JUDGMENT OF THE COURT
17 November 1992 *

In Joined Cases C-271/90, C-281/90 and C-289/90,

Kingdom of Spain, represented initially by Carlos Bastarreche Sagües and subsequently by Alberto José Navarro González, Director General of Community Legal and Institutional Coordination, and Rosario Silva de Lapuerta, Abogado del Estado, Head of the Department for Community Legal Proceedings, acting as Agents, with an address for service in Luxembourg at the Spanish Embassy, 4-6 Boulevard Emmanuel Servais,

applicant

supported by

French Republic, represented by Jean-Pierre Puissochet, Director of Legal Affairs in the Ministry of Foreign Affairs, and Géraud de Bergues, Principal Deputy Secretary in the same ministry, with an address for service in Luxembourg at the French Embassy, 9 Boulevard Prince Henri,

intervener,

Kingdom of Belgium, represented by Eduard Marissens, of the Brussels Bar, with an address for service in Luxembourg at the Chambers of Lucy Dupong, 14a Rue des Bains,

applicant,

* Languages of the case: Spanish (in Case C-271/90), French (in Case C-281/90), and Italian (in Case C-289/90).

Italian Republic, represented by Luigi Ferrari Bravo, Head of the Department for Legal Affairs in the Ministry of Foreign Affairs, acting as Agent, assisted by Ivo M. Braguglia, Avvocato dello Stato, with an address for service in Luxembourg at the Italian Embassy, 5 Rue Marie-Adelaide,

applicant

against

Commission of the European Communities, represented in Cases C-271/90 and C-281/90 by Bernhard Jansen, Legal Adviser, and, respectively, by Blanca Rodríguez Galindo and Xavier Lewis, of the Legal Service, acting as Agents, and, in Case C-289/90, by Enrico Traversa, of the Legal Service, acting as Agent, with an address for service in Luxembourg at the office of Roberto Hayder, a representative of the Legal Service, Wagner Centre, Kirchberg,

defendant,

APPLICATION for the annulment of Commission Directive 90/388/EEC of 28 June 1990 on competition in the markets for telecommunications services (OJ 1990 L 192, p. 10),

THE COURT,

composed of: G. C. Rodríguez Iglesias, acting as President, M. Zuleeg and J. L. Murray (Presidents of Chambers), G. F. Mancini, R. Joliet, F. A. Schockweiler, J. C. Moitinho de Almeida, F. Grévisse and D. A. O. Edward, Judges,

Advocate General: F. G. Jacobs,
Registrar: D. Triantafyllou, Administrator,

having regard to the Report for the Hearing,

after hearing oral argument from the parties at the hearing on 31 March 1992, at which, in Case C-271/90, the Kingdom of Spain was represented by Antonio

Hierro Hernández-Mora, Abogado del Estado, and the Commission of the European Communities by Francisco Enrique González Díaz and Enrico Traversa, members of its Legal Service, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 20 May 1992,

gives the following

Judgment

1 By applications lodged at the Court Registry on 7, 14 and 20 September 1990 respectively, the Kingdom of Spain, the Kingdom of Belgium and the Italian Republic, each brought an action under the first paragraph of Article 173 of the EEC Treaty for the annulment of Commission Directive 90/388/EEC of 28 June 1990 on competition in the markets for telecommunications services (OJ 1990 L 192, p. 10). The French Republic intervened in Case C-271/90 in support of the Kingdom of Spain.

2 Directive 90/388 was adopted on the basis of Article 90(3) of the Treaty. Article 1 gives definitions of the various terms used in the directive, such as, in particular, 'telecommunications organizations', 'special or exclusive rights', 'public telecommunications network', 'telecommunications services', 'network termination point' and 'essential requirements'. It also makes clear that the directive does not apply to telex, mobile radiotelephony, paging and satellite services.

3 Under Article 2 of the directive, the Member States are to withdraw all special or exclusive rights for the supply of telecommunications services other than voice telephony and are to take the measures necessary to ensure that any operator is entitled to supply such telecommunications services.

4 Article 4 requires the Member States to take the necessary measures to ensure that the conditions governing access to the networks are objective and non-discriminatory and to publish them and, each time that the charges for leased lines are increased, to provide information to the Commission on the factors justifying such increases.

5 Article 6 provides, *inter alia*, for the abolition by the Member States of the existing restrictions on the processing of signals before their transmission via the public network or after their reception and the obligation to inform the Commission of the measures taken for that purpose.

6 Article 7 requires the Member States, as from 1 July 1991, to entrust certain administrative, technical, control and surveillance functions to a body independent of the telecommunications organizations.

7 Article 8 grants to customers bound by a contract for the supply of telecommunications services in respect of which, at the time it was concluded, special or exclusive rights existed, the right to terminate the contract at a specified period of notice.

8 Finally, under Article 9, the Member States are to communicate to the Commission the necessary information to enable it to draw up, for a period of three years, at the end of each year, an overall report on the application of the directive.

9 Reference is made to the Report for the Hearing for a fuller account of the facts, the procedure and the pleas in law and arguments of the parties, which are mentioned or discussed hereinafter only in so far as is necessary for the reasoning of the Court.

10 In support of their applications, the Member States put forward various pleas in law, alleging, essentially, lack of powers on the part of the Commission, an inadequate statement of the reasons on which the directive was based and breach of the principle of proportionality.

The Commission's powers

11 In its written submissions, the Belgian Government claims, first, that Article 90(3) of the Treaty does not confer on the Commission a power to legislate but merely entrusts to it the task of surveillance in relation to existing Community rules. In its view, the Commission was not entitled to issue new rules on the basis of Article 90(3) of the Treaty, as it did in Articles 1, 2, 4 and 6 of the contested directive.

12 That argument must be rejected. As the Court held in its judgment in Case C-202/88 *France* v *Commission* [1991] ECR I-1223, paragraph 14, inasmuch as it makes it possible for the Commission to adopt directives, Article 90(3) of the Treaty empowers it to lay down general rules specifying the obligations arising from the Treaty which are binding on the Member States as regards the undertakings referred to in Article 90(1) and (2). The Commission's power is not, therefore, limited to mere surveillance to ensure application of the existing Commission rules.

13 The Belgian Government claims, secondly, that, by requiring the withdrawal of special and exclusive rights, the Commission encroached upon the powers vested in the Council by Articles 87 and 100a of the Treaty.

14 In that regard, it need merely be borne in mind that purpose of the powers conferred on the Commission by Article 90(3) is different from and more specific than that of the powers attributed to the Council by Article 100, on the one hand, and by Article 87, on the other, and that the possibility of rules being issued by the Council by virtue of the general power vested in it by other articles of the Treaty,

involving provisions which touch upon the matters specific to Article 90, does not impede the exercise of the powers which the latter article confers on the Commission (*France* v *Commission*, cited above, paragraphs 25 and 26).

15 At the hearing, the Belgian Government also put forward the following arguments.

16 It contended, first, that whilst the Commission had been entitled to define, in Directive 88/301/EEC of 16 May 1988 on competition in the markets in telecommunications terminal equipment (OJ 1988 L 131, p. 73), known as the 'terminal equipment' directive, the obligations deriving from Article 30 of the Treaty, since that article had been sufficiently clarified, in advance, by the rules of secondary law, it was not entitled to define the obligations deriving from Article 59 of the Treaty, the application of which raises complex problems in the telecommunications sector, without the prior adoption of a Council directive specifying the scope of that article.

17 It also contended that, in so far as it is possible to envisage several ways in which the Member States could discharge their obligations under Article 86 of the Treaty in the telecommunications services sector, the Commission was not entitled to impose on them one particular method of achieving a result.

18 It must be borne in mind that, in its judgment in *France* v *Commission*, cited above, paragraph 21, the Court held that the supervisory power conferred on the Commission includes the possibility of specifying, pursuant to Article 90(3), obligations arising under the Treaty and that the extent of that power therefore depends on the scope of the rules with which compliance is to be ensured.

19 By virtue of Article 59 of the Treaty, restrictions on the freedom to provide services within the Community were to be withdrawn by the end of the transitional period as regards nationals of Member States established in a Community country

other than that of the person for whom the services are intended. The requirements of that provision include, in particular, the elimination of any discrimination against the provider of a service established in a Member State other than that where the service is provided.

20 The Court has consistently held (see in particular the judgment in Case 279/80 *Webb* [1981] ECR 3305, paragraph 13) that Article 59 imposes an obligation to achieve a precise result, the fulfilment of which had to be made easier by, but not dependent upon, the implementation of a programme of progressive measures. It follows that the provisions of Article 59 of the Treaty became unconditional on the expiry of the transitional period (judgment in Case 33/74 *Van Binsbergen* [1974] ECR 1299, paragraph 24).

21 Since Article 59 is thus, like Article 30, a directly applicable provision, the Commission was empowered, with a view to promoting the effective exercise of the freedom to provide services, to specify the obligations arising from that article without the need for any prior legislative action on the part of the Council. In those circumstances, a restriction on the Commission's power of the kind envisaged by the Belgian Government would deprive Article 90(3) of its effectiveness. The Belgian Government's first argument must therefore be rejected.

22 As far as Article 86 of the Treaty is concerned, it is sufficient to note that, contrary to the view of the Belgian Government, Directive 90/388 does not determine exhaustively the methods available to the Member States for the purpose of discharging their obligations under that provision. Thus, Article 7 of Directive 90/388, which at the hearing the Belgian Government took as an example of the constraints imposed on the Member States, merely prescribes, in accordance with the requirements of the system of undistorted competition envisaged by Article 3(f) of the Treaty (see in particular the judgment in *France* v *Commission*, cited above, paragraphs 51 and 52), that the body vested with the powers to authorize, control and monitor telecommunications services be independent of the telecommunications organizations. That provision lays down a rule of law and leaves the national authorities a wide choice as to the methods of implementing it. Consequently, the argument that the Commission exceeded its powers under Article 90(3) by laying down too rigid a framework for the elimination of infringements of Article 86 must likewise be rejected.

23 The Spanish and Italian Governments, for their part, state that Article 90(3) of the Treaty does not empower the Commission to require the Member States to prescribe changes in contracts that were freely entered into between the operators and the customers of telecommunications services, as it did in Article 8 of the directive.

24 In its judgment in *France* v *Commission*, cited above, paragraph 55, the Court pointed out that Article 90 of the Treaty confers powers on the Commission only in relation to State measures and that anti-competitive conduct engaged in by undertakings acting on their own initiative can be called in question only by means of individual decisions adopted under Articles 85 and 86 of the Treaty.

25 Like the 'terminal equipment' directive, the directive at issue in these proceedings gives no indication whatsoever that the holders of special or exclusive rights were compelled or encouraged, by State measures, to enter into long-term contracts.

26 Article 90 cannot therefore be regarded as an appropriate basis for the removal of obstacles to competition resulting from long-term contracts referred to in the directive.

27 It follows that Article 8 of the directive must be annulled.

Adequacy of the statement of reasons

28 The Spanish Government maintains that the contested directive does not contain, as far as special rights are concerned, an adequate statement of the reasons on which it is based.

29 In its judgment in *France* v *Commission*, cited above, paragraph 45, the Court held, in relation to the 'terminal equipment' directive, that a directive must be regarded as not giving an adequate statement of the reasons on which it is based if, although providing for the withdrawal of special rights in a particular sector, it does not state either in its provisions or in its preamble either the type of special rights which are actually involved or in what respect the existence of such rights is contrary to the various provisions of the Treaty.

30 The contested directive does not give that specific information.

31 In particular, the definition in Article 1, according to which 'special or exclusive rights' means the 'rights granted by a Member State or a public authority to one or more public or private bodies through any legal, regulatory or administrative instrument reserving them the right to provide a service or undertake an activity', does not make it possible to determine the type of special rights with which the directive is concerned or in what respect the existence of those rights is contrary to the various provisions of the Treaty.

32 Accordingly, the provisions of the directive must be annulled to the extent to which they purport to govern special rights.

Justification for the general prohibition of special rights

33 The Italian Government submits that, since the grant of special or exclusive rights is not, as such, contrary to the Treaty, the Commission should not have imposed a general obligation to withdraw such rights, in the sector concerned, without having first undertaken a detailed investigation into the various ways in which such rights have been exercised. In the opinion of the Italian Government, a general prohibition could be justified only if an investigation had shown that the grant of special or exclusive rights excluded any possibility of competition in the sector in question, It considers, however, that an investigation would have disclosed only isolated instances of restrictions on access to the market, due, for example, to

excessive pecuniary charges. In those circumstances, it was incumbent on the Commission to take measures designed solely to eliminate specific cases of abuse, in conformity with the principle of proportionality.

34 It must be made clear at the outset that the present plea in law will be examined only in relation to exclusive rights, since the directive has been annulled in so far as it purports to govern special rights (see paragraph 32 above).

35 The Court has held that the mere fact of creating a dominant position by granting exclusive rights within the meaning of Article 90(1) of the Treaty is not as such incompatible with Article 86 (see, in particular, the judgment in Case C-179/90 *Merci Convenzionali Porto di Genova* [1991] ECR I-5889, paragraph 16).

36 However, the Court has also held that the extension of the monopoly on the establishment and operation of the telephone network to the market in telephone equipment, without any objective justification, was prohibited as such by Article 86, or by Article 90(1) in conjunction with Article 86, where that extension resulted from a State measure, thus leading to the elimination of competition (judgment in Case C-18/88 *GB-Inno-BM* [1991] ECR I-5941, paragraph 24). The same conclusion necessarily follows where the monopoly on establishment and operation extends to the market in telecommunications services.

37 In that regard, it may be seen from the 16th recital in the preamble to the contested directive, the terms of which have not been in any way challenged by the Italian Government, that the grant of exclusive rights to telecommunications organizations has been conducive to the latter's excluding competitors from the market for

telecommunications services or, at least, restricting their access to that market. According to the same recital, all the services in question could in principle be supplied by providers established in other Member States.

38 The Commission was therefore justified in requiring the withdrawal of such exclusive rights as regards the supply of certain telecommunications services. The plea in law relating to this matter must therefore be rejected.

Costs

39 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs. However, the first subparagraph of Article 69(3) provides that the Court may order that the costs be shared or that the parties bear their own costs if each party succeeds on some and fails on other heads. Since the applicants have been only partially successful, the parties, including the intervener, should be ordered to pay their own costs.

On those grounds,

THE COURT

hereby:

1. Annuls Commission Directive 90/388/EEC of 28 June 1990 on competition in the markets for telecommunications services to the extent to which it purports to govern special rights;

2. Annuls Article 8 of the directive;

3. For the rest, dismisses the application;

4. Orders the parties to bear their own costs.

Rodríguez Iglesias Zuleeg Murray Mancini

Joliet Schockweiler Moitinho de Almeida Grévisse Edward

Delivered in open court in Luxembourg on 17 November 1992.

J.-G. Giraud
Registrar

G. C. Rodríguez Iglesias
acting as President