JUDGMENT OF THE COURT
18 June 1991 *

In Case C-260/89,

REFERENCE by the Monemeles Protodikeio Thessaloniki (Thessaloniki Regional Court) for a preliminary ruling in the proceedings pending before that court between

Elliniki Radiophonia Tileorassi Anonimi Etairia (ERT AE)

Panellinia Omospondia Syllogon Prossopikou ERT, (intervener)

and

Dimotiki Etairia Pliroforissis (DEP)

Sotirios Kouvelas,

Nicolaos Avdellas and Others, (interveners)

on the interpretation of the EEC Treaty, in particular Articles 2, 3(f), 9, 30, 36, 85 and 86,

* Language of the case: Greek

THE COURT,

composed of O. Due, President, T. F. O'Higgins, G. C. Rodríguez Iglesias and M. Díez de Velasco (Presidents of Chambers), Sir Gordon Slynn, C. N. Kakouris, R. Joliet, F. A. Schockweiler and P. J. G. Kapteyn, Judges,

Advocate General: C. O. Lenz,
Registrar: H. A. Rühl, Principal Administrator,

After considering the observations submitted on behalf of:

— Elliniki Radiophonia Tileorassi Anonimi Etairia, by V. Kostopoulos and K. Kalavros, of the Athens Bar,

— Dimotiki Etairia Pliorforissis and Sotirios Kouvelas, by A. Vamvakopoulos, A. Panagopoulos and P. Ladas, of the Thessaloniki Bar,

— The Government of the French Republic, by E. Belliard, Deputy Director in the Directorate for Legal Affairs of the Ministry for Foreign Affairs and G. de Bergues, Principal Deputy Secretary for Foreign Affairs in the same Ministry, acting as Agents,

— The Commission of the European Communities, by G. Marenco, Legal Adviser, B. Jansen and M. Condou-Durande, Members of its Legal Service, acting as Agents,

having regard to the Report for the Hearing,

after hearing oral argument from Elliniki Radiophonia Tileorassi Anonimi Etairia, Dimotiki Etairia Pliroforissis and the Commission at the hearing on 27 November 1990,

after hearing the Opinion of the Advocate General at the sitting on 23 January 1991,

gives the following

Judgment

1 By judgment of 11 April 1989, which was received at the Court on 16 August 1989, the Monomeles Protodikeio Thessaloniki [Thessaloniki Regional Court], in proceedings for interim measures, referred to the Court for a preliminary ruling under Article 177 of the EEC Treaty, several questions on the interpretation of the EEC Treaty, in particular Articles 2, 3(f), 9, 30, 36, 85 and 86, and also of Article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms for November 1950 in order to determine the compatibility with those provisions of a national system of exclusive television rights.

2 Those questions were raised in proceedings between Elliniki Radiophonia Tileorassi Anonimi Etairia (hereinafter referred to as 'ERT'), a Greek radio and television undertaking, to which the Greek State had granted exclusive rights for carrying out its activities, and Dimotiki Etairia Pliroforissis (hereinafter referred to as 'DEP'), a municipal information company at Thessaloniki, and S. Kouvelas, Mayor of Thessaloniki. Notwithstanding the exclusive rights enjoyed by ERT, DEP and the Mayor, in 1989, set up a television station which in that same year began to broadcast television programmes.

3 ERT was established by Law No 1730/1987 (*Official Journal of the Hellenic Republic* No 145 A of 18 August 1987, p. 144). According to Article 2(1) of that Law, ERT's object is, without a view to profit, to organize, exploit and develop radio and television and to contribute to the information, culture and entertainment of the Hellenic people. Article 2(2) provides that the State grants to ERT an exclusive franchise, in respect of radio and television, for any activity which contributes to the performance of its task. The franchise includes in particular the broadcasting by radio or television of sounds and images of every kind from Hellenic territory for general reception or by special closed or cable circuit, or any other form of circuit, and the setting up of radio and stations. Under Article 2(3) ERT may produce and exploit by any means radio and television broadcasts. Article 16(1) of the same Law prohibits any person from undertaking, without authorization by ERT, activities for which ERT has an exclusive right.

4 Since it took the view that the activities of DEP and the Mayor of Thessaloniki fell within its exclusive rights, ERT brought summary proceedings before the Thessaloniki Regional Court in order to obtain, on the basis of Article 16 of Law No 1730/1987, an injunction prohibiting any kind of broadcasting and an order for the seizure and sequestration of the technical equipment. Before that court, DEP and Mr Kouvelas relied mainly on the provisions of Community law and the European Convention on Human Rights.

5 Since it took the view that the case raised important questions of Community law, the national court stayed the proceedings and referred the following questions to the Court of Justice for a preliminary ruling:

'(1) Does a law which allows a single television broadcaster to have a television monopoly for the entire territory of a Member State and to make television broadcasts of any kind is consistent with the provisions of the EEC Treaty and of secondary law.

(2) If so, whether and to what extent the fundamental principle of free movement of goods laid down in Article 9 of the EEC Treaty is infringed in view of the fact that the enjoyment by a single broadcaster of an exclusive television franchise entails a prohibition for all other Community citizens on the export, leasing or distribution, by whatever means, to the Member State in question of materials, sound recordings, films, television documentaries or other products which may be used to make television broadcasts, except in order to serve the purposes of the broadcaster who has the exclusive television franchise, when, of course, that broadcaster also has the discretionary power to select and favour national materials and products in preference to those of other Member States of the Community.

(3) Whether and to what extent the grant of a television franchise to a single broadcaster constitutes a measure having equivalent effect to a quantitative restriction on imports, expressly prohibited under Article 30 of the EEC Treaty.

(4) If it is accepted that it is lawful to grant by law to a single broadcaster the exclusive right, for the entire national territory of a Member State, to make television broadcasts of any kind, on the ground that the grant falls within the provisions of Article 36 of the EEC Treaty as it has been interpreted by the European Court, and given that that grant satisfies a mandatory

requirement and serves a purpose in the public interest — the organization of television as a service in the public interest — whether and to what extent that intended purpose is exceeded, that is to say whether that purpose, the protection of the public interest, is attained in the least onerous manner, in other words in the manner which offends least against the principle of the free movement of goods.

(5) Whether and to what extent the exclusive rights granted by a Member State to an undertaking (a broadcaster) in respect of television broadcasts, and the exercise of those rights, are compatible with the rules on competition in Article 85 in conjunction with Article 3(f) of the EEC Treaty when the performance by the undertaking of certain activities, in particular the exclusive (a) transmission of advertisements, (b) distribution of films, documentaries and other television material produced within the Community, (c) selection, in its own discretion, distribution and transmission of television broadcasts, films, documentaries and other material, prevents, restricts or distorts competition to the detriment of Community consumers in the sector in which it operates and throughout the national territory of the Member State, even though it is entitled by law to carry out those activities.

(6) Where the Member State uses the undertaking entrusted with the operation of the television service — even with regard to its commercial activities, particularly advertising — as an undertaking entrusted with the operation of services of general economic interest, whether and to what extent the rules on competition contained in Article 85 in conjunction with Article 3(f) are incompatible with the performance of the task assigned to the undertaking.

(7) Whether such an undertaking which has been granted under the law of the Member State a monopoly on television broadcasting of any kind throughout the national territory of that State may be considered to occupy a dominant position in a substantial part of the Common Market, and,

(8) If so, whether and to what extent the imposition (owing to the absence of any other competition in the market) of monopoly prices for television advertisements and of such preferential treatment, at its discretion, to the detriment of Community consumers, and the performance by that undertaking of the activities mentioned above in question (5), pursued in the absence of competition in the field in which it operates, constitute an abuse of a dominant position.

(9) Whether and to what extent the grant by law to a single broadcaster of a television monopoly for the entire national territory of a Member State, with the right to make television broadcasts of any kind, is compatible today with the social objective of the EEC Treaty (preamble and Article 2), the constant improvement of the living conditions of the peoples of Europe and the rapid raising of their standard of living, and with the provisions of Article 10 of the European Convention for the Protection of Human Rights of 4 November 1950.

(10) Whether the freedom of expression secured by Article 10 of the European Convention for the Protection of Human Rights of 4 November 1950 and the abovementioned social objective of the EEC Treaty, set out in its preamble and in Article 2, impose *per se* obligations on the Member States, independently of the written provisions of Community law in force, and if so what those obligations are.'

6 Reference is made to the report for the hearing for a fuller account of the legal background and facts of the main proceedings, 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.

7 It emerges, in substance, from the judgment making the reference that by its first question the national court is seeking to ascertain whether a television monopoly held by a single company to which a Member State has granted exclusive rights for that purpose is permissible under Community law. The second, third and fourth questions relate to the point whether the rules on the free movement of goods, in particular Article 9 and Article 30 and 36 of the Treaty, preclude such a monopoly. Since these questions concern a monopoly in services, they are to be regarded as referring not only to the rules of the Treaty in relation to the free movement of goods but also to those relating to the freedom to provide services, in particular Article 59 of the Treaty.

8 The fifth, sixth, seventh and eighth questions relate to the interpretation of the rules on competition applicable to undertakings. In that respect the national court seeks to ascertain in the first place whether Article 3(f) and Article 85 of the Treaty preclude the grant by the State of exclusive rights in the field of television.

Secondly, the national court inquires whether an undertaking which has an exclusive right in relation to television throughout the territory of a Member State holds, as a result, a dominant position in a substantial part of the market within the meaning of Article 86 of the Treaty and whether certain conduct constitutes an abuse of that dominant position. Thirdly, the national court asks whether the application of the rules on competition precludes the performance of the particular task entrusted to such an undertaking.

9 The ninth and tenth questions are concerned with an examination of the monopoly situation in the field of television in the light of Article 2 of the Treaty and Article 10 of the European Convention on Human Rights.

The television monopoly

10 In Case C-155/73 *Sacchi* [1974] ECR 409, paragraph 14, the Court held that nothing in the Treaty prevents Member States, for considerations of a non-economic nature relating to the public interest, from removing radio and television broadcasts from the field of competition by conferring on one or more establishments an exclusive right to carry them out.

11 Nevertheless, it follows from Article 90(1) and (2) of the Treaty that the manner in which the monopoly is organized or exercised may infringe the rules of the Treaty, in particular those relating to the free movement of goods, the freedom to provide services and the rules on competition.

12 The reply to the national court must therefore be that Community law does not prevent the granting of a television monopoly for considerations of a non-economic nature relating to the public interest. However, the manner in which such a monopoly is organized and exercised must not infringe the provisions of the Treaty on the free movement of goods and services or the rules on competition.

Free movement of goods

13 It should be observed *in limine* that it follows from the *Sacchi* judgment that television broadcasting falls within the rules of the Treaty relating to services and that since a television monopoly is a monopoly in the provision of services, it is not as such contrary to the principle of the free movement of goods.

14 However it follows from the same judgment that trade in material, sound recordings, films, and other products used for television broadcasting is subject to the rules on the free movement of goods.

15 In that respect, the grant to a single undertaking of exclusive rights in relation to television broadcasting and the grant for that purpose of an exclusive right to import, hire or distribute material and products necessary for that broadcasting does not as such constitute a measure having an effect equivalent to a quantitive restriction within the meaning of Article 30 of the Treaty.

16 It would be different if the grant of those rights resulted, directly or indirectly, in discrimination between domestic products and imported products to the detriment of the latter. It is for the national court, which alone has jurisdiction to determine the facts, to consider whether that is so in the present case.

17 As regards Article 9 of the Treaty it is sufficient to observe that that article contains a prohibition between Member States of customs duties on imports and exports and of all charges having equivalent effect. Since the documents before the Court contain nothing to show that the legislation in question involves the levying of a charge on import or export, Article 9 does not appear to be relevant for the purpose of appraising the monopoly in question from the point of view of the rules on the free movement of goods.

18 It is therefore necessary to reply that the articles of the EEC Treaty on the free movement of goods do not prevent the granting to a single undertaking of exclusive rights relating to television broadcasting and the granting for that purpose of exclusive authority to import, hire or distribute materials and products necessary for that broadcasting, provided that no discrimination is thereby created between domestic products and imported products to the detriment of the latter.

Freedom to provide services

19 Article 59 of the Treaty provides that restrictions on freedom to provide services within the Community are to be progressively abolished during the transitional period in respect of nationals of Member States who are established in a State of the Community other than that of the person for whom the services are intended. The requirements of that provision entail, in particular, the removal of any discrimination against a person providing services who is established in a Member State other than that in which the services are to be provided.

20 As has been indicated in paragraph 12 of this judgment, although the existence of a monopoly in the provision of services is not as such incompatible with Community law, the possibility cannot be excluded that the monopoly may be organized in such a way as to infringe the rules relating to the freedom to provide services. Such a case arises, in particular, where the monopoly leads to discrimination between national television broadcasts and those originating in other Member States, to the detriment of the latter.

21 As regards the monopoly in question in the main proceedings, it is apparent from Article 2(2) of Law No 1730/1987 and the case-law of the Hellenic Council of State that ERT's exclusive franchise comprises both the right to broadcast its own programmes (hereinafter referred to as 'broadcasts') and the right to receive and retransmit programmes from other Member States (hereinafter referred to as 'retransmissions').

22 As the Commission has observed, the concentration of the monopolies to broadcast and retransmit in the hands of a single undertaking gives that under-

taking the possibility both to broadcast its own programmes and to restrict the retransmissions of programmes from other Member States. That possibility, in the absence of any guarantee concerning the retransmission of programmes from other Member States, may lead the undertaking to favour its own programmes to the detriment of foreign programmes. Under such a system equality of opportunity as between broadcasts of its own programmes and the retransmission of programmes from other Member States is therefore liable to be seriously compromised.

23 The question whether the aggregation of the exclusive right to broadcast and the right to retransmit actually leads to discrimination to the detriment of programmes from other Member States is a matter of fact which only the national court has jurisdiction to determine.

24 It should next be pointed out that the rules relating to the freedom to provide services preclude national rules which have such discriminatory effects unless those rules fall within the derogating provision contained in Article 56 of the Treaty to which Article 66 refers. It follows from Article 56, which must be interpreted strictly, that discriminatory rules may be justified on grounds of public policy, public security or public health.

25 It is apparent from the observations submitted to the Court that the sole objective of the rules in question was to avoid disturbances due to the restricted number of channels available. Such an objective cannot however constitute justification for those rules for the purposes of Article 56 of the Treaty, where the undertaking in question uses only a limited number of the available channels.

26 Accordingly the reply to the national court must be that Article 59 of the Treaty prohibits national rules which create a monopoly comprising exclusive rights to transmit the broadcasts of the holder of the monopoly and to retransmit broadcasts from other Member States, where such a monopoly gives rise to discriminatory

effects to the detriment of broadcasts from other Member States, unless those rules are justified on one of the grounds indicated in Article 56 of the Treaty, to which Article 66 thereof refers.

The rules on competition

27 As a preliminary point, it should be observed that Article 3(f) of the Treaty states only one objective for the Community which is given specific expression in several provisions of the Treaty relating to the rules on competition, including in particular Articles 85, 86 and 90.

28 The independent conduct of an undertaking must be considered with regard to the provisions of the Treaty applicable to undertakings, such as, in particular, Articles 85, 86 and 90(2).

29 As regards Article 85, it is sufficient to observe that it applies, according to its own terms, to agreements 'between undertakings'. There is nothing in the judgment making the reference to suggest the existence of any agreement between undertakings. There is therefore no need to interpret that provision.

30 Article 86 declares that any abuse of a dominant position within the common market or in any substantial part of it is prohibited as incompatible with the common market in so far as it may affect trade between Member States.

31 In that respect it should be borne in mind that an undertaking which has a statutory monopoly may be regarded as having a dominant position within the meaning of Article 86 of the Treaty (see the judgment in Case C-311/84 *CBEM* v *CLT and IBP* [1985] ECR 3261, paragraph 16) and that the territory of a Member State over which the monopoly extends may constitute a substantial part of the common market (see the judgment in Case C-322/81 *Michelin* v *Commission* [1983] ECR 3461, paragraph 28).

32 Although Article 86 of the Treaty does not prohibit monopolies as such, it nevertheless prohibits their abuse. For that purpose Article 86 lists a number of abusive practices by way of example.

33 In that regard it should be observed that, according to Article 90(2) of the Treaty, undertakings entrusted with the operation of services of general economic interest are subject to the rules on competition so long as it is not shown that the application of those rules is incompatible with the performance of their particular task (see in particular, the judgment in *Sacchi*, cited above, paragraph 15).

34 Accordingly it is for the national court to determine whether the practices of such an undertaking are compatible with Article 86 and to verify whether those practices, if they are contrary to that provision, may be justified by the needs of the particular task with which the undertaking may have been entrusted.

35 As regards State measures, and more specifically the grant of exclusive rights, it should be pointed out that while Articles 85 and 86 are directed exclusively to undertakings, the Treaty none the less requires the Member States not to adopt or maintain in force any measure which could deprive those provisions of their effectiveness (see the judgment in Case C-13/77 *INNO* v *ATAB* [1977] ECR 2115, paragraphs 31 and 32).

36 Article 90(1) thus provides that, in the case of undertakings to which Member States grant special or exclusive rights, Member States are neither to enact nor to maintain in force any measure contrary to the rules contained in the Treaty.

37 In that respect it should be observed that Article 90(1) of the Treaty prohibits the granting of an exclusive right to retransmit television broadcasts to an undertaking which has an exclusive right to transmit broadcasts, where those rights are liable to create a situation in which that undertaking is led to infringe Article 86 of the Treaty by virtue of a discriminatory broadcasting policy which favours its own programmes.

38 The reply to the national court must therefore be that Article 90(1) of the Treaty prohibits the granting of an exclusive right to transmit and an exclusive right to retransmit television broadcasts to a single undertaking, where those rights are liable to create a situation in which that undertaking is led to infringe Article 86 by virtue of a discriminatory broadcasting policy which favours its own programmes, unless the application of Article 86 obstructs the performance of the particular tasks entrusted to it.

Article 2 of the Treaty

39 As the Court has consistently held (see, in particular, the judgment in Case C-339/89 *Alsthom Atlantique* v *Compagnie de Construction Mécanique* [1991] ECR I-107), Article 2 of the Treaty, referred to in the ninth and tenth preliminary questions, describes the task of the European Economic Community. The aims stated in that provision are concerned with the existence and functioning of the Community and are to be achieved through the establishment of a common market and the progressive approximation of the economic policies of Member States.

40 The reply to the national court must therefore be that no criteria for deciding whether a national television monopoly is in conformity with Community law can be derived from Article 2.

Article 10 of the European Convention on Human Rights

41 With regard to Article 10 of the European Convention on Human Rights, referred to in the ninth and tenth questions, it must first be pointed out that, as the Court has consistently held, fundamental rights form an integral part of the general principles of law, the observance of which it ensures. For that purpose the Court draws inspiration from the constitutional traditions common to the Member States and from the guidelines supplied by international treaties for the protection of human rights on which the Member States have collaborated or of which they are signatories (see, in particular, the judgment in Case C-4/73 *Nold* v *Commission* [1974] ECR 491, paragraph 13). The European Convention on Human Rights has special significance in that respect (see in particular Case C-222/84 *Johnston* v *Chief Constable of the Royal Ulster Constabulary* [1986] ECR 1651, paragraph 18). It follows that, as the Court held in its judgment in Case C-5/88 *Wachauf* v *Federal Republic of Germany* [1989] ECR 2609, paragraph 19, the Community cannot

accept measures which are incompatible with observance of the human rights thus recognized and guaranteed.

42 As the Court has held (see the judgment in Joined Cases C-60 and C-61/84 *Cinéthèque* v *Fédération Nationale des Cinémas Français* [1985] ECR 2605, paragraph 25, and the judgment in Case C-12/86 *Demirel* v *Stadt Schwäbisch Gmund* [1987] ECR 3719, paragraph 28), it has no power to examine the compatibility with the European Convention on Human Rights of national rules which do not fall within the scope of Community law. On the other hand, where such rules do fall within the scope of Community law, and reference is made to the Court for a preliminary ruling, it must provide all the criteria of interpretation needed by the national court to determine whether those rules are compatible with the fundamental rights the observance of which the Court ensures and which derive in particular from the European Convention on Human Rights.

43 In particular, where a Member State relies on the combined provisions of Articles 56 and 66 in order to justify rules which are likely to obstruct the exercise of the freedom to provide services, such justification, provided for by Community law, must be interpreted in the light of the general principles of law and in particular of fundamental rights. Thus the national rules in question can fall under the exceptions provided for by the combined provisions of Articles 56 and 66 only if they are compatible with the fundamental rights the observance of which is ensured by the Court.

44 It follows that in such a case it is for the national court, and if necessary, the Court of Justice to appraise the application of those provisions having regard to all the rules of Community law, including freedom of expression, as embodied in Article 10 of the European Convention on Human Rights, as a general principle of law the observance of which is ensured by the Court.

45 The reply to the national court must therefore be that the limitations imposed on the power of the Member States to apply the provisions referred to in Articles 66 and 56 of the Treaty on grounds of public policy, public security and public health must be appraised in the light of the general principle of freedom of expression embodied in Article 10 of the European Convention on Human Rights.

Costs

46 The costs incurred by the French Government and the Commission, which have submitted observations to the Court, are not recoverable. As these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision as to costs is a matter for that court.

On those grounds,

THE COURT,

in answer to the questions referred to it by the Monomeles Protodikeio de Thessalonique by judgment of 11 April 1989, hereby rules:

(1) **Community law does not prevent the granting of a television monopoly for considerations of a non-economic nature relating to the public interest. However, the manner in which such a monopoly is organized and exercised must not infringe the provisions of the Treaty on the free movement of goods and services or the rules on competition;**

(2) **The articles of the EEC Treaty on the free movement of goods do not prevent the granting to a single undertaking of exclusive rights relating to television broadcasting and the granting for that purpose of exclusive authority to import, hire or distribute materials and products necessary for that broadcasting, provided that no discrimination is thereby created between domestic products and imported products to the detriment of the latter;**

(3) **Article 59 of the Treaty prohibits national rules which create a monopoly comprising exclusive rights to transmit the broadcasts of the holder of the monopoly and to retransmit broadcasts from other Member States, where such a monopoly gives rise to discriminatory effects to the detriment of broadcasts from other Member States, unless those rules are justified on one of the grounds indicated in Article 56 of the Treaty, to which Article 66 thereof refers;**

(4) Article 90(1) of the Treaty prohibits the granting of an exclusive right to transmit and an exclusive right to retransmit television broadcasts to a single undertaking, where those rights are liable to create a situation in which that undertaking is led to infringe Article 86 by virtue of a discriminatory broadcasting policy which favours its own programmes, unless the application of Article 86 obstructs the performance of the particular tasks entrusted to it;

(5) No criteria for deciding whether a national television monopoly is in conformity with Community law can be derived from Article 2 of the Treaty;

(6) The limitations imposed on the power of the Member States to apply the provisions referred to in Articles 66 and 56 of the Treaty on grounds of public policy, public security and public health must be appraised in the light of the general principle of freedom of expression embodied in Article 10 of the European Convention on Human Rights.

Due O'Higgins Rodríguez Iglesias Díez de Velasco

Slynn Kakouris Joliet Schockweiler Kapteyn

Delivered in open court in Luxembourg on 18 June 1991.

J.-G. Giraud
Registrar

O. Due
President