the possibility of eliminating all competition from such undertaking (judgment in Case 311/84 *CBEM* [1985] ECR 3261).

- 19 Therefore the fact that an undertaking holding a monopoly in the market for the establishment and operation of the network, without any objective necessity, reserves to itself a neighbouring but separate market, in this case the market for the importation, marketing, connection, commissioning and maintenance of equipment for connection to the said network, thereby eliminating all competition from other undertakings, constitutes an infringement of Article 86 of the Treaty.
- 20 However, Article 86 applies only to anti-competitive conduct engaged in by undertakings on their own initiative (see judgment in Case C-202/88 *France v Commission* 'Telecommunications terminals', [1991] ECR I-1223), not to measures adopted by States. As regards measures adopted by States, it is Article 90(1) that applies. Under that provision, Member States must not, by laws, regulations or administrative measures, put public undertakings and undertakings to which they grant special or exclusive rights in a position which the said undertakings could not themselves attain by their own conduct without infringing Article 86.
- 21 Accordingly, where the extension of the dominant position of a public undertaking or 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.
- 22 The exclusion or the restriction of competition on the market in telephone equipment cannot be regarded as justified by a task of a public service of general economic interest within the meaning of Article 90(2) of the Treaty. The production and sale of terminals, and in particular of telephones, is an activity that

should be open to any undertaking. In order to ensure that the equipment meets the essential requirements of, in particular, the safety of users, the safety of those operating the network and the protection of public telecommunications networks against damage of any kind, it is sufficient to lay down specifications which the said equipment must meet and to establish a procedure for type-approval to check whether those specifications are met.

According to the RTT, there could be a finding of an infringement of Article 90(1) of the Treaty only if the Member State had favoured an abuse that the RTT itself had in fact committed, for example by applying the provisions on type-approval in a discriminatory manner. It emphasizes, however, that the order for reference does not state that any abuse has actually taken place, and that the mere possibility of discriminatory application of those provisions by reason of the fact that the RTT is designated as the authority for granting approval and is competing with the undertakings that apply for approval cannot in itself amount to an abuse within the meaning of Article 86 of the EEC Treaty.

That argument cannot be accepted. It is sufficient to point out in this regard that it is the extension of the monopoly in the establishment and operation of the telephone network to the market in telephone equipment, without any objective justification, which is prohibited as such by Article 86, or by Article 90(1) in conjunction with Article 86, where that extension results from a measure adopted by a State. As competition may not be eliminated in that manner, it may not be distorted either.

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 (judgment in Case C-202/88, paragraph 51).

- 26 In those circumstances, the maintenance of effective competition and the guaranteeing of transparency require that the drawing up of technical specifications, the monitoring of their application, and the granting of type-approval must be carried out by a body which is independent of public or private undertakings offering competing goods or services in the telecommunications sector (judgment in Case C-202/88, paragraph 52).
- 27 Moreover, the provisions of the national regulations at issue in the main action may influence the imports of telephone equipment from other Member States, and hence may affect trade between Member States within the meaning of Article 86 of the Treaty.
- 28 Accordingly, it must first be stated, in reply to the national court's questions, that Articles 3(f), 90 and 86 of the EEC Treaty preclude a Member State from granting to the undertaking which operates the public telecommunications network the power to lay down standards for telephone equipment and to check that economic operators meet those standards when it is itself competing with those operators on the market for that equipment.

The free movement of goods

- 29 The national court asks secondly whether Article 30 prevents a public undertaking from being given the power to approve telephone equipment which is intended to be connected to the public network and which it has not supplied if the decisions of that undertaking cannot be challenged before the courts.
- 30 As the Court has consistently held (see in particular the judgment in Case 120/78 *REWE-Zentral* [1979] ECR 649, 'Cassis de Dijon'), in the absence of common rules applying to the products concerned, the obstacles to free movement within the Community resulting from disparities between national provisions must be

accepted in so far as those national provisions, which are applicable without distinction to national products and to imported products, can be justified as being necessary in order to satisfy imperative requirements of Community law. The Court has, however, held that such rules must be proportionate to the object to be achieved and that, where a Member State has a choice between a number of measures suited to achieving the same purpose, it must choose the means that least hinders the free movement of goods.

- 31 In the absence of Community rules on the establishment of public telecommunications networks, and in view of the technical diversity of the networks in the Member States, the Member States retain, on the one hand, the power to lay down technical specifications which telephone equipment must meet to be capable of being connected to the public network and, on the other, the power to examine whether the said equipment is fit to be connected to the network in order to satisfy the imperative requirements regarding the protection of users as consumers of services and the protection of the public network and its proper functioning.
- 32 It is true that the requirement that telephone equipment must be granted type-approval to be capable of being connected to the network does not absolutely exclude the importation into the Member State concerned of products from other Member States. But that requirement does nonetheless render the sale of such equipment more difficult or more onerous. Such a requirement means that a manufacturer in the Member State of exportation has to take into account, when manufacturing the products concerned, the criteria for type-approval laid down in the Member State of importation. Moreover, the procedure for obtaining type-approval necessarily entails delay and expense, even where the imported products meet the criteria for approval.
- 33 An exception to the principle of the free movement of goods based on an imperative requirement is justified only if the national rules are proportionate to the object to be achieved.

- 34 It is apparent from the judgment in Case 178/84 *Commission v Germany* [1987] ECR 1227, paragraph 46, that it must be open to traders to challenge before the courts an unjustified failure to grant authorization for imports. The same possibility must exist with regard to decisions refusing to grant type-approval since they can lead in practice to denial of access to the market of a Member State to telephone equipment imported from another Member State and hence to a barrier to the free movement of goods.
- 35 If there were no possibility of any challenge before the courts, the authority granting type-approval could adopt an attitude which was arbitrary or systematically unfavourable to imported equipment. Moreover, the likelihood of the authority granting type-approval adopting such an attitude is increased by the fact that the procedures for obtaining type-approval and for laying down the technical specifications do not involve the hearing of any interested parties.
- 36 The second answer to be given to the national court is, therefore, that Article 30 of the Treaty precludes a public undertaking from being given the power to approve telephone equipment which is intended to be connected to the public network and which it has not supplied if the decisions of that undertaking cannot be challenged before the courts.

Costs

- 37 The costs incurred by the Commission of the European Communities, which has 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 Vice-President of the Commercial Court, Brussels, by order of 11 January 1988, hereby rules:

1. Articles 3(f), 90 and 86 of the EEC Treaty preclude a Member State from granting to the undertaking which operates the public telecommunications network the power to lay down standards for telephone equipment and to check that economic operators meet those standards when it is itself competing with those operators on the market for that equipment;
2. Article 30 of the Treaty precludes a public undertaking from being given the power to approve telephone equipment which is intended to be connected to the public network and which it has not supplied if the decisions of that undertaking cannot be challenged before the courts.

Joliet

Slynn

Moitinho de Almeida

Rodríguez Iglesias

Zuleeg

Delivered in open court in Luxembourg on 13 December 1991.

J.-G. Giraud

R. Joliet

Registrar

President of the Fifth Chamber