JUDGMENT OF THE COURT OF FIRST INSTANCE (Second Chamber)
10 July 1991 *

TABLE OF CONTENTS

Facts and procedure 540

Form of order sought by the parties 546

The application for the annulment of the decision as a whole 547

— Breach of Article 86 of the Treaty and inadequate statement of reasons 547

— Arguments of the parties 547

— Legal assessment 559

The definition of the relevant products 559

The existence of a dominant position 561

The existence of an abuse 561

Effects on trade between Member States 566

The alternative application for the annulment of Article 2 of the decision 568

1. Infringement of Article 3(1) of Regulation No 17 of the Council 568

— Arguments of the parties 568

— Legal assessment 569

2. Infringement of the Berne Convention 571

— Arguments of the parties 571

* Language of the case: English.

— Legal assessment 572

Costs 574

In Case T-70/89,

The British Broadcasting Corporation and **BBC Enterprises Limited,** whose offices are in London, represented by Jeremy Lever QC, Christopher Bellamy QC and Rupert Anderson, of the Bar of England and Wales, instructed by Robin Griffith, Solicitor, London, with an address for service in Luxembourg at the Chambers of Messrs Loesch and Wolter, 8 Rue Zithe,

applicants,

v

Commission of the European Communities, represented by Jacques Bourgeois, a member of its Legal Department, acting as Agent, assisted by Ian Forrester QC, of the Scottish Bar, with an address for service in Luxembourg at the office of G. Berardis, a member of the Commission's Legal Department, Wagner Centre, Kirchberg,

defendant,

supported by

Magill TV Guide Limited, a company governed by Irish law, established in Dublin, represented by John D. Cooke, Senior Counsel, of the Irish Bar, instructed by Messrs Gore & Grimes, Solicitors, Dublin, with an address for service in Luxembourg at the Chambers of Louis Schiltz, 83 Boulevard Grande-Duchesse Charlotte,

intervener,

APPLICATION for a declaration that Commission Decision 89/205/EEC of 21 December 1988 relating to a proceeding under Article 86 of the EEC Treaty

(IV/31.851, Magill TV Guide/ITP, BBC and RTE) (Official Journal 1989 No L 78, p. 43) is void,

THE COURT OF FIRST INSTANCE (Second Chamber),

composed of: A. Saggio, President of the Chamber, Chr. Yeraris, C. P. Briët, D. Barrington and J. Biancarelli, Judges,

Registrar: H. Jung,

having regard to the written procedure and further to the hearing on 21 February 1991,

gives the following

Judgment

Facts and procedure

1 By application lodged at the Registry of the Court of Justice on 10 March 1989, the British Broadcasting Corporation ('the BBC') and BBC Enterprises Limited sought the annulment of the Commission Decision of 21 December 1988 (hereinafter referred to as 'the decision') in which the Commission found that their policies and practices, at the material time, in relation to publication of their advance weekly listings for television and radio programmes which may be received in Ireland and Northern Ireland constituted infringements of Article 86 of the EEC Treaty in so far as they prevented the publication and sale of comprehensive weekly television guides in Ireland and Northern Ireland. This action is linked with the concurrent actions for the annulment of that decision brought by the two other organizations to which it was addressed, namely Radio Telefis Eireann ('RTE') and Independent Television Publications Ltd ('ITP') (Cases T-69/89 and T-76/89).

2 The background to the decision may be summarized as follows. Most homes in Ireland and between 30 and 40% of homes in Northern Ireland can receive at least six television channels: RTE1 and RTE2, provided by RTE, which enjoys a statutory monopoly for the provision of a national radio and television broadcasting service in Ireland, BBC1 and BBC2, provided by the BBC, and ITV and Channel 4, provided at the material time by the companies franchised by the Independent Broadcasting Authority ('the IBA') to supply independent television

programmes. In the United Kingdom, the BBC and the IBA enjoyed a duopoly for the provision of national television broadcasting services. In addition, many television viewers in Great Britain and Ireland could receive several satellite channels either directly or through cable networks. There was, however, no cable television in Northern Ireland.

At the material time, no comprehensive weekly television guide was available on the market in Ireland or Northern Ireland owing to the policy of the organizations to which the decision was addressed regarding the dissemination of information on the programmes of the six channels referred to above. Each of those organizations published a specialized television guide containing only its own programmes and, under the United Kingdom Copyright Act 1956 and the Irish Copyright Act 1963, claimed copyright in its weekly programme listings, preventing their reproduction by third parties.

Those listings indicate programme content and specify the broadcasting channel, together with the date, time and title of each programme. They go through a series of drafts, which become increasingly detailed and precise at each stage, until a weekly schedule is finalized approximately two weeks before transmission. At that stage, as the decision states (recital 7 in the preamble), the programme schedules become a marketable product.

3 With particular reference to the present case, it is to be noted that the BBC reserved the exclusive right to publish the weekly programme schedules for BBC1 and BBC2 in the *Radio Times*, its own magazine for presenting its programmes.

4 The BBC is incorporated in the United Kingdom by Royal Charter and broadcasts under a licence granted by the Secretary of State for Home Affairs. Its principal object is to provide, as a public service, radio and television broadcasting services for general reception in the United Kingdom. By a resolution dated 8 January 1981, annexed to its licence, the BBC recognized its duty to ensure that programmes maintain a high general standard regarding the quality of its service and to present a wide range of programmes. Another object of the BBC, under its charter, is to compile, print, publish, issue, circulate and distribute, with or without

charge, such printed matter as may be conducive to the attainment of any of its objects.

5 The BBC is funded by a licence fee, which constitutes its main revenue, by grants and by its own trading activities, including publishing, carried out through its wholly owned subsidiary, BBC Enterprises Limited. The documents in the case show, for example, that the BBC's pre-tax profit for the year to 31 March 1988 amounted to UKL 1 198 million from licence fees and grants. For the same period, the pre-tax profit of BBC Enterprises Ltd amounted to UKL 6.4 million, of which the *Radio Times* accounted for UKL 4.2 million.

In that connection, it must be noted that the *Radio Times* is published for commercial gain by BBC Enterprises Ltd under the control of its parent organization, which also determines overall policy for the licensing of its radio and television programme listings. For that reason, the Commission took the view that the two applicant organizations (hereinafter referred to collectively as 'the BBC' or 'the applicant') should in that respect be regarded as a single undertaking for the application of Article 86 in the present case (see recital 19 in the preamble to the decision).

6 At the time of the adoption of the decision, the *Radio Times* published the television programme listings for BBC1 and BBC2 only, supplemented *inter alia* by cast lists and synopses, and the BBC radio programme listings. The *Radio Times* also contained feature articles, background information and readers' letters, which accounted for about a third of the pages in the magazine, excluding advertising space. To cater for the diversity of local and regional variations, sixteen editions of the *Radio Times* were published each week. The selling price of the *Radio Times* was UKL 0.37 or IRL 0.52. In Ireland, about 15 000 copies of the *Radio Times* were sold each week. In Northern Ireland, weekly sales were about 75 000 copies, which means, according to the documents in the case, that it was bought by about 25% of households. According to the information supplied by the applicant, the *Radio Times* and the *TV Times*, the television guide published by ITP, were the two best-selling magazines in the United Kingdom, where over 97% of the total weekly sales (averaging over 3 million copies) of the *Radio Times* were made.

7 At the material time, the BBC's policy towards third parties with regard to information concerning its programmes was as follows: it provided daily and weekly newspapers with its programme schedules free on request, accompanied by a licence for which no fee was charged, setting out the terms on which that information might be reproduced. Daily newspapers could thus publish the daily listings or, at weekends and public holidays, the listings for two days, subject to certain conditions as to the format of publication. Weekly newspapers were also permitted to publish 'highlights' of the week's television programmes. The BBC ensured strict compliance with the licence conditions, by taking legal proceedings, where necessary, against publications which failed to comply with them.

8 The publisher Magill TV Guide Limited (hereinafter referred to as 'Magill'), a company governed by Irish law, is a wholly owned subsidiary of Magill Publications Holding Limited. It was established in order to publish in Ireland and Northern Ireland a weekly magazine containing information on the television programmes available to viewers in that area, the *Magill TV Guide*. According to the information provided by the parties, publication commenced in May 1985. The magazine initially confined itself to providing information on BBC, RTE, ITV and Channel 4 weekend programmes and on highlights of their weekly programmes. After the publication on 28 May 1986 of an issue of the *Magill TV Guide* containing all the weekly listings for all the television channels available in Ireland — including BBC1 and BBC2 — an Irish court, in response to an application from BBC, RTE and ITP, issued an interim injunction restraining Magill from publishing weekly listings for those organizations' programmes. Following that injunction, Magill ceased its publishing activities. The substance of the case was considered in part by the High Court which, in a judgment of 26 July 1989 delivered by Mr Justice Lardner, gave its ruling on the scope of the copyright in the programme listings under Irish law. The judge stated: 'I am satisfied by the evidence that the BBC's weekly TV programme schedules as published in *Radio Times* are the end product of a long process of planning, preparation, arrangement and revision which involves a great deal of work and experience and the exercise of skill and judgment. They are the creation of the BBC and in my judgment they constitute an original literary work in the sense of a compilation within Sections 2 and 8 of the Copyright Act 1963 in which the BBC and BBC Enterprises Limited have shown that they are entitled to copyright in the Republic of Ireland' ([1990] ILRM 534, at p. 550).

9 Previously, on 4 April 1986, with a view to the publishing of complete weekly listings, Magill had lodged a complaint with the Commission under Article 3 of Regulation No 17 of the Council of 6 February 1962, First Regulation implementing Articles 85 and 86 of the Treaty (Official Journal, English Special Edition 1959-1962, p. 87; hereinafter referred to as 'Regulation No 17'), seeking a finding that the ITP, BBC and RTE were abusing their dominant position by refusing to grant licences for the publication of their respective weekly listings. On 16 December 1987 the Commission decided to initiate a proceeding; in March 1988 it sent the BBC a statement of objections and finally, on 21 December 1988, it adopted the decision with which the present action is concerned.

10 In the decision, the relevant products are defined as follows for the three organizations concerned: they are the advance weekly programme listings of ITP, the BBC and RTE, and also the television guides in which those listings are published (first paragraph of recital 20 in the preamble). In the Commission's definition, a programme listing is 'a list of programmes to be broadcast by or on behalf of a broadcasting organization within a given period of time, the list including the following information: the title of each programme to be broadcast, the channel, the date and time of transmission' (recital 7).

The Commission finds that because of the factual monopoly enjoyed by the broadcasting organizations over their respective weekly listings, third parties interested in publishing a weekly television guide are 'in a position of economic dependence which is characteristic of the existence of a dominant position'. Furthermore, the Commission adds, that monopoly is strengthened into a legal monopoly in so far as those organizations claim copyright protection for their respective listings. In those circumstances, the Commission observes, 'no competition from third parties is permitted to exist on [the relevant] markets'. From that it infers that 'ITP, BBC and RTE each hold a dominant position within the meaning of Article 86' (recital 22).

11 To establish the existence of an abuse, the decision relies more particularly on subparagraph (b) of the second paragraph of Article 86 of the Treaty, pursuant to which an abuse is committed if an undertaking holding a dominant position limits production or markets to the prejudice of consumers (first paragraph of recital 23 in the preamble). The Commission considers in particular that 'substantial potential

demand . . . for comprehensive TV guides' exists on the market (ibid., fourth paragraph). It finds that, by using its dominant position 'to prevent the introduction on to the market of a new product, that is, a comprehensive weekly TV guide', the applicant is abusing that dominant position. It adds that a further element of the abuse is that, by virtue of the offending policy regarding information on its programmes, the applicant retains for itself the derivative market for weekly guides for those programmes (recital 23).

The Commission therefore rejects the argument that the conduct to which it objects is justified by copyright protection and states that in the present case ITP, the BBC and RTE 'use copyright as an instrument of the abuse, in a manner which falls outside the scope of the specific subject-matter of that intellectual property right' (penultimate paragraph of recital 23).

12 With respect to the measures intended to bring the infringement to an end, Article 2 of the operative part of the decision is worded as follows: 'ITP, BBC and RTE shall bring the infringements as mentioned in Article 1 to an end forthwith by supplying each other and third parties on request and on a non-discriminatory basis with their individual advance weekly programme listings and by permitting reproduction of those listings by such parties. This requirement does not extend to information in addition to the listings themselves, as defined in this Decision. If they choose to supply and permit reproduction of the listings by means of licences, any royalties requested by ITP, BBC and RTE should be reasonable. Moreover, ITP, BBC and RTE may include in any licences granted to third parties such terms as are considered necessary to ensure comprehensive high-quality coverage of all their programmes, including those of minority and/or regional appeal, and those of cultural, historical and educational significance. The parties are therefore required, within two months from the date of notification of this Decision, to submit proposals for approval by the Commission of the terms upon which they consider third parties should be permitted to publish the advance weekly programme listings which are the subject of this Decision'.

13 Concurrently with the present application for a declaration that the decision is void, the applicant, in a separate application also lodged on 10 March 1989, sought the suspension of the operation of Articles 1 and 2 of the decision. By order of 11 May 1989, the President of the Court of Justice ordered 'the

suspension of the operation of Article 2 of the contested decision in so far as it obliges the applicants to bring the infringement found by the Commission to an end forthwith by supplying each other and third parties on request and on a non-discriminatory basis with their individual advance weekly programme listings and by permitting reproduction of those listings by such parties'. For the rest, the applications for interim measures were dismissed (Joined Cases 76, 77 and 91/89 R [1989] ECR 1141, paragraph 20 of the order).

By order of 6 July 1989 in the present proceedings for the annulment of the decision, the Court of Justice gave leave to Magill to intervene in support of the Commission's conclusions. The written procedure took place in part before the Court of Justice which, by order of 15 November 1989 pursuant to Article 3(1) and Article 14 of the Council Decision of 24 October 1988 establishing a Court of First Instance of the European Communities, referred the case to the Court of First Instance. Upon hearing the report of the Judge-Rapporteur, the Court of First Instance decided, at the end of the written procedure, to open the oral procedure without any preparatory inquiry.

Form of order sought by the parties

14 The BBC, the applicant, claims that the Court should:

(a) declare the decision null and void in so far as it applies to the BBC;

(b) in the alternative, declare that the Commission has no power under Community law to order the BBC to supply any third parties with its weekly programme listings and to permit reproduction of those listings either on terms to be approved by the Commission or on any terms, including by way of licence;

(c) order the Commission to pay the costs.

The Commission, the defendant, contends that the Court should:

(a) dismiss the application;

(b) order the applicant to pay the costs of the Commission.

The application for the annulment of the decision as a whole

15 In support of its application for a declaration that the decision is void, the applicant alleges breach of Article 86 of the Treaty and inadequate statement of the reasons for the finding of an infringement of that article.

— *Breach of Article 86 of the Treaty and inadequate statement of reasons*

— *Arguments of the parties*

16 As regards the precondition for applying Article 86 in relation to the holding of a dominant position, the applicant challenges the definition of the relevant market adopted in the decision. Unlike the Commission, it considers that the products to be taken into consideration in assessing its position in the market, for the purposes of Article 86, are not its weekly listings and the television guides in which those listings are published but broadcasting services. The applicant considers that its function as a public service broadcaster includes not only preparing listings as part of programme planning but also disseminating information about its programmes as widely as possible. The publication of the *Radio Times* thus met the requirements of the BBC's public service function in so far as it gave exhaustive details of its programmes, served regional interests and minorities and was available on the market at a reasonable price.

The applicant claims that it does not hold a dominant position in the market for the provision of broadcasting services. It states that the major broadcaster in Ireland is RTE and that reception of the BBC's programmes there is fortuitous. In Northern Ireland, the BBC faces strong competition from private television companies.

17 But the applicant further claims, in the alternative, that if, contrary to its contention, broadcasting services were not regarded as the relevant market, that market must be defined as comprising television programme information generally. It considers that the diverse sources of information on television programmes, such

as daily or weekly newspapers, trailers, teletext services and previous knowledge of programme times, are substitutable for television guides, as may be seen in particular from the fact that relatively few people in Ireland buy the *Radio Times*. Television magazines thus do not constitute a market separate from that for programme information in general.

In that connection, the applicant states that it does not hold a dominant position on the market in television programme information in general, in so far as only a small proportion of viewers purchase weekly guides such as the *Radio Times*. It explains that, for most viewers, the programme information published *inter alia* in daily or weekly newspapers is largely substitutable for weekly television magazines.

Having expounded its position, the applicant goes on to dispute the Commission's contention that its programme listings constitute a market. It states, first, that its factual or legal monopoly over its own programme listings which, it asserts, is merely a consequence of its copyright and the exercise thereof, does not in itself give rise to a dominant position within the meaning of Article 86. It refers in that respect to the judgment of the Court of Justice of 8 June 1971 in Case 78/70 (*Deutsche Grammophon* v *Metro* [1971] ECR 487, in particular paragraph 16). Following that preliminary observation, the applicant states in particular that general weekly television magazines have never existed on the relevant geographical market. Consequently, as far as the BBC's weekly listings are concerned, no third party is in fact in a position of economic dependence characteristic of the existence of a dominant position. The applicant concludes, therefore, that the mere presence of 'potential publishers' on a market for general weekly television magazines which it regards as entirely hypothetical is not a sufficient basis for establishing the existence of a dominant position within the meaning of Article 86.

18 The applicant also challenges the analysis which led the Commission to find that its policy on programme information constituted an abuse within the meaning of Article 86. It claims primarily that by reserving the exclusive right of reproducing its programme listings and first placing them on the market it was doing no more than protecting the specific subject-matter of its copyright, which cannot in any way constitute an abuse within the meaning of Article 86. In the alternative, it

maintains that even if the contested actions were capable of constituting an abuse, it has not been established that they could be classified as such in the present case. The applicant's reasoning comprises four parts.

19 The applicant refers in the first place to its copyright in its own programme listings in Ireland and Northern Ireland. Referring to the judgment of the Court of Justice of 5 October 1988 in Case 238/87 *Volvo* v *Veng* [1988] ECR 6211, and the judgment of 14 September 1982 in Case 144/81 *Keurkoop* v *Nancy Kean Gifts* [1982] ECR 2853, it states that, as Community law now stands and in the absence of Community standardization or harmonization of national laws, it is for the national legislature to lay down the conditions and procedures relating to copyright protection and, in particular, to determine what products are to enjoy such protection. The applicant points out that copyright subsists in the programme listings, as defined by the Commission in recital 7 of the Decision, in both Ireland and Northern Ireland. It refers in that regard to the judgments given by the English High Court of Justice in *BBC and ITP* v *Time Out Limited* [1984] FSR 64 and by the Irish High Court in *RTE, BBC and ITP* v *Magill*, cited above. It emphasizes that, under both United Kingdom and Irish legislation, copyright entitles the owner *inter alia* to prevent reproduction and publication of the copyright work.

20 Secondly, the applicant maintains that the Court of Justice has consistently held that action taken by an undertaking under national law to protect the specific subject-matter of an intellectual property right cannot itself constitute 'abuse' within the meaning of Article 86. It refers in particular to the judgment in *Volvo* v *Veng* (cited above, paragraph 8 of the judgment). Citing the judgment of the Court of Justice of 6 October 1982 and the opinion of Mr Advocate General Reischl in Case 262/81 *Coditel* v *Ciné-Vog Films* [1982] ECR 3381, it submits that the Treaty does not affect the specific subject-matter of intellectual property rights conferred by the laws of the Member States. The applicant states that the specific subject-matter of copyright, which is at issue in this case, necessarily includes an exclusive right to reproduce and publish the protected work, and to exercise the corresponding legal remedies (judgment of the Court of Justice of 17 May 1988 in Case 158/86 *Warner Brothers and Others* v *Christiansen* [1988] ECR 2605, paragraph 13).

21 Having regard to the foregoing considerations, the applicant states, in the third place, that by refusing to authorize publication of its weekly programme listings

and by instituting proceedings against Magill, it was merely protecting the specific subject-matter of its copyright in its own programme listings. The Commission's finding that the contested practices fall 'outside the scope of the specific subject-matter' of the copyright, is therefore manifestly erroneous.

22 The Commission also failed, according to the applicant, to meet its obligation to state the reasons on which its decision was based, contrary to Article 190 of the Treaty as interpreted by the Court of Justice in its judgment of 26 November 1975 in Case 73/74 (*Papiers Peints* v *Commission* [1975] ECR 1491). The applicant alleges both that the Commission did not state in the decision what it considered to be 'the scope of the specific subject-matter' of the copyright, and that it did not state its reasons for considering, contrary — in the applicant's submission — to the settled case-law confirmed in the judgment in *Volvo* v *Veng*, that the contested conduct fell outside the specific subject-matter of the copyright. The applicant points out, in particular, that the decision does not refer to any exceptional circumstances of the kind mentioned in paragraph 9 of the *Volvo* judgment (reproduced in paragraph 33, below) which might, if appropriate, make it possible to establish that the exercise of an intellectual property right by its holder constituted an abuse. In the applicant's submission, the failure to state adequate reasons was unlawful in particular because the decision was the first occasion on which the Commission had called into question the exclusive right of reproducing and of first placing on the market the subject-matter of a copyright.

23 Fourthly, and finally, the applicant contends, in the alternative, that even if, contrary to the view set out above, the contested actions were nevertheless capable of constituting an abuse of a dominant position, the Commission has not established the existence of any such abuse. The Commission has not proved that, for the purposes of subparagraph (b) of the second paragraph of Article 86, the absence of a comprehensive weekly television guide as a result of the applicant's licensing policy is actually to the prejudice of consumers as a whole. The applicant asserts that a mere refusal by a copyright owner to participate in the creation of a new product, in this case a general television magazine, cannot constitute an abuse merely because the Commission considers that it meets a particular demand. In that regard it claims, on the basis of the judgment of the Court of Justice of 29 June 1978 in Case 77/77 (*BP* v *Commission* [1978] ECR 1513), that in the absence of proof of any prejudice to consumers, the Commission has no right to override the policy legitimately adopted by the applicant and impose its own views.

24 As far as the effect on trade between Member States — a precondition for the application of Article 86 — is concerned, the applicant merely points out that, in its abovementioned judgment of 26 July 1988, the Irish High Court found that Magill had not established that the BBC's programme information policy had had a significant or appreciable effect on trade between Member States.

25 The Commission rejects all the applicant's arguments concerning the alleged breach of Article 86 and inadequate statement of reasons.

26 In order to establish the existence of a dominant position, the Commission reaffirms the arguments on which the reasoning for the decision was based. In substance, it states that each of the applicants holds a dominant position in two narrow markets. The first relates to its own programme listings for the week ahead, over which it enjoys a monopoly. The second is the market for weekly television magazines, which in the Commission's view constitutes a separate sub-market within the general market for daily and weekly publications, being alone in offering a product — in this case complete information on the weekly programmes of the BBC — for which there is a specific demand on the part of television viewers. In that regard, the Commission stresses that, at the material time, Ireland and the United Kingdom were the only Member States in which there was no comprehensive weekly television guide, such as to be capable of competing with the *Radio Times*, which thus enjoyed a monopoly.

27 In order to demonstrate that the conduct at issue constitutes an abuse, the Commission bases its reasoning on the premiss — which it explicitly accepted at the hearing — that programme listings enjoy copyright protection under domestic law. It maintains, first, that even on that assumption the relevant policies and practices of the applicant are not covered by copyright protection as recognized in Community law.

28 In that connection, the Commission first draws attention, in general terms, to the incompatibility with Community rules of a national law which upholds the

existence of copyright in programme listings. It points out that, as has consistently been held, the television industry is subject to the Community rules (see in particular the judgment of the Court of Justice of 6 October 1982 in Case 262/81 *Coditel* v *Ciné-Vog Films*, cited above). It stresses that national rules creating copyright in programme listings would allow broadcasting companies to use a legitimate legal monopoly in radio and television broadcasts on a particular frequency in order to retain an unlawful monopoly over the ancillary downstream market in publications of those weekly listings and thus prevent the emergence of a competing product of a new kind in the form of a comprehensive television guide. The existence of copyright in programme listings would also hinder the achievement of a single market in broadcasting services on the basis of Article 59 of the Treaty. In the absence of a single market in programme information, consumers' rights to enjoy 'télévision sans frontières' would be undermined since television viewers, reluctant to buy a multitude of magazines each giving programme details for only one channel, would likewise be less inclined to watch programmes, particularly in a foreign language, about which they had little information.

29 The Commission points out that, in order to resolve the conflict referred to in the preceding paragraph, between copyright on the one hand and the rules on, *inter alia*, freedom of competition on the other, the proper approach is, as has consistently been held, to identify in each particular case the 'specific subject-matter' of the intellectual property right, which alone merits special protection within the Community legal order and thereby justifies certain encroachments on the Community rules. In that connection, the Commission first reflects on the legitimacy of copyright in programme listings and the underlying reasons for the maintenance thereof, which it describes as unusual. It is necessary, the Commission submits, to appraise the legal and economic 'value' and 'well-foundedness' of the copyright in the weekly listings in the present case, having regard to the objectives normally attributed to such a right. In that light, it asserts, it is necessary to take into consideration, *inter alia*, the nature of the property protected from the technological, cultural or innovative point of view, together with the purpose and justification in domestic law of the copyright in listings (see, in particular, the following judgments of the Court of Justice: judgment of 8 June 1982 in Case 258/78 *Nungesser* v *Commission* [1982] ECR 2015; judgment of 6 October 1982 in Case 262/81 *Coditel* v *Ciné-Vog Films*, cited above; judgment of 30 June 1988 in Case 35/87 *Thetford Corporation* v *Fiamma* [1988] ECR 3585, paragraphs 17 to 21; and judgment of 17 May 1988 in Case 158/86 *Warner Brothers* v *Christiansen*, cited above, paragraphs 10 to 16).

30 Applying those criteria, the Commission submits that, in the present case, the programme listings are not in themselves secret, innovative or related to research.

On the contrary, they are mere factual information in which no copyright could therefore subsist. The creative effort required for their preparation is directly rewarded by the size of the audience for the programmes. The impact of the decision on the copyright in the programme listings does not extend in any way to broadcasting activity, which is distinct from publishing. Referring to the opinion of Mr Advocate General Mischo in *Thetford*, cited above, the Commission observes that the maintenance of copyright in programme listings can only be explained by the desire to 'reserve a monopoly' to its owner.

31 Secondly, having thus maintained that copyright protection for programme listings does not fulfil the essential function of such a right, the Commission stresses that the applicant's policy as regards information concerning its weekly programmes constitutes an abuse. That abuse resides in particular, it claims, precisely in the arbitrary refusal — that is to say a refusal not justified by requirements of secrecy, research and development or other objectively verifiable considerations — to authorize Magill and other 'potential entrants' into the weekly television magazine market to publish that information, solely for the purpose of preventing the emergence of any competing product.

32 In that regard, the Commission submits that the applicant's licensing policy discriminated 'against the emergence of a new product in the form of a multi-channel guide which would compete with [the] captive guide' of each of the organizations in question or, in other words, 'against Magill and other potential market entrants offering comprehensive weekly guides'. The Commission also states that 'if the broadcast companies for some reason chose not to disseminate to anyone the information about forthcoming programmes, the analysis might be different; but they do disseminate it to two categories of economic operator: their own captive periodicals, and daily publications which do not compete with the captive periodicals. These factors indicate that the refusal to tolerate publication by others is arbitrary and discriminatory'. That arbitrariness is confirmed by the fact that the BBC discriminated against general television magazines published in certain Member States, but did not prevent such publications in Belgium and the Netherlands.

33 The Commission also refers, in support of its argument, to the judgments of the Court of Justice of 5 October 1988 in Case 238/87 *Volvo* v *Veng*, cited above, paragraph 9, and Case 53/87 *CICRA* v *Renault*, [1988] ECR 6039, paragraph 16. It cites in particular paragraph 9 of the *Volvo* judgment: 'the exercise of an exclusive right by the proprietor of a registered design in respect of car body panels may be prohibited by Article 86 if it involves, on the part of an undertaking holding a dominant position, certain abusive conduct such as the arbitrary refusal to supply spare parts to independent repairers, the fixing of prices for spare parts at an unfair level or a decision no longer to produce spare parts for a particular model even though many cars of that model are still in circulation, provided that such conduct is liable to affect trade between Member States'. According to the Commission, the conduct for which the applicant is criticized is similar to the arbitrary refusal, referred to by the Court in the judgments cited above, by the owner of a registered design to supply spare parts to independent repairers who depend on such supply for their business. By refusing to authorize, *inter alia*, Magill to publish its weekly listings, the applicant was hindering Magill in its activity of publishing general television magazines.

Similarly, the Commission further contends that the conduct for which the BBC is criticized is different from that which the Court held to be lawful in the *Volvo* judgment. It is apparent from that judgment that the fact that a car manufacturer who holds protective rights in a design reserves for himself the right to manufacture all spare parts for his cars does not in itself constitute an abuse (paragraph 11 of the judgment). In the present case the Commission draws attention to the fact that the market in spare parts was within the area of Volvo's main business activity. By contrast, the BBC was exploiting a dominant position in one market (the market in information on its programmes) which is within the area of its main activity — broadcasting — in order to obtain advantages in the publishing market, a separate economic activity, downstream. Moreover, the prejudice to consumers, who were denied access to a new product, namely a general television magazine for which there was a strong demand, is an aggravating factor which renders the applicant's policy as regards information on its weekly programmes abusive. On the other hand, the Commission emphasizes, in the *Volvo* case consumers were able to obtain the spare parts and competition was possible between independent repairers, and indeed between the various manufacturers themselves, since customers could opt for other makes if spare parts became too costly or difficult to obtain.

34 The Commission also rejects the applicant's arguments concerning its public-service duties. It considers that it was incumbent on the BBC to adapt the content and the presentation of the *Radio Times*, if it considered such action appropriate.

35 The Commission states that its analysis of the abuse of copyright applies also to situations different from that at issue in this case, in the area of computer software for example.

36 In support of its contention that the applicant's conduct is capable of affecting trade between Member States, the Commission states that the effect on trade between Ireland and the United Kingdom is to be determined by reference, *inter alia*, to the potential level of trade in comprehensive guides. It notes that the existence of a potential trade in television guides between Ireland and Northern Ireland is attested by statements made by a BBC expert at the oral hearing of the applicant. That expert explained that the applicant's reluctance to see multi-channel guides published was due to apprehension that such guides, published in English and containing, *inter alia*, information on BBC programmes, might be imported into the United Kingdom.

37 The intervener, Magill, states that the High Court has now found that in Irish law copyright does subsist in programme listings and that that copyright was infringed by Magill. Accordingly, the outcome of the proceedings brought against Magill by the BBC, ITP and RTE before the Irish court will depend on the ruling of the Community Court on the question whether the practices criticized in the Commission Decision are compatible with Community law. Magill points out that the effects of the interlocutory injunctions made in 1986 and the costs incurred in the proceedings before the national court have put it out of business and driven it from the market-place as a competitor of BBC, ITP and RTE.

38 Magill supports all the Commission's observations. It disputes the applicant's interpretation to the effect that the decision requires the grant of compulsory licences. It highlights the importance of the consent of the copyright owner. In Magill's submission, 'if . . . no licences were granted to any third party.. [the applicant] could genuinely argue that it was doing no more than exploiting its exclusive right

of ownership to its own advantage'. However, once the applicant chooses to grant licences for the reproduction of information concerning its daily programmes, it may not, in Magill's view, use its copyright to prevent the publication of its weekly listings by third parties.

39 Magill also claims that the conduct complained of constitutes an abuse within the meaning of Article 86 'precisely because it has been contrived in an identical manner between three national television authorities so as to impose a common regime upon all competing news media throughout two Member States for the purpose of protecting a market share which they have appropriated to their own three publications'. Magill considers that that common regime is based on a tacit agreement.

40 The applicant states in its reply that the Commission has raised before the Court new facts and arguments which do not appear either in the statement of objections or in the decision. The Commission is thereby infringing the right to a fair hearing both during the administrative procedure and before the Court (judgment of the Court of Justice of 4 July 1963 in Case 24/62 *Germany* v *Commission* [1963] ECR 63, and judgment of 15 March 1967 in Joined Cases 8 to 11/66 *Cimenteries CBR* v *Commission* [1967] ECR 75).

The applicant maintains in particular that the Commission's argument calling into question the compatibility with Community law of national law providing for copyright in programme listings is not admissible before the Court, since it is a fresh issue. It stresses that the argument that copyright in programme listings constitutes 'copyright over facts and ideas' is inadmissible. The Commission's allegations that the conduct concerned was arbitrary and discriminatory are also inadmissible; they, too, appear in neither the statement of objections nor the decision. In that connection, the applicant observes that the reasoning contained in recital 23 in the preamble to the decision — assuming it to be correct — would not be invalidated if the BBC had never granted any licences to third parties. It is thus clear that the decision is not based on a finding of discrimination. Consequently, in the applicant's submission, the decision cannot be supported on the ground that there is discrimination, since discrimination is not the basis of the decision. The applicant also denies the admissibility of the submission, made only by Magill, alleging the existence of a tacit agreement between the BBC, ITP and RTE. That

submission, the applicant notes, alleges a breach of Article 85(1) of the Treaty, and is therefore inadmissible.

41 With regard to the substance of the dispute, the applicant observes that, as regards the allegedly abusive nature of its licensing policy, the Commission has not come to grips with the difficulty arising from the fact that the refusal to authorize the reproduction of programme listings cannot constitute an abuse, since such a course of action would lead to 'the proprietor being deprived of the substance of its exclusive right'. The nature of the copyright material and its relative value are irrelevant to the assessment of the scope of that right. The applicant states that the essential subject-matter and the basis of copyright are the same whether or not the copyright material is innovative or is a 'trade secret' or relates to a research activity. Thus, copyright law in the United Kingdom and Ireland does not distinguish between works which are, in the Commission's expression, 'banal' and other works, that being, in the applicant's view, a purely subjective assessment. Similarly, the fact that the BBC grants royalty-free licences to many third parties to print copyright information every day not only does not mean that that information is worth little or does not constitute 'valuable' property, but is also irrelevant to assessment of the scope of the copyright covering it.

42 The applicant also rejects the Commission's claim that the BBC engages in 'a discriminatory licensing policy' by reason of the fact that it licenses the copyright material to some categories of third parties but excludes those who wish to produce a comprehensive weekly television magazine. It states that the essence of discrimination is dissimilar treatment of objectively similar situations and it denies that its policy is discriminatory, since it is willing to license any newspaper, periodical or magazine on the terms applied hitherto. The applicant likewise rejects the argument put forward by the intervener that because, after agreeing to furnish its listings to third parties, the BBC then restricted the conditions under which they might publish them, the allegedly offending conduct went beyond protection of the specific subject-matter of the copyright. The applicant contends in that regard that, as a matter of law, a copyright owner who pursues a liberal policy and grants licences, albeit subject to some limitations, does not thereby subject himself to an obligation to grant unlimited licences.

43 The applicant also contests the allegation of arbitrariness. It observes that the essential subject-matter of copyright is a right to prevent third parties from reproducing the copyright material without the consent of the copyright owner, without the need for any 'objectively verifiable consideration'. It points out, however, that its policy is objectively justified. A combination of the various sources of programme information available on the market and the publication of the *Radio Times* as part of the BBC's public service function (see paragraph 16, above) is the best means of meeting public needs and demands. In that connection, the applicant claims that the continued publication of the *Radio Times* in its present form as a guide specializing in BBC programmes would probably no longer be commercially viable if comprehensive weekly guides were published in Ireland and the United Kingdom.

44 Unlike the applicant, the Commission considers that the arguments of fact and law which it is putting forward in the present proceedings do no more than amplify, clarify and consolidate the considerations underlying the grounds of the decision, with which they are thus perfectly consistent. Even if that were not the case, the Commission considers that, contrary to the applicant's contention, the applicant's right to a fair hearing before the Court or during the administrative proceedings would not be prejudiced — at most the result would be an inadequacy or an error in the reasoning of the decision, but that has not occurred in this case. The Commission points out that the Court of Justice has held that it is not necessary 'to state independent and exhaustive reasons' for each part of a decision where 'sufficient reasons can be deduced from the context of all the findings stated in support of the decision as a whole' (judgment of 20 March 1957 in Case 2/56 *Geitling* v *High Authority* [1957 and 1958] ECR 3, at p. 15). In the present case the principal matters of fact and law underlying the decision were clearly, albeit succinctly, stated.

45 The Commission observes in particular that the fact that in the decision the assumption was made that copyright subsisted in the materials at issue was completely consistent with the submission, at the stage of the Court proceedings, that such copyright should not subsist in compilations of banal information.

As regards the finding that the applicant's conduct was abusive, the Commission contends that the adjectives arbitrary and discriminatory, applied to that conduct,

do not reveal any new concept, even if they were not used in the administrative procedure. They describe the abuse resulting from the fact that the applicant's licensing policy 'discriminated against the emergence of a new product in the form of a multi-channel guide which would compete with [the] applicant's captive guide, while at the same time promoting the publicizing of the applicant['s] programmes through daily newspapers'.

46 With regard to the substance of the dispute, the Commission pointed out at the hearing that the concern expressed by the applicant over the viability of the *Radio Times* if it were to be faced with competition from general television magazines had since proven to be unfounded, following the enactment by the United Kingdom Parliament of the Broadcasting Act 1990. The changes brought about by that act led, as from March 1991, to the publication by the BBC and ITP of their respective magazines in the form of multi-channel guides giving television viewers information on BBC, ITV, Channel 4 and satellite channel programmes.

— *Legal assessment*

47 In the light of the arguments of the parties, detailed above, the Court, in its review of the merits of the plea based on a breach of Article 86 and an inadequate statement of reasons, must examine four points. First of all, the definition of the relevant product market must be considered; then, secondly, the applicant's position on that market must be determined. As a third stage, the Court must decide whether or not the conduct at issue constitutes an abuse and whether the decision contains a sufficient statement of the reasons on which it is based in that regard. Fourthly, it must rule on the effects of that conduct on trade between Member States.

— The definition of the relevant products

48 As regards the definition of the relevant product market — according to the decision, the relevant products are the applicant's weekly programme listings and the television guides in which those listings are published — the Court finds that, contrary to the applicant's claims, the products thus defined represent specific markets which cannot be identified either with the market for broadcasting services or with the market for information on television programmes in general.

49 In the context of this dispute, the markets for weekly listings and for the television magazines in which they are published fall within a sphere of economic activity — publishing — which is entirely separate from that of broadcasting. It must be stressed that the listings are utilizable only as programme information, essential for the production of television magazines. They are therefore clearly distinguishable from the programmes themselves. Furthermore, the publication by the applicant of its own television magazine represents a commercial activity totally unrelated to its main activity of broadcasting. That finding is not affected by the fact that the applicant endeavours, as part of its public service function, to promote the programmes which it broadcasts, *inter alia* by ensuring that the information on its programmes published in the *Radio Times* meets certain criteria of quality and provides a full presentation of the programmes in that magazine's sixteen regional editions.

50 In fact, the markets for weekly listings and for the television magazines in which they are published constitute sub-markets within the market for television programme information in general. They offer a product — information on weekly programmes — for which there is a specific demand, both from third parties wishing to publish and market comprehensive television guides and from television viewers. The former are unable to publish such guides unless they have at their disposal all the weekly programme listings for the channels which can be received within the relevant geographic market. As regards the latter, it must be observed that, as the Commission rightly established in its decision, the programme information available on the market at the time of the adoption of the decision, namely the complete lists of programmes for a 24-hour period — and for a 48-hour period at weekends and before public holidays — published in certain daily and Sunday newspapers, and the television sections of certain magazines covering in addition 'highlights' of the week's programmes, are only to a limited extent substitutable for advance information to viewers on all the week's programmes. Only weekly television guides containing comprehensive listings for the week ahead enable users to decide in advance which programmes they wish to follow and arrange any leisure activities for the week accordingly.

That limited substitutability of weekly programme information is evidenced in particular by the success enjoyed, at the material time, by the specialized television

magazines which were all that was available on the market in weekly guides in the United Kingdom and Ireland and, in the rest of the Community, by the comprehensive television guides available on the market in the other Member States. That clearly demonstrates the existence of a specific, constant and regular potential demand on the part of viewers, in this case in Ireland and Northern Ireland, for television magazines containing comprehensive television programme listings for the week ahead, irrespective of any other sources of programme information available on the market.

— The existence of a dominant position

51 With regard to the applicant's position on the relevant market, the Court notes that the BBC enjoyed, as a consequence of its copyright in its programme listings, the exclusive right to reproduce and market those listings. It was thus able, at the material time, to secure a monopoly over the publication of its weekly listings in the *Radio Times*, a magazine specializing in its own programmes. Consequently, the applicant clearly held at that time a dominant position both on the market represented by its weekly listings and on the market for the magazines in which they were published in Ireland and Northern Ireland. Third parties such as Magill who wished to publish a general television magazine were in a situation of economic dependence on the applicant, which was thus in a position to hinder the emergence of any effective competition on the market for information on its weekly programmes (judgment of the Court of Justice of 9 November 1983 in Case 322/81 *Michelin* v *Commission* [1983] ECR 3461, paragraph 30).

— The existence of an abuse

52 Having established that the applicant occupied a dominant position at the material time, the Court must determine whether or not its policy on the distribution of information concerning the BBC's weekly programmes, based on the exploitation of its copyright in the programme listings, constituted an abuse within the meaning of Article 86. In order to do so, it is necessary to interpret Article 86 in the light of the copyright in programme listings.

53 In the absence of harmonization of national rules or Community standardization, the determination of the conditions and procedures under which copyright is

protected is a matter for national rules. That division of powers with regard to intellectual property rights was explicitly endorsed by the Court of Justice in its judgment of 14 September 1982 in Case 144/81 (*Keurkoop* v *Nancy Kean Gifts*, cited above, paragraph 18 of the judgment) and confirmed, in particular, in its judgments of 5 October 1988 in Case 53/87 (*CICRA* v *Renault*, cited above, paragraph 10 of the judgment) and Case 238/87 (*Volvo* v *Veng*, cited above, paragraph 7 of the judgment).

54 The relationship between national intellectual property rights and the general rules of Community law is governed expressly by Article 36 of the Treaty, which provides for the possibility of derogating from the rules relating to the free movement of goods on grounds of the protection of industrial or commercial property. However, that derogation is explictly made subject to certain reservations. The protection of intellectual property rights conferred by national law is recognized, in Community law, only subject to the conditions set out in the second sentence of Article 36. Under that provision, restrictions on free movement arising out of the protection of intellectual property 'shall not . . . constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States'. Article 36 thus emphasizes that the reconciliation between the requirements of the free movement of goods and the respect to which intellectual property rights are entitled must be achieved in such a way as to protect the legitimate exercise of such rights, which alone is justified within the meaning of that article, and to preclude any improper exercise thereof likely to create artificial partitions within the market or pervert the rules governing competition within the Community. The exercise of intellectual property rights conferred by national legislation must consequently be restricted as far as is necessary for that reconciliation (see the judgment of 14 September 1982 in Case 144/81 *Keurkoop* v *Nancy Kean Gifts*, paragraph 24).

55 Within the system of the Treaty, Article 36 must be interpreted 'in the light of the Community's objectives and activities as defined by Articles 2 and 3 of the EEC Treaty', as the Court of Justice held in its judgment of 9 February 1982 in Case 270/80 (*Polydor* v *Harlequin* [1982] ECR 329, paragraph 16). That assessment must take into account, in particular, the requirements arising out of the establishment of a system of free competition within the Community, referred to in Article 3(f), which take the form, *inter alia*, of the prohibitions laid down in Articles 85 and 86 of the Treaty.

56 Under Article 36, as it has been interpreted by the Court of Justice in the light of the objectives pursued by Articles 85 and 86 and the provisions governing the free movement of goods or services, only those restrictions on freedom of competition, free movement of goods or freedom to provide services which are inherent in the protection of the actual substance of the intellectual property right are permitted in

Community law. In its judgment of 8 June 1971 in Case 78/70 *Deutsche Grammophon*, cited above, which concerned a right similar to copyright, the Court of Justice held: 'Although it permits prohibitions or restrictions on the free movement of products, which are justified for the purpose of protecting industrial and commercial property, Article 36 only admits derogations from that freedom to the extent to which they are justified for the purpose of safeguarding rights which constitute the specific subject-matter of such property' (paragraph 11 of the judgment; see also the judgment of 18 March 1980 in Case 62/79 *Coditel* v *Ciné-Vog Films* [1980] ECR 881, paragraph 14; judgment of 22 January 1981 in Case 58/80 *Dansk Supermarked* v *Imerco* [1981] ECR 181, paragraph 11; and judgment of 6 October 1982 in Case 262/81 *Coditel*, cited above, paragraph 12; with regard to intellectual property rights other than copyright, see the judgment of 31 October 1974 in Case 16/74 *Centrafarm* v *Winthrop* [1974] ECR 1183; judgment of 23 May 1978 in Case 102/77 *Hoffmann-La Roche* v *Centrafarm* [1978] ECR 1139, paragraph 8; judgment of 25 February 1986 in Case 193/83 *Windsurfing International* v *Commission* [1986] ECR 611, paragraph 45; judgments of 5 October 1988 in Case 53/87 *CICRA* v *Renault*, cited above, paragraph 11, and Case 238/87 *Volvo* v *Veng*, cited above, paragraph 8; and judgment of 17 October 1990 in Case C-10/89 *S. A. CNL-SUCAL NV* v *HAG GF AG* [1990] ECR I-3711, paragraph 12).

57 It is common ground that in principle the protection of the specific subject-matter of a copyright entitles the copyright-holder to reserve the exclusive right to reproduce the protected work. The Court of Justice expressly recognized that in its judgment of 17 May 1988 in Case 158/86 *Warner Brothers* v *Christiansen*, cited above, in which it held that '[t]he two essential rights of the author, namely the exclusive right of performance and the exclusive right of reproduction, are not called in question by the rules of the Treaty' (paragraph 13; see also the judgment of 24 January 1989 in Case 341/87 *EMI Electrola* v *Patricia Im- und Export and Others* [1989] ECR 79, paragraphs 7 and 14).

58 However, while it is plain that the exercise of the exclusive right to reproduce a protected work is not in itself an abuse, that does not apply when, in the light of the details of each individual case, it is apparent that that right is exercised in such ways and circumstances as in fact to pursue an aim manifestly contrary to the objectives of Article 86. In that event, the copyright is no longer exercised in a manner which corresponds to its essential function, within the meaning of Article 36 of the Treaty, which is to protect the moral rights in the work and ensure a reward for the creative effort, while respecting the aims of, in particular, Article 86 (see, with regard to patent rights, the judgment of the Court of Justice of 14 July 1981 in Case 187/80 *Merck & Co* v *Stephar* [1981] ECR 2063, paragraph 10, and the judgment of 9 July 1985 in Case 19/84 *Pharmon* v *Hoechst* [1985] ECR 2281, paragraph 26; with regard to copyright, see the judgment of 17 May 1988 in Case

158/86 *Warner Brothers* v *Christiansen*, cited above, paragraph 15). In that case, the primacy of Community law, particularly as regards principles as fundamental as those of the free movement of goods and freedom of competition, prevails over any use of a rule of national intellectual property law in a manner contrary to those principles.

59 That analysis is borne out by the case-law of the Court of Justice which in its abovementioned judgments of 5 October 1988 — *Volvo* v *Veng*, on which the Commission relies, and *CICRA* v *Renault* — held that the exercise of an exclusive right which, in principle, corresponds to the substance of the relevant intellectual property right may nevertheless be prohibited by Article 86 if it involves, on the part of the undertaking holding a dominant position, certain abusive conduct. The questions referred to the Court in those two cases — both references for a preliminary ruling — turned on whether the conduct of two car manufacturers who reserved to themselves the exclusive right to manufacture and market spare parts for the vehicles which they produced, on the basis of their registered designs for those parts, was permissible. The Court cited, as examples of conduct constituting abuses within the meaning of Article 86, the arbitrary refusal to supply spare parts to independent repairers, the fixing of prices for spare parts at an unfair level or a decision no longer to produce spare parts for a particular model even though many cars of that model were still in circulation (*Volvo* v *Veng*, paragraph 9, and *CICRA* v *Renault*, paragraph 18).

60 In the present case, it must be noted that the applicant, by reserving the exclusive right to publish its weekly television programme listings, was preventing the emergence on the market of a new product, namely a general television magazine likely to compete with its own magazine, the *Radio Times*. The applicant was thus using its copyright in the programme listings which it produced as part of its broadcasting activity in order to secure a monopoly in the derivative market of weekly television guides. It appears significant, in that connection, that the applicant also authorized, free of charge, the publication of its daily listings and of highlights of its weekly programmes in the press in both Ireland and the United Kingdom. Moreover, it authorized the publication of its weekly listings in other Member States, without charging royalties.

Conduct of that type — characterized by preventing the production and marketing of a new product, for which there is potential consumer demand, on the ancillary market of television magazines and thereby excluding all competition from that market solely in order to secure the applicant's monopoly — clearly goes beyond what is necessary to fulfil the essential function of the copyright as permitted in Community law. The applicant's refusal to authorize third parties to publish its

weekly listings was, in this case, arbitrary in so far as it was not justified either by the specific needs of the broadcasting sector, with which the present case is not concerned, or by those peculiar to the activity of publishing television magazines. It was thus possible for the applicant to adapt to the conditions of a television magazine market which was open to competition in order to ensure the commercial viability of its weekly publication, the *Radio Times*. The applicant's conduct cannot, therefore, be covered in Community law by the protection conferred by its copyright in the programme listings.

61 In confirmation of that finding, it must also be stressed that, contrary to its assertions, the applicant's refusal to authorize third parties to publish its weekly programme listings may be distinguished from the refusal of Volvo and Renault, considered in the abovementioned judgments of 5 October 1988, to grant third parties licences to manufacture and market spare parts. In the present case, the aim and effect of the applicant's exclusive reproduction of its programme listings was to exclude any potential competition from the derivative market represented by information on the weekly programmes broadcast on BBC channels, in order to maintain the monopoly enjoyed, through the publication of the *Radio Times*, by the applicant on that market. From the point of view of outside undertakings interested in publishing a television magazine, the applicant's refusal to authorize, on request and on a non-discriminatory basis, any third party to publish its programme listings is therefore comparable, as the Commission rightly stresses, to an arbitrary refusal by a car manufacturer to supply spare parts — produced in the course of his main activity of car making — to an independent repairer carrying on his business on the derivative market of automobile maintenance and repair. Moreover, the applicant's conduct stifled the emergence on the market of a certain type of product, namely general television magazines. Consequently, in so far as it was in particular characterized, in that regard, by a failure to take consumer needs into consideration, that conduct also presented a certain similarity to a decision by a car manufacturer — envisaged as a hypothesis by the Court of Justice in the abovementioned judgments — no longer to produce spare parts for certain models even though there was still a market demand for such parts (*Volvo* v *Veng*, paragraph 9 of the judgment, and *CICRA* v *Renault*, paragraph 18). It is thus clear from that comparison that the applicant's conduct is not related, according to the criteria established in the case-law to which the parties refer, to the actual substance of its copyright.

62 In the light of the foregoing considerations, the Court finds that, although the programme listings were at the material time protected by copyright as laid down by national law, which still determines the rules governing that protection, the conduct at issue could not qualify for such protection within the framework of the necessary reconciliation between intellectual property rights and the fundamental principles of the Treaty concerning the free movement of goods and freedom of competition. The aim of that conduct was clearly incompatible with the objectives of Article 86.

63 In that connection, however, the applicant also claims that the decision does not contain an adequate statement of the reasons on which it is based. That claim cannot be upheld. In the decision, the Commission clearly stated its reasons for finding that the applicant, by using its exclusive right to reproduce the listings as the instrument of a policy contrary to the objectives of Article 86, went beyond what was necessary to ensure the protection of the actual substance of its copyright and committed an abuse within the meaning of Article 86. Contrary to the applicant's allegations, the statement of reasons in the contested decision is thus sufficient to allow interested parties to ascertain the main legal and factual criteria on which the Commission based its findings and to enable the Court to carry out its review. It therefore fulfils the conditions relating to the respect of the right to a fair hearing as they have consistently been defined in the case-law. The Court of Justice has held, *inter alia* in its judgment of 17 January 1984 in Joined Cases 43 and 63/82 *VBVB and VBBB* v *Commission* [1984] ECR 19, that 'although, under Article 190 of the Treaty, the Commission is required to state the factual matters justifying the adoption of a decision, together with the legal considerations which have led to its adopting it, the article does not require the Commission to discuss all the matters of fact and law which may have been dealt with during the administrative proceedings' (paragraph 22; see also the judgment of 11 July 1989 in Case 246/86 *Belasco* v *Commission* [1989] ECR 2117, paragraphs 55 and 56). The legal and factual arguments essential to establishing the allegations made against the applicant in the decision appeared in the statement of objections. The applicant's contention that the administrative procedure was unlawful must therefore also be dismissed (judgment of the Court of Justice of 25 October 1983 in Case 107/82 *AEG* v *Commission* [1983] ECR 3151, paragraph 30).

— Effects on trade between Member States

64 It must be pointed out, first of all, that the interpretation and application of the condition that the abuse must affect trade between Member States in order for

Article 86 to be applicable 'must be based on the purpose of that condition which is to define, in the context of the law governing competition, the boundary between the areas respectively covered by Community law and the law of the Member States. Thus Community law covers any agreement or any practice which is capable of constituting a threat to freedom of trade between Member States in a manner which might harm the attainment of the objectives of a single market between the Member States, in particular by partitioning the national markets or by affecting the structure of competition within the common market' (judgment of the Court of Justice of 31 May 1979 in Case 22/78 *Hugin* v *Commission* [1979] ECR 1869, paragraph 17; see also the judgment of 6 March 1974 in Joined Cases 6 and 7/73 *Commercial Solvents* v *Commission* [1974] ECR 223, paragraph 32; the judgment of 13 February 1979 in Case 85/76 *Hoffmann-La Roche* v *Commission* [1979] ECR 461, paragraph 125; and the judgment of 14 February 1978 in Case 27/76 *United Brands* v *Commission* [1978] ECR 207, paragraph 201). It is enough, in order for Article 86 to be applicable, that the abusive conduct should be capable of affecting trade between Member States. It is therefore not necessary to find that there is a real and present effect on inter-State trade (see, *inter alia*, the judgment of the Court of Justice of 9 November 1983 in Case 322/81 *Michelin* v *Commission*, cited above, paragraph 104, and its judgment of 23 April 1991 in Case C-41/90 *Höfner and Elser* v *Macrotron*, [1991] ECR I-1979, paragraph 32).

65 In the present case, the Court finds that the applicant's conduct modified the structure of competition on the market for television guides in Ireland and Northern Ireland and thus affected potential trade flows between Ireland and the United Kingdom.

The applicant's refusal to authorize interested third parties to publish its weekly listings had decisive repercussions on the structure of competition in the field of television magazines in the territory of Ireland and Northern Ireland. Through its licensing policy which prevented, *inter alia*, Magill from publishing a general television magazine to be marketed in both Ireland and Northern Ireland, the applicant not only eliminated a competing undertaking from the market for television guides but also excluded any potential competition from that market, thus in effect maintaining the partitioning of the markets represented by Ireland and Northern Ireland respectively. The conduct in question was therefore undeniably capable of affecting trade between Member States.

It must further be pointed out that clear evidence of the appreciable effect which the policy at issue had on potential trade flows between Ireland and the United

Kingdom may be found in the specific demand for a general television magazine of the *Magill TV Guide* type, demonstrated by the success of television magazines specializing in the programmes of a single television channel in the absence, at the material time, of a comprehensive television guide on the relevant geographical market. The applicant's information policy as regards weekly programmes hindered the production and marketing of general television magazines, which were intended for all television viewers in Ireland and Northern Ireland. The relevant geographical area, within which a single market in television broadcasting services has already been achieved, likewise represents a single market for information on television programmes, particularly since trade is greatly facilitated by a common language.

66 For all those reasons, the pleas based on a breach of Article 86 and inadequate statement of the reasons on which the decision was based must be dismissed as unfounded.

67 It follows that the application for the annulment of the decision in its entirety must be dismissed.

The alternative application for the annulment of Article 2 of the decision

68 In support of its alternative conclusions, the applicant alleges infringement of Article 3(1) of Regulation No 17 and infringement of the Berne Convention of 1886 for the protection of literary and artistic works, as revised at Brussels in 1948 and at Paris in 1971 (hereinafter referred to as 'the Berne Convention'), with a view to obtaining the partial annulment of the decision, confined to Article 2 in so far as it imposes compulsory licensing.

1. *Infringement of Article 3(1) of Regulation No 17 of the Council*

— Arguments of the parties

69 In the alternative, the applicant contests the obligation imposed upon it in Article 2 of the decision to permit third parties to publish its weekly programme listings. It claims that the Commission has infringed Article 3(1) of Regulation No 17, which provides: 'Where the Commission, upon application or upon its own initiative,

finds that there is infringement of Article 85 or Article 86 of the Treaty, it may by decision require the undertakings or associations of undertakings concerned to bring such infringement to an end'. That article, in the applicant's submission, only authorizes the Commission to order the undertakings to bring the infringement to an end. The applicant alleges that the Commission did not merely require the BBC to bring the infringement to an end but laid down the precise manner in which that was to be brought about, by requiring it to grant 'compulsory licences of the protected works'. The applicant points to other ways in which, it submits, the infringement could have been terminated: ceasing publication of *Radio Times*, at least in Ireland, selling the magazine as a going concern or offering the weekly listings by auction to the highest bidder. It therefore considers that it is for the parties alone to determine how the termination of the infringement, ordered by the Commission, is to be achieved.

70 The Commission, on the other hand, maintains that in Article 2 of the decision it not exceed its powers under Article 3 of Regulation No 17. It points out that Article 2 suggests two ways of bringing the infringement to an end: the supply to third parties on request and on a non-discriminatory basis of the listings concerned with a view to their publication — the course preferred by the Commission — or the grant of licences on conditions which take account of the parties' legitimate preoccupations. Contrary to the applicant's contention, the decision does not therefore impose a single solution but proposes, in a flexible manner, certain courses of conduct designed to bring the infringement to an end which are consistent with well-established case-law and practice (see the judgment of the Court of Justice of 6 March 1974 in Joined Cases 6 and 7/73 *Commercial Solvents* v *Commission*, cited above).

— Legal assessment

71 It is necessary to interpret Article 3(1) of Regulation No 17 in order to determine whether the Commission is entitled to order the applicant to permit the publication of its weekly listings by third parties, if necessary by granting licences. The Court notes that the power conferred on the Commission by Article 3 to require the undertakings concerned to bring an infringement to an end implies, according to established case-law, a right to order such undertakings to take or refrain from taking certain action with a view to bringing the infringement to an end. In that light, the obligations imposed upon the undertakings must be defined with regard to requirements related to re-establishing compliance with the law, taking into account the details of each individual case. In its judgment of 6 March 1974 in Joined Cases 6 and 7/73 *Commercial Solvents* v *Commission*, the Court of Justice

held that Article 3 of Regulation No 17 'must be applied in relation to the infringement which has been established and may include an order to do certain acts or provide certain advantages which have been wrongfully withheld as well as prohibiting the continuation of certain action[s], practices or situations which are contrary to the Treaty'. It specified that '[f]or this purpose the Commission may, if necessary, require the undertaking concerned to submit to it proposals with a view to bringing the situation into conformity with the requirements of the Treaty' (paragraph 45). Moreover, the Court of Justice has expressly acknowledged, in an order of 17 January 1980, that the Commission must be able to exercise the right to take decisions conferred upon it 'in the most efficacious manner best suited to the circumstances of each given situation' (Case 792/79 R *Camera Care* v *Commission* [1980] ECR 119, paragraph 17).

72 In the present case, the Court finds that the constituent elements of the infringement revealed by the consideration of the first plea justify the measures imposed in Article 2 of the decision. The requirement that the applicant supply ITP, RTE and third parties on request and on a non-discriminatory basis with its weekly listings with a view to their publication is, in the light of the specific circumstances of the case as found by the Court when considering the constituent elements of the infringement, the only means of bringing that infringement to an end, as the Commission established in the contested decision. The various options suggested by the applicant — which, although it does not appear to be envisaging or proposing their actual implementation, claims that they are capable of bringing the abuse to an end, thus ostensibly demonstrating that the Commission exceeded its powers by imposing the grant of licences — are not sufficient, in view of the structure of the market for television magazines, to eliminate the effect of the exclusion of competition described above, which constitutes an abuse. By ordering the applicant to permit third parties, on request and on a non-discriminatory basis, to publish its weekly listings, the Commission did not deprive it of its choice between the various measures which could bring the infringement to an end. It must, moreover, be emphasized that the counterpart to the requirement that the applicant allow third parties to publish its listings, subject possibly to the payment of reasonable royalties, is the applicant's right, which Article 2 of the decision quite properly recognizes, to include in any licences granted such terms as are necessary to ensure 'comprehensive high-quality coverage of all [its] programmes, including those of minority and/or regional appeal, and those of cultural, historical and educational significance'. That was the context in which the Commission ordered the applicant, in the same article, to submit to it for approval proposals regarding such terms. All the obligations placed on the applicant in Article 2 of the decision are thus justified in the light of their purpose, as defined

in Article 3(1) of Regulation No 17, namely to bring the infringement to an end. It follows that the Commission did not go beyond the limits of its power of assessment under that paragraph.

73 For all those reasons, the plea based on infringement of Article 3(1) of Regulation No 17 must be dismissed as unfounded.

2. *Infringement of the Berne Convention*

— *Arguments of the parties*

74 Also in the alternative, the applicant maintains that even if Article 3 of Regulation No 17 authorizes the Commission to prescribe, in appropriate circumstances, the granting of compulsory licences, such a solution is incompatible with the Berne Convention. It considers that, since all the Member States of the Community are parties to the Berne Convention, that convention must be regarded as forming part of Community law and reflecting the relevant principles thereof, pursuant to Article 234 of the Treaty.

The applicant points out that Article 9(1) of the convention confers on the author of a literary or artistic work the exclusive right of reproducing the protected work. Article 9(2), introduced by the Paris revision of 1971, it claims, allows a signatory State to permit the reproduction of literary and artistic works in certain special cases, provided that such reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author.

The applicant infers that Article 2 of the decision is incompatible with the Berne Convention inasmuch as it conflicts with the normal exploitation of its copyright in the programme listings and seriously prejudices its legitimate interests.

75 The Commission contends, however, that the Berne Convention does not apply to the present case. The Community is not a party to the Convention, the Commission explains, and it has consistently been held that 'in matters governed

by the EEC Treaty, that Treaty takes precedence over agreements concluded between Member States before its entry into force' (judgment of the Court of Justice of 27 February 1962 in Case 10/61 *Commission* v *Italy* [1962] ECR 1). Moreover, the Berne Convention is not applicable in any event because, in the Commission's view, copyright within the meaning of that convention cannot subsist in programme listings. However, even if the decision did cover information in which copyright subsisted, the Commission contends in the alternative that the fact that the information was provided free of charge to certain third parties for publication shows that compulsory licensing for a reasonable fee would not prejudice the legitimate interests of the applicant and would therefore be in conformity with the Berne Convention.

— *Legal assessment*

76 Logically, consideration must first be given to the problem of the applicability to the present case of the Berne Convention and to the Commission's argument that Community law takes precedence over the provisions of that convention. In that regard, the Court observes, first of all, that the Community — to which, as Community law now stands, powers have not been transferred in the field of intellectual and commercial property — is not a party to the Berne Convention, which has been ratified by all the Member States. As regards conventions concluded by Member States, it must be noted that Article 234 of the EEC Treaty governs the relationship between the provisions of the Treaty and international agreements concluded by the Member States before its entry into force. It provides: 'The rights and obligations arising from agreements concluded before the entry into force of this Treaty between one or more Member States on the one hand, and one or more third countries on the other, shall not be affected by the provisions of this Treaty'. The Court of Justice has interpreted that article as affecting only obligations entered into by Member States towards non-member countries. In its judgment of 11 March 1986 in Case 121/85 *Conegate Ltd* v *HM Customs and Excise* [1986] ECR 1007, it held that 'Article 234 is intended to ensure that the application of the Treaty does not affect either the duty to observe the rights of non-member countries under an agreement previously concluded with a Member State, or the observance by that Member State of its obligations under that agreement. Agreements concluded prior to the entry into force of the Treaty may not therefore be relied upon in relations between Member States in order to justify restrictions on trade within the Community' (paragraph 25; see also the judgment of 27 February 1962 in Case 10/61 *Commission* v *Italy*, cited above, especially at p. 10; and the judgment of 14 October 1980 in Case 812/79 *Attorney-General* v *Burgoa* [1980] ECR 2787, paragraph 8).

77 In the present case concerning Ireland and the United Kingdom, it must be pointed out that, under Article 5 of the Act of Accession, Article 234 of the EEC Treaty applies to agreements or conventions concluded before their accession to the Community on 1 January 1973. In intra-Community relations, therefore, the provisions of the Berne Convention, ratified by Ireland and the United Kingdom before 1 January 1973, cannot affect the provisions of the Treaty. The applicant may not rely on them to justify restrictions on the system of freedom of competition established and implemented within the Community pursuant to the Treaty and, in particular, Article 86 thereof. The argument that Article 2 of the decision is in conflict with Article 9(1) of the Berne Convention must therefore be dismissed, without there even being any need to inquire into its substance.

The same conclusion is reached with regard to Article 9(2). It is sufficient to point out that that paragraph was introduced by the Paris revision of 1971, to which the United Kingdom has been a party since 2 January 1990 and which Ireland has not yet ratified. As far as the United Kingdom is concerned, the Paris revision — and in particular Article 9(2) of the convention — was therefore ratified subsequent to its accession to the Community and consequently cannot affect a provision of the EEC Treaty. Member States may not set aside the rules arising out of the Treaty by concluding an international agreement or convention. If they wish to do so, they must use the procedure provided for in Article 236 of the Treaty. It follows that Article 9(2) of the Berne Convention may not be relied upon in limitation of the powers conferred on the Community by the Treaty for the implementation of the competition rules laid down therein, in particular in Article 86 and the rules for its implementation, such as Article 3 of Regulation No 17.

78 The plea of infringement of the Berne Convention must therefore in any event be dismissed as unfounded.

79 It follows that the alternative conclusions seeking the annulment of Article 2 of the decision must be rejected, and that the application must be dismissed in its entirety.

Costs

80 Under Article 69 (2) of the Rules of Procedure of the Court of Justice, applicable *mutatis mutandis* to procedure before the Court of First Instance under the third paragraph of Article 11 of the Council Decision of 24 October 1988, cited above, the unsuccessful party is to be ordered to pay the costs if they have been asked for in the successful party's pleading. Since the applicant has failed in all its submissions, it must be ordered to pay the costs, including those of the intervener.

On those grounds,

THE COURT (Second Chamber)

hereby:

1. Dismisses the application;

2. Orders the applicant to pay the costs, including those of the intervener.

Saggio Yeraris

Briët Barrington Biancarelli

Delivered in open court in Luxembourg on 10 July 1991.

H. Jung
Registrar

A. Saggio
President of the Second Chamber