European Union
European Court of Justice
Case C-320/91 Paul Corbeau
19 May 1993, [1993] ECR 1-2563

In Case C-320/91,

REFERENCE to the Court under Article 177 of the EEC Treaty by the Tribunal Correctionnel de Liège (Belgium) for a preliminary ruling in the criminal proceedings before that court against

Paul Corbeau,

Civil party claiming damages: Régie des Postes (The Post Office),

on the interpretation of Articles 86 and 90 of the EEC Treaty,

THE COURT,

composed of: O. Due, President, C.N. Kakouris, G.C. Rodríguez Iglesias, M. Zuleeg and J.L. Murray (Presidents of Chambers), G.F. Mancini, R. Joliet, F.A. Schockweiler, J.C. Moitinho de Almeida, F. Grévisse, M. Diez de Velasco, P.J.G. Kapteyn and D.A.O. Edward, Judges,

Advocate General: G. Tesauro,

Registrar: L. Hewlett, Administrator,

after considering the written observations submitted on behalf of:

- Paul Corbeau, by Luc Misson, of the Liège Bar,

- the Régie des Postes, by Edouard Marissens, of the Brussels Bar,

- the Government of the Kingdom of Spain, by Alberto Navarro González, Director-General of Community legal and institutional coordination, and Miguel Bravo-Ferrer Delgado, Abogado del Estado in the Legal Department for Community litigation, acting as Agents,

- the United Kingdom, by S. Cochrane, of the Treasury Solicitor' s Department, acting as Agent,

- Ireland, by Louis J. Dockery, Chief State Solicitor, acting as Agent,

- the Commission of the European Communities, by Giuliano Marenco, Legal Adviser, Berend Jan Drijber and Francisco Enrique González Diaz, of the Legal Service, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations of Paul Corbeau, the Régie des Postes, the United Kingdom, represented by V. Rose, Barrister, the Spanish Government, the Greek Government, represented by V. Kontolaimos and P. Athanassoulis, Legal Advisers, acting as Agents, the Italian

Government, represented by I.M. Braguglia, Avvocato dello Stato, acting as Agents, Ireland, represented by J. Cooke SC, and B. Lenihan, Barrister-at-Law, acting as Agents, and the Commission at the hearing on 2 December 1992,

after hearing the Opinion of the Advocate General at the sitting on 9 February 1993,

gives the following

Judgment

GROUNDS

1 By judgment of 13 November 1991, received at the Court on 11 December 1991, the Tribunal Correctionnel de Liège (Criminal Court, Liège) referred to the Court for a preliminary ruling under Article 177 of the EEC Treaty four questions on the interpretation of Articles 86 and 90 of the Treaty in order to enable it to determine the compatibility with those articles of the Belgian rules on the postal monopoly.

2 The questions were raised in criminal proceedings before that court against Paul Corbeau, a businessman from Liège, charged with infringing the Belgian legislation on the postal monopoly.

3 In Belgium the Law of 26 December 1956 on the postal service (Moniteur Belge of 30-31 December 1956, p. 8619) and the Law of 6 July 1971 establishing the Régie des Postes (Moniteur Belge of 14 August 1971, p. 9510) confer on the Régie des Postes, a legal person under public law, an exclusive right to collect, carry and distribute throughout the Kingdom all correspondence of whatever nature, and lay down penalties for any infringement of that exclusive right.

4 It may be seen from the documents in the main proceedings which have been sent to the Court, from the written observations submitted and from the oral argument presented at the hearing, that Mr Corbeau provides, within the City of Liège and the surrounding areas, a service consisting in collecting mail from the address of the sender and distributing it by noon on the following day, provided that the addressee is located within the district concerned. As regards correspondence destined for addressees outside that district, Mr Corbeau collects it from the sender' s address and sends it by post.

5 Upon complaint from the Régie des Postes, the Tribunal Correctionnel de Liège decided, in view of its doubts with regard to the compatibility of the Belgian rules in question with Community law, to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

(a) To what extent is a postal monopoly, such as that organized under the Belgian Law of 26 December 1956 on the postal monopoly, in conformity, as Community law now stands, with the rules of the Treaty of Rome (and in particular with Articles 90, 85 and 86) and with the rules of derived law in force which are applicable in this area?

(b) To what extent, if at all, must such a monopoly be modified in order to comply with the

Community obligations imposed on the Member States in this area, and in particular with Article 90(1), and with the rules of derived law applicable in this area?

(c) Is an undertaking in which a statutory monopoly is vested and which enjoys exclusive rights analogous to those described in the Belgian Law of 26 December 1956, subject to the rules of European competition law (and in particular to Articles 7 and 85 to 90 inclusive) by virtue of Article 90(2) of the EEC Treaty?

(d) Does such an undertaking hold a dominant position in a substantial part of the common market within the meaning of Article 86 of the Treaty of Rome, a position deriving either from a statutory monopoly or from the particular circumstances?

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

7 With regard to the facts in the main proceedings, the questions referred to the Court must be understood as meaning that the national court is substantially concerned with the question whether Article 90 of the Treaty must be interpreted as meaning that it is contrary to that article for the legislation of a Member State which confers on a body such as the Régie des Postes the exclusive right to collect, carry and distribute mail to prohibit an economic operator established in that State from offering, under threat of criminal penalties, certain specific services on that market.

8 To reply to that question, as thus reformulated, it should first be pointed out that a body such as the Régie des Postes, which has been granted exclusive rights as regards the collection, carriage and distribution of mail, must be regarded as an undertaking to which the Member State concerned has granted exclusive rights within the meaning of Article 90(1) of the Treaty.

9 Next it should be recalled that the Court has consistently held that an undertaking having a statutory monopoly over a substantial part of the common market may be regarded as having a dominant position within the meaning of Article 86 of the Treaty (see the judgments in Case C-179/90 Merci Convenzionali Porto di Genova [1991] ECR I-5889 at paragraph 14 and in Case C-18/88 RTT v GB-Inno-BM [1991] ECR I-5941 at paragraph 17).

10 However, Article 86 applies only to anti-competitive conduct engaged in by undertakings on their own initiative, not to measures adopted by States (see the RTT v GB-Inno-BM judgment, cited above, paragraph 20).

11 The Court has had occasion to state in this respect that although the mere fact that a Member State has created a dominant position by the grant of exclusive rights is not as such incompatible with Article 86, the Treaty none the less requires the Member States not to adopt or maintain in force any measure which might deprive those provisions of their effectiveness (see the judgment in Case C-260/89 ERT [1991] ECR I-2925, paragraph 35).

12 Thus Article 90(1) provides that in the case of public undertakings to which Member States grant special or exclusive rights, they are neither to enact nor to maintain in force any measure

contrary to the rules contained in the Treaty with regard to competition.

13 That provision must be read in conjunction with Article 90(2) which provides that undertakings entrusted with the operation of services of general economic interest are to be subject 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.

14 That latter provision thus permits the 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 possessed of the exclusive rights.

15 As regards the services at issue in the main proceedings, it cannot be disputed that the Régie des Postes is entrusted with a service of general economic interest consisting in the obligation to collect, carry and distribute mail on behalf of all users throughout the territory of the Member State concerned, at uniform tariffs and on similar quality conditions, irrespective of the specific situations or the degree of economic profitability of each individual operation.

16 The question which falls to be considered is therefore the extent to which a restriction on competition or even the exclusion of all competition from other economic operators is necessary in order to allow the holder of the exclusive right to perform its task of general interest and in particular to have the benefit of economically acceptable conditions.

17 The starting point of such an examination must be the premise that the obligation on the part of the undertaking entrusted with that 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 where the economically profitable sectors are concerned.

18 Indeed, to authorize individual undertakings to compete with the holder of the exclusive rights in the sectors of their choice corresponding to those rights would make it possible for them to concentrate on the economically profitable operations and to offer more advantageous tariffs than those adopted by the holders of the exclusive rights since, unlike the latter, they are not bound for economic reasons to offset losses in the unprofitable sectors against profits in the more profitable sectors.

19 However, the exclusion of competition is not justified as regards specific services dissociable from the service of general interest which meet special needs of economic operators and which call for certain additional services not offered by the traditional postal service, such as collection from the senders' address, greater speed or reliability of distribution or the possibility of changing the destination in the course of transit, in so far as such specific services, by their nature and the conditions in which they are offered, such as the geographical area in which they are provided, do not compromise the economic equilibrium of the service of general economic interest performed by the holder of the exclusive right.

20 It is for the national court to consider whether the services at issue in the dispute before it

meet those criteria.

21 The answer to the questions referred to the Court by the Tribunal Correctionnel de Liège should therefore be that it is contrary to Article 90 of the EEC Treaty for legislation of a Member State which confers on a body such as the Régie des Postes the exclusive right to collect, carry and distribute mail, to prohibit, under threat of criminal penalties, an economic operator established in that State from offering certain specific services dissociable from the service of general interest which meet the special needs of economic operators and call for certain additional services not offered by the traditional postal service, in so far as those services do not compromise the economic equilibrium of the service of general economic interest performed by the holder of the exclusive right. It is for the national court to consider whether the services in question in the main proceedings meet those criteria.

Costs

22 The costs incurred by the Spanish, United Kingdom and Irish Governments and by the Commission of the European Communities, 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 proceedings pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT,

in answer to the questions referred to it by the Tribunal Correctionnel de Liège by judgment of 13 November 1991, hereby rules:

It is contrary to Article 90 of the EEC Treaty for legislation of a Member State which confers on a body such as the Ré ie des Postes the exclusive right to collect, carry and distribute mail, to prohibit, under threat of criminal penalties, an economic operator established in that State from offering certain specific services dissociable from the service operated of general interest which meet the special needs of economic operators and call for certain additional services not offered by the traditional postal service, in so far as those services do not compromise the economic stability of the service of general economic interest performed by the holder of the exclusive right. It is for the national court to consider whether the services in question in the main proceedings meet those criteria.

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Opinion of Mr Advocate General Tesauro Delivered on 9 February 1993.
[Original language: Italian]

Mr President,

Members of the Court,

1. In its four questions the national court is substantially asking to Court of Justice to decide

whether Articles 90 and 86 of the Treaty prevent a Member State from establishing or maintaining in force a monopoly system which includes, apart from the basic postal service, also a "rapid delivery service".

These questions arose in the course of criminal proceedings against Mr Corbeau for infringing the rules governing the Belgian postal monopoly (Law of 26 December 1956, Articles 1, 26 and 33).

Mr Corbeau has provided postal services within a limited geographical area (the City and outskirts of Liège). For that purpose he has concluded a series of service contracts ("conventions de location de services"), under which he undertook to collect correspondence from the sender' s address and deliver it by the next morning provided that the addressee was located within that area. Mr Corbeau also arranged to forward by the postal service correspondence for addressees outside the area which he served.

At the material time the abovementioned Belgian legislation reserved to the postal administration alone, in general terms and with very few exceptions, the activities of collecting, carrying and distributing correspondence.

However, the legislation was subsequently amended. The Law of 21 March 1991 expressly envisages among the derogations from the postal monopoly distribution by rapid delivery ("courrier accéléré").

In the observations submitted to the Court the Belgian postal administration (the Régie des Postes) stated that the new legislation essentially recognized a situation which already existed in fact, since even before the amendments made in March 1991 the Belgian authorities had largely condoned rapid delivery services effected by operators specializing in the sector.

However, the Régie des Postes denies that Mr Corbeau' s operations may be described as a rapid delivery service.

The four questions

2. That is the context in which the national court has referred the matter to the Court of Justice. The questions raised (the wording of which is set out in the Report for the Hearing) concern the following points:

(a) Does a postal monopoly such as that governed by the 1956 Belgian Law constitute an undertaking having a dominant position within the meaning of Article 86 of the Treaty (see the fourth question)?

(b) To what extent may such a monopoly be regarded as being in conformity with Community law and in particular with Articles 90, 85 and 86 (see the first question)?

(c) To what extent is such a monopoly entitled to the derogation referred to in Article 90(2) (see the third question)?

(d) To what extent must such a monopoly be reorganized to comply with Community law (see the second question)?

Points (d) and (a)

3. Before I deal with the substance of the problem - which, as mentioned, concerns the legality of the exclusive right conferred for the rapid delivery services and is referred to in points (b) and (c) - it is appropriate to consider briefly the two other aspects outlined by the court of reference.

First of all, with regard to point (d), the subject of the second question, it may be seen that the Court will not need to make a specific pronouncement on the need for a "reorganization" of the Belgian postal monopoly. The answer to that question will in fact be covered by the answer which the Court is asked to give on the other questions raised by the court of reference. In fact, once it has been established whether and to what extent the postal monopoly conforms to the limits laid down by the Community legal order it will be superfluous to consider whether the monopoly must be reorganized: it is obvious that in any case the national legislation will have to be amended to eliminate any grounds of incompatibility noted by the Court and hence to re-establish a situation which complies with the requirements of the Treaty. On the other hand it hardly needs to be pointed out that the question put by the court of reference in this respect seems to envisage the requirement to "adjust" monopolies of a commercial character referred to in Article 37 of the Treaty, a provision which, according to a consistent case-law, concerns exclusively the marketing of goods and is therefore irrelevant as regards exclusive rights conferred for the provision of services.

4. So it is easy to answer the first of the points listed above. Essentially the court of reference is asking whether the Régie des Postes may be described as an undertaking in a dominant position within the meaning of Article 86 of the Treaty. In this respect it must be remembered that in the judgment in Case C-41/90 Hoefner and Elser v Macrotron GmbH (1) the Court stated that in the context of competition law the concept of an undertaking covers encompasses every entity engaged in an economic activity, regardless of its legal status or the way in which it is financed. In this case it is clear - and is acknowledged by the Régie des Postes itself - that both the basic postal services, consisting of collecting, sorting and distributing the correspondence, and the rapid delivery services constitute activities of an economic nature. There is therefore no reason not to recognize a body such as the Régie des Postes, which performs such activities, as an undertaking within the meaning of the Community rules on competition.

5. It must also be said that the Régie des Postes, by virtue of the aforesaid Belgian Law of 1956, possesses a statutory monopoly in the performance of the services in question and that, according to the case-law of the Court, (2) a dominant position may be the result of laws or regulations conferring exclusive rights on a given undertaking.

Finally, as was also confirmed in the ERT judgment, a dominant position over the whole of a Member State' s territory must be regarded as affecting a "substantial part" of the common market within the meaning of Article 86 of the Treaty.

On that point therefore the answer to the national court may clearly be that a body such as the Belgian Régie des Postes, on which the law has conferred a general monopoly in postal services

for the whole national territory occupies a dominant position in a substantial part of the common market within the meaning of Article 86 of the Treaty.

Points (b) and (c)

6. Moving on now to deal with the central question raised in these proceedings, I think the analysis may take the following course:

First it is appropriate to outline the essential features of the case-law relating to the application of the competition rules of the Treaty - in particular Articles 90 and 86 - to exclusive rights conferred by States on certain undertakings, relating to the provision of services.

In the second place it will be possible to assess the compatibility with those rules of the exclusive right granted to the Belgian postal administration as regards the basic postal service and rapid delivery services of the type at issue in this case.

Outline of the case-law

7. First of all, it is well known that, as the Court has consistently held, and as confirmed most recently in the judgment in Case C-271/90 (telecommunications services), (3) the mere fact of creating a dominant position by the grant of exclusive rights, within the meaning of Article 90(1) of the Treaty, is not, as such, incompatible with Article 86.

At the same time the Court, as from its first judgments on this matter, has taken care to lay down the conditions restricting the powers of Member States to protect certain undertakings, by the grant of exclusive rights, from the free play of competition.

8. Thus in the judgment in Case 10/71 concerning the Port of Mertert (4) - a case not very different from the more recent judgment in Case C-179/90 concerning the Port of Genoa, (5) the Court stated that Article 90(2) is in principle applicable in the case of an undertaking which, in ensuring the navigability of the most important waterway of the State to which it belongs, enjoys certain privileges for the accomplishment of the task entrusted to it by law and for such purposes has close links with the public authorities (see paragraph 11 of the grounds of judgment). It should be stated that in that case the "privileges" took the form of a de facto monopoly situation enjoyed by the undertaking, under provisions adopted by the public authorities, for loading and unloading goods (the case before the national court concerned a competitor who had been prevented from performing such operations by reason of the monopoly granted to the "privileged" undertaking).

With regard to such a case the Court took the view that it was for the Commission to check whether the conditions for the application of the derogation in Article 90(2) were met, a check which in its turn involved "an appraisal of the requirements, on the one hand, of the particular task entrusted to the undertaking concerned and, on the other hand, the protection of the interests of the Community" (paragraphs 12, 13 and 14 of the grounds of judgment).

The Court further stated that such an appraisal depended "on the objectives of general economic policy pursued by the States under the supervision of the Commission" - supervision which the

Commission was required to carry out under the powers conferred on it by Article 90(3) (paragraphs 15 and 16). (6)

9. Similarly in the Sacchi judgment, (7) the Court, in stating that Article 90(1) did not prohibit the grant of special or exclusive rights, made it clear that the establishment of a statutory monopoly - such as that granted to Radio Audizione Italiana for radio and television broadcasts - was compatible with the Treaty "for considerations of public interest, of a non-economic nature" (paragraph 14).

10. The next judgment, van Ameyde, (8) follows the same line. In that case the Court was once again called upon to decide as to the legality of restrictions on freedom of competition arising from the grant of exclusive rights to certain undertakings. An undertaking acting as a loss adjuster (investigating and settling claims for road accidents), a subsidiary of a Netherlands insurance company, had been prevented from pursuing its own business activities by the measure adopted by the Italian authorities under the "green card" system reserving the business of settling claims for damage caused on the national territory by vehicles insured abroad, solely to insurance companies which were members of the Italian Clearing Office for International Motor-vehicle Insurance (U.C.I.) and thus excluding loss adjusters. (9)

In that respect the Court stressed that in examining the question in the light of Articles 85, 86 and 90 of the Treaty it was necessary to assess separately the compatibility with those measures, on the one hand of any conduct or practices of the undertakings possessed of the exclusive right and, on the other hand, of the national measure reserving the settlement of claims for accidents caused by foreign vehicles solely to the insurance companies.

With regard to the latter aspect the Court concluded that the measure in question was not after all incompatible with the combined provisions of Articles 90, 85 and 86 of the Treaty. The outcome of the examination, it should be stressed, is based on a somewhat detailed consideration of the objectives of the measure, assessed in the light of the Community' s own requirements. The Court stated in fact that the reservation in favour of the insurance companies realized one of the objectives of the "green card" system (that is, that of offering full protection to those who have suffered damage, by the creation, in each member country, of a national bureau composed of insurance companies each one of which is subject to particular checks and each of which must supply the guarantees required by national law); and that, in its turn, that system, recognized and perfected by Community law, was intended to facilitate the free movement of persons and goods. Moreover the Court, in recognizing on those grounds the compatibility of the exclusive right at issue - and that of the ensuing restrictions on competition - was careful to define the limits of such compatibility: it stated that the legality of the national system as regards Article 90 in conjunction with Articles 85 and 86 was subject to the condition that the statutory exclusive right should in no event conflict with "the freedom of the insurer to whom the settlement is entrusted to rely, for the purposes of the investigation of the accident claim, on another undertaking specialized in such matters which is not a member of the bureau" (paragraph 18 of the grounds of judgment).

It may also be stated that in the van Ameyde judgment the Court did not accept that the grant by the State of an exclusive right involved as such - that is, by the mere fact of creating a reservation in favour of certain undertakings - discrimination based on nationality and hence an infringement

of Articles 52 and 59 of the Treaty (see paragraph 26 et seq.).

11. More recently the compatibility of exclusive rights with the rules of the Treaty has been considered by the Court in two groups of judgments. A first group includes the judgments in Hoefner and Elser, ERT and Porto di Genova. In those three decisions the Court starts expressly from the principle, already recognized in the GB-Inno-BM v ATAB judgment, (10) according to which the Member States may not adopt measures impairing the effectiveness of the Community rules on competition. The Court deduced that Article 90(1) in conjunction with Article 86 is infringed when the States confer exclusive rights creating a situation in which the undertaking possessed of them cannot avoid misusing them. It should be stated that the said judgments do not define (at least not clearly) what factors make it possible to distinguish a situation necessarily leading to an abuse from a situation which on the other hand does not have that effect. Nor do the judgments specify whether it is sufficient to find that a given situation is potentially one leading to abuse or on the contrary whether it must be ascertained in every case that a given abuse has actually been committed. (11) However, from the whole of the grounds of judgment in the aforementioned cases it would seem that, in order to establish whether the grant or the maintenance of an exclusive right is able to prejudice the effectiveness of the Community rules on competition and is thus incompatible with Article 90(1), it is appropriate to consider features such as the ability of the possessor of the exclusive right to satisfy demand on the market in question and (at least) the possibility that he might be encouraged to engage in conduct contrary to Article 86 of the Treaty.

12. It should also be stressed that in the ERT judgment the Court recognized that Article 59 of the Treaty prevents the establishment of a statutory monopoly (relating to the broadcasting of television programmes produced by the monopoly itself and the re-broadcasting of programmes originating in other Member States), when such a monopoly entails discriminatory effects to the detriment of broadcasts from other Member States. However, in the subsequent judgment in Case C-353/89 Commission v Netherlands, (12) the Court stated that rules which require broadcasting organizations to have recourse, for the production of programmes, to a national undertaking clearly comes under Article 59 and is therefore prohibited unless justified grounds relating to the general interest (see paragraph 31 et seq. of the grounds of judgment). Under Article 59 therefore, a statutory monopoly for services cannot restrict the freedom of those for whom the service is intended to have recourse to persons providing services who are established in other Member States. However, Article 59 does not make it possible to deal with a different situation: that in which, as precisely in this case, the statutory monopoly prevents a national operator from providing the service for national users. (13)

13. The case-law so far outlined is finally completed by another group of judgments including those in RTT v GB-Inno-BM (14) and in Case C-271/90 (telecommunications services). The latter in particular makes it clear that the extension of a statutory monopoly to a neighbouring but separate market without objective justification is prohibited as such by the combined provisions of Articles 90(1) and 86. That judgment, as made even clearer in the RTT v GB-Inno-BM judgment, is based on the idea that a national provision cannot lawfully put a public undertaking or one enjoying special or exclusive rights in a position which, if it had been the result of the undertaking' s own conduct, would constitute an infringement of Article 86 of the Treaty.

Still from the RTT v GB-Inno-BM judgment it may be seen that:

- when a national provision extends an exclusive right to another market without any objective justification, it is the extension as such which is prohibited by Articles 90(1) and 86, and it is not necessary to prove that the State has encouraged abuses actually committed by the undertaking possessed of the exclusive right (paragraphs 23 and 24);

- that the activity of producing and marketing products (affected by the exclusive right) is an activity which must be open to any undertaking (paragraph 22);

- that the exclusion or restriction of competition resulting from the national provision in question may be justified on the basis of Article 90(2) on condition that it is proportionate to certain "essential requirements" (paragraph 22): that case concerned the safety of users and of those operating the network and the protection of the network against any damage.

Considerations regarding the case-law as a whole

14. The review of the case-law so far seems to confirm that Community law lays down precise limits to the power of Member States to confer exclusive rights. In the services sector provisions conferring such rights may be appraised in the light of the combined provisions of Articles 90 and 86 or, where the conditions are met, Articles 90 and 59.

In particular the Court in principle regards provisions extending statutory exclusive rights from one market to another as incompatible with Articles 90 and 86 (judgments in RTT v GB-Inno-BM and in Case C-271/90 (telecommunications services). In such a case the State measure produces especially harmful effects on competition and trade. It takes effect in a situation in which the market structure is already affected by the existence of a prior exclusive right; in such circumstances to protect other sectors of activity from free competition is not in principle compatible with a system intended to guarantee freedom of the market and effective competition between undertakings.

However, a clarification seems required. Provisions extending the scope of an exclusive right are not by their nature different from provisions establishing an exclusive right. They both eliminate, in a given sector, the possibility of the free exercise of economic activity and hence of competition. They may therefore be examined in the light of Articles 90 and 86. And in both cases what it is essential to check is whether or not the provisions in question are objectively justified.

An examination of such justifications seems to me in fact to be the main feature of the case-law referred to (see the judgments in Case 10/71 (Port of Mertert), van Ameyde, Sacchi, RTT v GB-Inno-BM and Case C-271/90 (telecommunications services). From that point of view it will therefore be essential to consider whether the exclusive rights conferred by the States are justified by requirements of general interest which are themselves consistent with the Community' s objectives.

In undertaking such an assessment it will be necessary to abide by a criterion of proportionality in the sense that restrictions on competition (and trade) which are not indispensable for meeting

the requirements relied on to justify the exclusive rights must not be regarded as acceptable (see in particular the judgments in RTT v GB-Inno-BM and in Case 10/71 (Port of Mertert)).

The case-law is not unambiguous as regards the question whether an appraisal of such requirements must be effected on the basis of Article 90(1) (see in that respect the judgments in Sacchi and van Ameyde) or on that of Article 90(2) (see the judgments in Case 10/71 (Port of Mertert) and, more recently, RTT v GB-Inno-BM). The first solution would appear to be more consistent with the content of the two provisions. In fact Article 90(1) refers to measures adopted by States, whereas Article 90(2) concerns undertakings and restricts the application of the rules on competition to the conduct of those undertakings. The distinction, however, does not seem to have any considerable legal importance. In any event it will be a matter of determining whether the restrictions on competition resulting from the national scheme in question are necessary for the realization of the requirements of public interest pursued.

The compatibility of the exclusive rights granted to the Belgian postal administration with Articles 90 and 86 must be assessed in the light of the abovementioned factors.

The statutory monopoly of the basic postal service.

15. In all the Member States a universal postal service has been established for the collection, sorting and delivery of correspondence (basic postal service). Clearly that service, inasmuch as it makes possible communications between individuals, meets a vital need of society.

In accordance with its social function, the postal service is organized in such a way as to meet certain specific requirements. It is in fact:

- provided on request throughout the national territory (public service requirement);

- at an average level of quality;

- at a single tariff (that is, irrespective of the distance to be covered and the location of the place of despatch or of destination) fixed at a level accessible to all.

For that purpose the postal service carries out a tariff equalization. That consists in fixing the tariffs in terms of the average cost of running the service, thus setting off against one another the surpluses realized on lowest unit cost services (in particular the most heavily used and best inter-connected services) and the deficits borne on the highest unit cost services.

That equalization in turn presupposes the establishment of a statutory monopoly. If in fact the postal service were liberalized, competition would concentrate on the most profitable services, exerting a progressive pressure on tariffs and a consequent "creaming-off" of the profits of the postal administration. On the other hand the task of providing the most onerous services and hence those structurally least profitable would fall to the administration.

It follows - as is largely confirmed by the Commission Green Paper on postal services (15) - that in the absence of a statutory monopoly the postal administration would be compelled, in order to maintain its own financial equilibrium, to abolish the system of tariff equalization and to adopt

differential tariffs. However, such a solution, apart from the question of its actual practicability, would conflict with the special social function of the postal service, since it would involve an increase in tariffs for the less-used services, which are more expensive to run, and this would mean actually penalizing correspondence to and from the more isolated and less thickly-populated areas which are less developed and where, as a result, the increased tariffs for an essential public service such as the postal service would be particularly harmful from all points of view.

In brief it may be stated that the statutory monopoly inherent in the basic service cannot be eliminated without prejudicing the essential function of the universal postal service, namely to offer to the public as a whole throughout national territory a means of person-to-person communication of average quality at an equalized price affordable by all.

16. However, Mr Corbeau' s counsel, referring to the judgment in Hoefner and Elser, has contended that the Belgian postal monopoly is no longer justified by reason of its inability to offer qualitatively acceptable services capable of satisfying demand and the users' expectations.

It is correct that the Court, in the Hoefner and Elser judgment, took the view that the establishment of a statutory monopoly was incompatible with Articles 90 and 86 when the monopoly itself was obviously not in a position to satisfy demand. It is doubtful, however, whether that case-law may be transposed to the case of a postal monopoly, which, even though the quality of its services may appear indifferent and below the public' s expectations, is nevertheless required by law to provide the service for all who request it.

But even apart from that consideration, I think that Mr Corbeau' s counsel' s argument must be rejected on grounds of principle. As has been said, statutory monopolies justified by objective requirements of public interest, in particular when those requirements are not of an economic nature, must be regarded as compatible with Articles 90 and 86. On the other hand, Articles 90 and 86 cannot constitute a means of evaluating the economic efficiency of this or that national monopoly. If a monopoly is objectively justified - as in the case of the basic postal monopoly - it is of little importance whether it is more or less effectively managed; in any event it will have to be regarded as consistent with the Treaty, whilst it will be for the national authorities to apply themselves to improving the quality of the services provided. Any other solution, moreover, would have the consequence that a national system conferring exclusive rights would be permissible in one case and prohibited in another, depending on how efficiently or, to put it another way, how ably and correctly the entity possessed of the exclusive right was managed.

17. In these circumstances I think that Articles 90 and 86 of the Treaty do not prevent the conferment on the postal administration of exclusive rights having as their object the service of collecting, at points pre-determined for the purpose, and the sorting and delivery of correspondence.

The rapid delivery service

18. As may be seen, moreover, from the Commission' s Green Paper and as has been stressed at length by the parties which have submitted observations in these proceedings - including the Régie des Postes - the maintenance of the universal postal service does not justify the recognition

of exclusive rights having an unlimited scope. The restrictions on competition resulting from a statutory monopoly, in fact, must in principle be restricted to what is strictly indispensable for meeting the requirements for which the monopoly itself was set up.

Although it is clear that the public monopoly must be retained for the basic postal service, the same cannot be said for services which are objectively different from the basic service and which show, as compared with the latter, a specific added value.

That applies in particular to the rapid delivery service at issue in these proceedings.

The rapid delivery service - which should not be confused with the ordinary "Express" mail, which falls within the sphere of the normal postal service (Green Paper, pages 365 and 366) - is a specific service which has been steadily developing, particularly in recent years, to deal with the requirements of special categories of users (above all undertakings and the professions).

It must be stated that, as is quite clear from the Green Paper, the rapid delivery service - of which legislation gives no definition - is no different from the basic postal service as regards either the content and weight of the objects delivered or - it should be emphasized - by greater speed. In one of the passages of the Green Paper the Commission observes in this respect:

"In what way can an express item be easily distinguished from a letter? Its dimension, weight and contents may be the same. Even the speed of delivery may be similar. The essential difference lies in the value (whatever form it takes) added by express service providers and perceived by customers. The most effective way of determining the extra value perceived is to consider the extra price that customers are prepared to pay".

What characterizes the rapid delivery service is in general the added value which it presents as compared with the basic service, an added value which, in its turn, consists in one or more additional services such as:

- collection of the correspondence from the sender' s address;

- a greater speed or reliability of distribution (resulting for example from delivery by a certain time or to the addressee personally or again with confirmation to the sender that delivery has been effected);

- the possibility of changing the destination during transport (tracking and tracing);

- the possibility of shaping the service according to the individual requirements of customers (personalized services). (16)

The rapid delivery service may also operate in a territorial area of variable size: international, national or even infranational. (17) In particular the Green Paper specifies, with regard to "city mail", that "This is a service operated by private operators. It usually refers to mail which is collected in an urban area for delivery in that area." However, there is nothing to prevent international rapid delivery undertakings from performing "city mail" services.

It should also be stated that that service is performed by virtue of contractual relations under private law and is therefore subject to a legal system differing from that applied to the services provided by the postal administration. Finally, as regards tariffs, two aspects must be stressed. In the first place, in the absence of a scheme laid down by the public authorities, it is clear that tariffs will be laid down freely by the relevant undertakings on the basis of their costs and other market conditions (which means that in certain cases, though rarely, the tariffs may correspond to or even be less than the tariffs applied in a given country for the corresponding basic postal service).

In the second place, however, there is nothing to prevent the public authorities from adopting rules on tariffs allowing rapid delivery services only above a certain threshold. Such rules would make it possible to safeguard the basic postal service' s financial equilibrium but without harming the rapid delivery service: in fact, if it is correct that the latter contains an added value as compared with the basic postal service it may be assumed that the user will be prepared to pay for the rapid delivery service a higher price than that paid for the normal postal service. Such rules, moreover, on condition that they are transparent and remain within the limits necessary to guarantee the requirements of the postal monopoly for basic services, may be regarded as consistent with the Community competition rules, as was confirmed by the Court in the Ahmed Saeed judgment. (18) (19)

19. That having been said, and for the examination of the compatibility with Articles 90 and 86 of the application of the exclusive right not only to the basic postal service but also to the rapid delivery services, it should be pointed out that the requirements justifying the maintenance of the monopoly for the basic postal service do not, on the contrary, exist for the rapid delivery service.

The latter does not fulfil the special social function of the postal monopoly and is not subject to the same burdens: as distinct from the basic postal service, it does not meet a generalized need of society, but special requirements of specific categories of users (mostly business customers). Consequently it is not subjected to the restraints which characterize the postal service, that is, the obligation to provide the service to all who request it at an average level of quality and at an equalized tariff affordable by all, restraints which, as already stated, make it necessary to retain an exclusive field, a reserved area, for the activity of the basic postal service.

On the other hand it may be stressed that the need to liberalize the rapid delivery service is substantially recognized by the States themselves, which are in fact fully aware that the rapid delivery service is a service objectively different from the basic service and that it covers a separate market. If, for a period, the statutory monopoly was applied also to the rapid delivery service, that did not happen because it was thought for some reason necessary to reserve that service to the postal administration but was simply dependent on the fact that the postal monopoly was of a general nature and that consequently at the time when new services with added value began to spread for the distribution of correspondence, they automatically fell within the sphere of the monopoly. It has not however been denied, not only that there is no justification for monopolizing the rapid delivery service, but that, above all, the postal administration would not in any event be in a position to provide on its own the rapid delivery services demanded by the market (as may be seen from the Green Paper, there are only three Member States within the Community in which the rapid delivery service has not been entirely liberalized).

20. Then as regards the effect on intra-Community trade of the restrictions on competition linked to the application of the postal monopoly to the rapid delivery service, it is sufficient to state that the national legislation in question is such as to prevent operators from other Member States either from establishing themselves on the Belgian market to provide rapid delivery services or from providing such services from other Member States.

21. There is one more point. In these proceedings both the governments which have submitted observations and the Régie des Postes itself have agreed in taking the view that, in principle, the exclusive rights granted to the postal administration, to be compatible with the Treaty, must have a limited scope and cannot be extended to rapid delivery services showing a genuine added value and consequently differing from the basic service.

What has been contested in these proceedings, on the other hand, is that operations for the distribution of correspondence such as those carried out by Mr Corbeau may be regarded as a rapid delivery service. In that respect it has been contended that a service for the distribution of correspondence which is geographically limited, which has delivery periods similar to or slightly less than those of the postal service and for which the rates demanded are lower (though only slightly so) than the normal postal tariffs does not really offer an added value, but that it is comparable to the basic postal service and must therefore be subject to the statutory monopoly.

22. In that respect it seems to me that the following outline observations may be made.

It must first be stated that the definition of rapid delivery service as compared with the basic service must be worked out at Community level and on the basis of criteria which are as clear and uniform as possible. On that definition depends in fact the application to certain activities of a completely different legal system: on the one hand liberalization, on the other public monopoly. The activities subject to such systems must be defined in identical terms throughout the Community.

It has been stated that the rapid delivery service is characterized by the supply to the user of additional services as compared with the basic service and it has been indicated that the accent must be placed not so much on the greater speed of despatch as on the reliability guaranteed to the user. Moreover, provided that the service supplied contains an added value, it is unimportant that it should be performed in a greater or smaller geographical area.

As regards Mr Corbeau' s operations it should be said, on the basis of the description appearing in the documents before the Court and subject to the checks which only the national court can effect, that:

- the defendant collects the correspondence from the sender' s address;

- such collection normally takes place after the collection times of the postal service;

- delivery takes place next morning; though it is true that distribution times are theoretically similar to those of the post, the defendant undertakes by contract to comply punctually with that timetable (Article 3 of the copy of the contract produced to the Court), whilst delivery times for the postal service are indicative rather than guaranteed and are actually met in only a limited

percentage of cases;

- the service gives rise to a direct fiduciary relationship between the defendant and his customers;

- within certain limits the customer can contact Mr Corbeau to change the destination of the correspondence.

All those services are objectively additional services capable of representing a genuine added value as compared with the normal postal service. On the basis of those factors there is therefore no reason to regard the operations carried out by the defendant as not constituting a rapid delivery service.

Finally, as regards the fact that the tariffs applied by the defendant are slightly below the postal tariffs, it must be recalled that the national authorities are in principle empowered to adopt tariff rules which would prevent the performance of rapid delivery services below a given price threshold but that in the absence of such rules undertakings are obviously free to fix their tariffs independently as a function of their costs and market conditions.

23. In the light of the foregoing considerations I think it would be possible to reply to the national court as follows:

(1) An organization such as the Belgian Régie des Postes to which the law has granted a general monopoly in postal services for the whole national territory constitutes an undertaking having a dominant position in a substantial part of the common market within the meaning of Article 86 of the Treaty.

(2) The provisions of Article 90(1) of the Treaty, in conjunction with Article 86, prevent a Member State from applying the statutory monopoly established for the basic postal service also to rapid delivery services such as those at issue in the main proceedings, which present an actual added value as compared with the operations of collection and delivery of correspondence effected by the basic postal service.

**Notes**

(1) - [1991] ECR I-1979.

(2) - See the judgments in Case 311/84 CBEM [1985] ECR 3261 and, most recently, in Case C-260/89 ERT [1991] ECR I-2925.

(3) - Kingdom of Spain v Commission [1992] ECR I-0000.

(4) - Ministère Public Luxembourgeois v Madeleine Hein, née Muller [1971] ECR 723.

(5) - Merci Convenzionali Porto di Genova [1991] ECR I-5889.

(6) - It should be stated that in the Port de Mertert judgment, as in the Inter-Huiles judgment (Case 172/82 [1983] ECR 555), the Court takes as its starting point the principle that Article 90(2) is not a provision which is directly applicable. That interpretation, already contradicted by other judgments delivered more or less at the same time as the two abovementioned judgments, appears by now to have been entirely overruled in the light of more recent decisions (see in particular the judgments in ERT and Porto di Genova).

(7) - Judgment in Case 155/73 [1974] ECR 409.

(8) - Judgment in Case 90/76 S.r.l. van Ameyde v U.C.I. [1977] ECR 1091.

(9) - In the main proceedings the loss adjuster had asked the court to declare illegal UCI' s claim to entrust investigation and settlement of accident claims solely to insurance companies which were members of the UCI itself, and consequently to declare illegal any action taken by UCI with regard to third persons intended to restrict the plaintiff' s freedom of action and to take over its customers.

(10) - Case 13/77 [1977] ECR 2115.

(11) - The fact that the formula of a situation necessarily leading to an abuse is ambiguous (a rather confusing formula according to L. Gyselen in CMLR 1992, p. 1238) and therefore capable of arousing some uncertainties in application is confirmed by the rather divergent results arrived at by national courts called upon to apply, in individual cases, the Porto di Genova judgment. In fact according to some courts (Tribunale di Genova, order of 9 July 1992; Pretura di Genova, orders of 19 June, 22 June, 20 July and 12 August 1992, reported in Foro Italiano, 1992, I, 2811), the Court did not determine the illegality as such of the exclusive right conferred on the port companies but restricted itself to condemning misuse of them: it follows, according to that case-law, that the statutory reservation granted to the port companies could be regarded as void only if it appeared that the monopoly rights had actually been exercised in an abusive manner. Other courts on the other hand (Pretura de La Spezia, order of 3 June 1992; Pretura di Massa, order of 2 June 1992, also reported in Foro Italiano, cit.) have thought that, under the judgment of the Court, the statutory reservation must be considered, as such, to be incompatible with Community law.

Both the Italian Government, in the circular issued to give effect to the judgment in Porto di Genova and the Consiglio di Stato in an opinion given on that circular (Parere 13 May 1992, No 598, reported in Foro Italiano, 1992, III, 425) have taken the second view. Both took the view that the judgment of the Court decided that the last paragraph of Article 110 of the Codice della Navigazione was illegal so that the companies' monopoly in the performance of dock work was void.

It is also worth pointing out that, in the said opinion, the Consiglio di Stato, taking a different point of view from that expressed in the ministerial circular, thought that the judgment of the Court not only involved the elimination of the port monopolies but also had repercussions on the system of administrative franchise for the performance of dock work referred to in Article 111 of the Codice della Navigazione. The Consiglio in fact deduced from the Court' s decision a series of criteria which the administrative authority was to observe in granting franchises. Those

obligations are based on the statement that, in accordance with the principles of Community legislation, the system of administrative franchise must not result in the de facto establishment of illegal monopoly situations owing to a mistaken use of administrative power arising from the issue of a single authorization or a restricted number thereof. According to the Consiglio di Stato, the implementation of Community rules involves the grant of a number of franchises so as to guarantee the free market and a system of effective competition between undertakings. It follows that, in granting franchises, the administrative authority is required to assess the economic details of the relationship between the number of undertakings and the requirements of port traffic and the legal details of the requirement to implement the principles derived from Community rules on the subject of the free market and free competition. It is also pointed out in the opinion that the administrative provisions adopted in this matter must contain a proper statement of the reasons on which they are based.

(12) - [1991] ECR I-4069.

(13) - In the Hoefner and Elser judgment the Court had stated that Article 59 was not applicable to that case in view of the fact that both the undertaking possessing the exclusive right and the person for whom the service was intended were nationals of one and the same Member State.

(14) - Case C-18/88 [1991] ECR I-5973.

(15) - In the Green Paper on the single market in postal services - COM (91) 476 final, of 11 June 1992 - the Commission stresses the need to guarantee the provision throughout the Community of the universal postal service at prices accessible to all. That objective must be attained through the establishing (inasmuch as it was needed in Member States individually) of a set of reserved services which would confer some special and exclusive rights, in order to maintain the resources necessary for the undertaking the public service mission in sound conditions; at the same time, consistent with this objective, to have largest possible part of the sector operating in free competition (sic) (Executive Summary, p. 10).

(16) - The fact that such services are those which most frequently characterize the rapid delivery service may be seen not only from the Green Paper but also from the decisions adopted by the Commission under Article 90(3) in relation to the scheme for the operations of the rapid delivery service in Spain (Decision 90/456/EEC of 1 August 1990, OJ 1990 L 10, p. 19) and in the Netherlands (Decision 90/16/EEC of 20 December 1989, OJ 1989 L 10, p. 47).

(17) - As regards the provision of rapid delivery services in a territorially restricted area, see Commission Decision 90/16/EEC in which it was stated that on 1 January 1989 the undertakings providing such services in the Netherlands were to a large extent small and medium-sized undertakings employing for that service some 4000 persons mostly engaged in distributing the correspondence within the country.

(18) - Judgment in Case 66/86 Ahmed Saeed Flugreisen and Others v Zentrale zur Bekaempfung unlauteren Wettbewerbs [1989] ECR 803 at paragraph 54 et seq. of the grounds of judgment.

(19) - In Decision 90/16/EEC the Commission considered the Netherlands legislation providing for a minimum tariff for express delivery services. In that case the Commission, without calling

in question the minimum tariff as such, was critical of the fact that the tariff applied to the private operators and not to the postal administration, which reserved to itself the power to carry out the rapid delivery service even below the minimum tariff.

It should also be noted that the adoption of a tariff system to provide a legal distinction between the province of the rapid delivery service (liberalized) and the basic postal service (subject to a monopoly) is recommended in the Commission Green Paper (see pp. 43, 201, 359 and 360).