OPINION OF MR ADVOCATE GENERAL TESAURO
delivered on 13 February 1990 *

Mr President,
Members of the Court,

1. The application in this case is concerned with a directive which has already achieved a certain amount of notoriety, namely, Commission Directive 88/301/EEC of 16 May 1988 on competition in the markets in telecommunications terminal equipment, [1] the legal basis for which is Article 90(3) of the EEC Treaty. This is the second occasion on which the Commission has used Article 90(3) in order to adopt a directive, following the 'transparency' directive which gave rise to the judgment in *France, Italy and the United Kingdom* v *Commission.* [2] Moreover, the Member States' unwillingness to sit back and see Article 90(3) used in this way is borne out, not only by the fact that no less than four of the Member States (Belgium, Greece, Italy and Germany) have intervened in support of the views of the applicant Member State, but also by the opposition — which has been repeatedly reported in the press — of the Member States and the Council to a further directive on telecommunications, and in particular telecommunication services, which the Commission adopted only a few months after the directive at issue here, but which has not yet been published.

This dispute plainly affords the Court an opportunity to assess and resolve a legal question of definite importance — *inter alia* from its institutional point of view — which relates (a) to the scope of the Member States' obligations in connection with the existence and manner of operation of public undertakings or holders of exclusive or special rights — in this case, in the sector of telecommunications terminals — and (b) above all to the competence of the Commission (and by implication of the other institutions as well) with regard to public intervention in the economies of the Member States. In essence, the Court is called upon to interpret Article 90, in particular paragraphs (1) and (3), in such a way as to overcome its manifest obscurity.

Subject-matter of the dispute

2. It was clear from the written procedure and, above all, from the hearing that the main concern of the States contesting the directive relates not so much to its substantive content as to the Commission's power to legislate on the subject on the basis of Article 90(3), and the manner in which that power is exercised. That does not mean, of course, that all the Member States agree with the Commission that it is inconsistent with the Treaty that they should preserve, in their various laws, the special or exclusive rights vested in the bodies operating in the telecommunications sector. It merely means that each of the Member States has indicated — some overtly, some more circumspectly — that

* Original language: Italian.

1 — OJ 1988 L 131, p. 73.

2 — Joined Cases 188 to 190/80 *French Republic, Italian Republic and United Kingdom* v *Commission* [1982] ECR 2545

the attempt to liberalize the market in telecommunications terminal equipment, which is at the root of the action taken by the Commission, is not a matter of indifference to them. Nevertheless, as regards the manner, the procedure and the legal basis used by the Commission, all the Member States — applicant and interveners alike — seem to echo Dante's words: '... il modo ancor m'offende ...'.

3. I shall therefore consider both the substance and the manner. Although the Report for the Hearing sets out the facts, the relevant legislation and the arguments of the parties exhaustively, it seems useful to review briefly the origin of the dispute.

4. The starting point for the Commission's action is that, owing to technological developments and in particular the impact of information technology in the telecommunications sector, the present situation on the telecommunications market is unsatisfactory. In order to achieve the single internal market it therefore seems necessary to move towards more extensive liberalization, especially as regards terminals giving access to the telecommunications network. In other words, although the Commission appears — for the time being at least — to acknowledge that public monopolies will inevitably continue in being in the sector of *telecommunications networks*, it takes the view that any special or exclusive rights conferred by Member States on undertakings in relation to the importation, marketing, connection, bringing into service or maintenance of *telecommunications terminal equipment* are no longer acceptable. Accordingly, the core of the disputed directive consists in the requirement in Article 2 to the effect that Member States must withdraw such rights and inform the Commission of the measures taken or draft legislation introduced to that end.

Apart from Article 2, the applicant government takes issue with Articles 6, 7 and 9 of the directive. It criticizes Article 6 for providing that the functions of regulating technical specifications and marketing goods and/or services must be separated. It objects to Article 7 for providing that the Member States must take the necessary steps to allow the termination, with maximum notice of one year, of leasing or maintenance contracts for terminal equipment which, at the time when the contracts were concluded, was subject to exclusive or special rights granted to specific undertakings. It criticizes Article 9 for imposing the obligation to provide a yearly report allowing the Commission to monitor compliance with the provisions of the directive.

However, as for the other articles, which it regards as separable from the contested articles, the French Republic considers that they might be retained, since in its view they do not exhibit the same defects inherent in the disputed articles.

The different pleas in law

5. The pleas in law submitted by the applicant government and reiterated by the intervening governments allege lack of competence on the part of the Commission, infringement of essential procedural requirements in the form of an inadequate statement of reasons, infringement of the general principle of proportionality and misuse of procedure.

6. Yet it must be emphasized that, however the arguments may have been presented and categorized, the central question referred to the Court for consideration is that of the Commission's *competence*. For that reason alone it is as well to point out straight away that the alleged lack of competence is referred to under different aspects.

In its first manifestation, the alleged lack of competence takes the form more specifically of the misapplication of a substantive provision, namely Article 90(1). The essential objection is that, in the contested directive, the Commission declared special and exclusive rights to be illegal (and accordingly called for their withdrawal), whereas Article 90(1) is based on the *premise* that they are lawful. In other words, the Commission misapplied Article 90(1) by treating *the granting of special and exclusive rights* — which is lawful under Article 37 as well — as if it were the same thing as adopting *measures contrary to the Treaty*, which is indeed prohibited by Article 90(1). Consequently, the assessment which the Commission could (and should) have undertaken in order to remain within the substantive limits of the provision, should have been confined solely to the exercise of the rights in question with a view to determining whether it was compatible with the other substantive provisions of the Treaty.

In point of fact, this fundamental question of principle links up with the claim as to a breach of the principle of proportionality, whereby it is alleged that the means used by the Commission — the abolition of the rights — was manifestly disproportionate to the aim of keeping the exercise of such powers within the limits laid down by the Treaty.

Furthermore, the French Government argues that, even on the assumption that the Commission did not exceed the substantive limits of Article 90(1), it did in any event go beyond those laid down by Article 90(3). A directive cannot be adopted under Article 90(3) as a means of 'repressing' an infringement as an alternative to the procedure provided for in Article 169. This is also the basis for the claim that there has been a misuse of procedure.

Lastly, it is claimed that the Commission exercised improperly even that — contested — power to bring proceedings, by failing to provide a precise statement of the reasons for which the rights in question are alleged to have given rise to discrimination or, in any event, to situations inconsistent with the provisions on competition and the common market. Consequently, the directive is also vitiated by the absence of a proper statement of reasons.

7. But the application of the French Republic, like the observations submitted by the intervening States, is not confined to these issues. The Commission is also alleged to lack competence in another respect and this time lack of competence in the proper sense of the expression is meant. Contrary to the principle laid down in Article 4 of the Treaty to the effect that institutions must act within the limits of their powers, the Commission evaded the difficult but obligatory task of determining on a case-by-case basis whether imported terminal equipment was discriminated against in the various Member States, by adopting a general measure of a *legislative* character, the basic object of which was to regulate an entire sector of the economy. Such a measure clearly lies outside the range of powers (namely the power and duty of supervision) conferred by Article 90(3), and could, at most, have been the subject of a *proposal to the Council* pursuant to Article 100a.

8. The Commission, naturally, contests the applicant's claim that it has no competence in the two respects described above.

In the first place, the Commission denies that Article 90(1) presupposes that all special or exclusive rights are preserved. It contends that in certain cases rights exist whose very existence is inseparable from their exercise. The only way of obviating the unlawful exercise of such a right is to abolish the right itself. Secondly, the Commission confirms that the contested directive is not simply a decision seeking to put an end to measures conflicting with the Treaty but a 'directive which takes account of the overall structure of the markets in telecommunications terminal equipment in the various Member States and sets out, on the basis of an overall approach and detailed appraisal of the situations obtaining in the Member States, the measures to be adopted in order to ensure that the Member States can comply with the rules of the Treaty which apply to them'. The Agent for the Commission reiterated this view at the hearing. The Commission argues that the directive does not represent the exercise of a legislative power going beyond the limits of vigilance and supervision, let alone an action to legislate for an entire sector of the economy. The reality is much simpler: the directive seeks on the one hand, to remedy existing infringements and, on the other, to forestall future infringements, and both those aims fall fully within the powers conferred on the Commission by Article 90(3) of the Treaty.

The Commission also rejects the argument that, instead of adopting the disputed directive under Article 90(3), the aim which it sought to achieve should have been the subject of a Council directive under Article 100a. The two provisions have different fields of application. Article 100a aims to eliminate obstacles arising because of the existence of national laws and regulations; Article 90(3) puts the Commission under a duty to ensure that the Member States comply with the obligations imposed on them by Article 90(1), and therefore empowers the Commission to adopt the decisions and directives necessary for that purpose.

General remarks

9. I would make a number of remarks before turning to consider the various arguments before the Court.

(a) Article 90

10. In the first place, I would observe that the case-law of the Court to date, although undoubtedly offering a number of interesting pointers, does not provide answers to all the questions before us today. It is true that the judgment on the 'transparency' directive in particular, together with the more recent judgment in Case 226/87 *Commission* v *Hellenic Republic*,[3] have shed some light on the *scope* of the Commission's powers under Article 90(3) of the Treaty, inasmuch as they confirmed that 'the 'directives' and 'decisions' referred to in that provision of the Treaty [fall] within the general category of directives and decisions referred to in Article 189' (paragraph 11 of the judgment).

3 — *Commission* v *Hellenic Republic* [1988] ECR 3611.

Whereas, however, the question whether it is lawful to exercise the power provided for in Article 90(3) as a means of bringing proceedings against an infringement was left open in the judgment in *Commission* v *Hellenic Republic*, the lively controversy which has been brought to light in the present proceedings is indicative of the continuing uncertainty, among not only the Member States but also the institutions, as to the *nature* and *limits* of the Commission's power under Article 90(3).

11. From a more general angle, I would go on to observe that the clear obscurity of Article 90 to which I have just referred (like the obscure clarity which has for some time and with some authority surrounded Article 37, which was also originally located in Article 28 of the draft Treaty) is certainly not due to chance or to an unexpected difficulty in drafting but rather to the objective difficulty of reconciling the actual idea of a monopoly or undertaking holding exclusive rights with a system of free competition and a common market.

In my view, that difficulty is due to the fundamental contradiction inherent in the entire Community plan as enshrined in the Treaty: on the one hand, there is the specific provision made for a common market and a system of free competition, on the other the Member States were left free to take economic-policy decisions, subject to coordination. That contradiction found formal expression in Articles 222, 37 and 90 as far as the present case is concerned, but also in a wider context it explains, for example, the more cautious approach of the provisions on the free movement of capital as compared with the other freedoms, and the special features and delays permitted in the banking and insurance sector. In practical terms, therefore, the closer the liberalizing aims of the Treaty affect the choices left to the Member States to take independently and of their own responsibility, the less it can actually affect those choices except 'to the extent to which' it is indispensable in order to realize those aims. Here, I would associate within that same logical dimension (1) the phrase 'to the extent necessary to ensure the proper functioning of the common market' which, in Article 67, defines and limits the Member States' duty to abolish restrictions on the movement of capital, (2) the cautious tone of Article 90(2), which subjects undertakings entrusted with the operation of services of general economic interest to the rules of the Treaty 'in so far as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them', and (3) the Court's ruling in the judgment in *France, Italy and the United Kingdom* v *Commission* [1982] ECR 2545 that the power conferred on the Commission by Article 90(3) 'is limited to the directives and decisions which are necessary to perform effectively the duty of surveillance imposed upon it by that paragraph' (at paragraph 13).

(b) Two keys to the interpretation of the directive

12. Secondly, it emerges clearly enough from the discussion between the parties, which has been echoed — albeit outside the context of these proceedings — by a number of statements by other Community institutions, that the dispute before the

Court is on two separate levels, since the contested directive can be — and indeed has been — interpreted and assessed according to two different interpretations.

13. On the first interpretation, the directive, in essence, declares that the Treaty (in particular Articles 37, 59 and 86) does not admit of a system of exclusive rights which is in force in most of the Member States in the sector of telecommunications terminals and requires all the Member States to abolish that system, while at the same time laying down ancillary and consequential measures. In that light, the disputed power of the Commission appears to be exercised through a (normal) investigation of the legality of Member States' conduct, by reference to the provisions on the common market (goods and services) and to the rules on competition. The Commission itself, in the written procedure and at the hearing, claimed its own power in virtually those terms, although there are also certain divergent assertions in reply to the specific submissions of the applicant State and of the intervening parties.

14. According to the second interpretation, on the other hand, the directive displays the exercise of a legislative power in the true (if you like, full) sense of the term, inasmuch as the Commission set out, on the basis of a definition of the Member States' obligations under Articles 30, 37, 59 and 86 of the Treaty, to lay down different rules in the sector of telecommunications terminals, compared with the situation in most of the Member States in respect of some or all of the computer terminals at issue. In that light, the directive will no longer fit within the category of the review of legality in the strict sense, since it reveals itself as essentially an opportunistic choice, which is typical of the exercise of a legislative power in the true sense and which, of course, does not rule out the possibility that it was also dictated by the need to 'repress' and/or 'prevent' possible infringements of the Treaty. That is indeed the perspective suggested by the citation of Article 100a as an alternative, legitimate legal basis for a measure having the aims of the contested directive. This was suggested both by the applicant State and by the interveners (in particular the Belgian Government), and also — outside these proceedings — by the European Parliament [4] and the Council. [5] In fact, it is clear from the scheme of the directive itself and in particular from its preamble and from the fact that the Commission heralded its adoption as an important event in a series of legislative measures designed to 'develop' the market in telecommunications terminals and services. [6]

15. After that general preface, the assessments which follow will tackle successively (paragraphs 16 to 41 and paragraphs 42 to 45) both of the last-mentioned hypotheses, since I take the view that the Court cannot avoid giving the full answer called for by the parties and demanded by the circumstances of this case.

4 — Resolution of 14 December 1988 on the need to overcome the fragmentation in telecommunications, OJ 1989 C 12, p. 66, paragraph 8.

5 — See Agence Europe of 13 October 1989, p. 13, and 9 December 1989, p. 7.

6 — See, for instance, document No COM(88)48 Final, communication of 9 February 1988.

Misapplication of Article 90(1)

16. It must first be considered whether a directive which requires the Member States to abolish the system of exclusive rights in the sector of telecommunications terminals on the ground that it is contrary to particular provisions of the Treaty, is in keeping with the substantive and procedural limits laid down by Article 90.

17. Since the power of the Commission under Article 90(3) is limited as to its scope by Article 90(1), I consider that it is necessary first to consider whether the mere existence of a system of exclusive rights in favour of certain undertakings can be identified with the 'measures' contrary to the Treaty which the States are prohibited from 'enacting' or 'maintaining in force' over which the power of supervision operates. As has already been pointed out, the applicant State argues that the abolition of a monopoly or of a system of exclusive rights, whatever its merits, is not provided for anywhere in the Treaty: on the contrary, Article 90 in particular actually assumes that their existence is lawful.

18. The Court has ruled on this point on several occasions, with the result that the parties have cited a number of significant judgments. In the *Manghera* case[7] for example, the Court noted with regard to Article 37 that 'without requiring the abolition of the said monopolies [it] prescribes in mandatory terms that they must be adjusted in such a way as to ensure that when the transitional period has ended such discrimination shall cease to exist' (paragraph 5) and proceeded to hold that 'Article 37(1) of the EEC Treaty must be interpreted as meaning that as from 31 December 1969 every national monopoly of a commercial character must be adjusted so as to eliminate the exclusive right to import from other Member States' (paragraph 13).

19. The principle laid down by the Court in the *Manghera* case therefore seems to be moving in the direction desired by the Commission. None the less, although it should not be overlooked that in that case — unlike the present one — the holder of the exclusive right of importation was also a producer and hence discrimination against other traders in the Community might well be assumed, it must also be noted that the judgment is limited to the exclusive right of importation and there is nothing to say that the rulings contained therein hold good in the same way for other exclusive or special rights. In that connection, it is not without significance that the Court made the point that Article 37 does not require the abolition of commercial monopolies — which are regarded as lawful — but only the elimination of discrimination, which arose in that case because of the very existence of an exclusive importation right (paragraphs 10 to 13).

20. On other occasions the Court, using more general terms, has held that 'Article 90(1) permits Member States *inter alia* to grant special or exclusive rights to undertakings. ... However, for the performance of their tasks these establishments remain subject to the prohibitions against discrimination and, to the extent that this performance comprises activities of an economic nature, fall under the provisions

7 — Judgment of 3 February 1976 in Case 59/75 *Pubblico Ministero* v *Manghera* [1976] ECR 91.

referred to in Article 90 relating to public undertakings and undertakings to which Member States grant special or exclusive rights. The interpretation of Articles 86 and 90 taken together leads to the conclusion that the fact that an undertaking to which a Member State grants exclusive rights has a monopoly is not as such incompatible with Article 86. It is therefore the same as regards an extension of exclusive rights following a new intervention by this State'.[8] The Court left to the national court the task of ascertaining in each case whether the conduct in question was compatible with the substantive provisions of the Treaty.

21. In the *Hansen* case[9] the Court confirmed that 'Article 37 does not require the total abolition of State monopolies of a commercial character but only that they be so adjusted as to ensure that no discrimination regarding the conditions under which goods are procured and marketed exists between nationals of Member States' and, significantly, that 'Article 37 remains applicable wherever, even after the adjustment prescribed in the Treaty, the exercise by a State monopoly of its exclusive rights entails a discrimination or restriction prohibited by that article' (paragraph 8).

22. However, basing itself in particular on the Court's statement in the *Manghera* case that every commercial monopoly had to be adjusted so as to abolish the exclusive right of importation from other Member States, the Commission reaches the conclusion that the very fact of maintaining, for the benefit of undertakings holding exclusive rights in connection with telecommunications networks, an exclusive right for the importation, marketing, connection, bringing into service and maintenance of terminal equipment constitutes a measure falling within Article 90(1), and that the actual existence of those rights constitutes the infringement, since it is precisely from the exclusive right itself that the discrimination and abuse arise (see in particular the Commission's rejoinder, at p. 11).

I cannot share that view. It constitutes an arbitrary interpretation of the principle laid down by the Court in the *Manghera* case, inasmuch as it extends that principle to the system of exclusive rights as a whole — regardless whether the rights relate to goods or services — and, in any event, does not confine it to the right of importation; moreover, it overlooks the further qualifications included in the *Manghera* judgment itself and in the subsequent case-law (quoted above), from which it appears sufficiently plainly that the general approach is different from that indicated by the Commission.

23. Indeed, I consider that, beyond the statements relating specifically to the individual cases, there emerges from the judgments of the Court noted above an unequivocal, consistent basic approach. On the one hand, the need to attach a meaning to the wording of Article 37 and Article 90(1) stands out: there is an unmistakable existence (*inter alia* in the *Manghera* judgment, at paragraph 5) that a commercial monopoly or a system of exclusive rights *per se* is not contrary to the Treaty (Articles 37 and 86) and it is not therefore necessary to abolish them as such.

8 — Judgment of 30 April 1974 in Case 155/73 *Sacchi* [1974], paragraph 14.

9 — Judgment of 13 March 1979 in Case 91/78 *Hansen GmbH & Co.* v *Hauptzollamt Flensburg* [1979] ECR 935.

On the other hand, there also emerges the need to check in each specific case — but without limits or preconditions — whether the national systems are compatible with the Treaty and, if necessary, to assign that task to the national court.[10] For example, in the judgment of 7 June 1983 in Case 78/82, *Commission* v *Italy*,[11] the Court, after confirming by reference to the *Manghera* judgment that Article 37 'does not demand the total abolition of national monopolies' (paragraph 11), went on to hold that 'since the rules at issue apply without distinction to domestic and imported products, it is appropriate to consider whether they are nonetheless liable to have a discriminatory effect or to distort competition by restricting imports of tobacco products, thereby impeding trade within the Community' (paragraph 12).

24. More generally, the fact that a monopoly or a system of exclusive or special rights may not be in complete harmony with a system based on free competition is all too obvious; but by the same token it is a fact which the founders of the Community could not have failed to bear in mind.

It is thus clear that the Treaty, in order to accord (as it were) with Article 222 and with the overall Community design, set out to 'tolerate' monopolies and systems of exclusive or special rights by regarding them as lawful *in se*, although it assigned to the Commission the task of ensuring in any event the necessary compliance with the rules on the common market for goods and services and freedom of competition, subject to the possibility of derogation under Article 90(2).

This therefore explains the apparently obscure, but suitably balanced, wording of both Article 37 and Article 90(1); in particular it explains the 'adjustment' sought by Article 37 of commercial monopolies, using recommendations as a driving force, and also the powers of supervision conferred on the Commission by Article 90(3) and the possibility of using the more incisive instruments of the directive and the decision 'where necessary', also with a view to its exercising its duty of supervision more effectively.

25. In theory, therefore, it seems to me that the mere existence of a monopoly or a system of exclusive rights is not in itself contrary to the Treaty. However, I use the expression 'in theory' advisedly.

26. In practice, consideration of an individual case may suggest a different answer. The essential meaning of Article 90, seen in the light of and with the help of the case-law of the Court, is that it seeks to prevent the Member States, although they are free to opt for a particular economic policy on social grounds and to create or maintain a monopoly or a system of exclusive rights in a particular sector, from enjoying the same freedom to do so by taking the public undertaking or the holder of exclusive rights outside the rules of the game altogether, particularly as regards the common market in goods and services and freedom of competition. This is like Article 37 which, according to the Court, 'is

10 — See, in addition to the judgments referred to already, the judgment of 9 May 1985 in Case 21/84 *Commission* v *France* [1985] ECR 1355; the judgment of 3 October 1985 in Case 311/84 *Télémarketing* [1985] ECR 3261, paragraph 17; and the judgment of 4 May 1988 in Case 30/87 *Bodson* [1988] 2479.

11 — Case 78/82 *Commission* v *Italy* [1983] ECR 1955.

designed to ensure compliance with the fundamental rule of the free movement of goods throughout the common market, in particular by the abolition of quantitative restrictions and measures having equivalent effect in trade between Member States, and thereby to maintain normal conditions of competition between the economies of Member States should a given product, in one or other of those States, be subject to a national monopoly of a commercial character' (*Commission* v *Italy*, cited above, paragraph 11).

27. If that is so, it follows that it cannot be completely ruled out, on the basis of the wording of Articles 90 and 37, that in the very creation of the legal situation and in the very act of conferring special or exclusive rights, an infringement of the Treaty has occurred, thereby falling foul of the prohibition set out in Article 90(1). In fact, in those circumstances it will not be necessary for the State to adopt other 'measures' in order for a contravention of the Treaty to arise and consequently for Article 90(1) (and *ipso facto* Article 90(3)) to come into play. To date the Court has not yet given an express ruling on whether Article 37 or Article 90 involves the elimination of 'potential' discrimination, that is to say, the mere possibility of discrimination due to the existence of exclusive rights, despite having been prompted on several occasions to do so (see the Opinion of Mr Advocate General Warner in the *Manghera* case and the question referred by the national court).

28. In the final analysis, I consider that the ambit of the provision under discussion is broad enough to embrace the hypothesis of the illegality *per se* — to use an expression that recurs in these proceedings — of a monopoly or a system of exclusive or special rights.

However, I am equally convinced, especially in the light of the abovementioned judgments of the Court (including the *Manghera* judgment), that it is not possible to conclude that the mere granting of exclusive rights contravenes the Treaty except by means of a specific examination of the nature and mode of operation of the legal situation at issue and of the aims and implications of creating or maintaining it in relation to the common market in goods and services and freedom of competition. In short, the reply must be specific to the case and cannot be given in the abstract.

29. I would add that it follows from the direct and self-evident relationship between Article 90 and Article 222 of the Treaty, without disturbing the underlying philosophy of the Treaty referred to earlier, that there is at least a strong *presumption* in favour the *legality* of a public undertaking or a holder of exclusive rights as such. This, indeed, seems to me to be a useful, reasonable interpretation of Article 90(1) which respects not only Article 222 but also the rules protecting the common market and free competition. To go no further than just the wording of Article 90 so as to infer in the abstract that the words 'contrary to the Treaty' cover *inter alia* the mere existence of a system of exclusive rights — as the French Government argues — seems to be to be frankly a partial view which reduces some of the 'effectiveness' of Article 90. Similarly, it would be a mistake to depart altogether from the — certainly not accidental — wording of Article 90 or ignore its links with Article 222, and deny that the existence or creation of a situation of the kind under consideration here is

coupled — at least in principle — with a presumption of legality.

Within those limits, the applicant State's arguments should be disregarded.

Misuse of procedure

30. The next (and subordinate) question emerging from this dispute, which in some respects is connected with the question considered above, is whether the Commission is empowered under Article 90(3) to declare (in particular by means of a directive) that the existence of a system of exclusive rights constitutes an infringement, instead of setting in motion the general machinery provided by Article 169 of the Treaty. As was observed above, the applicant State and the interveners alike claim that to adopt a directive under Article 90(3) does not constitute a lawful alternative to bringing proceedings under Article 169 for the purpose of requiring the abolition of systems of exclusive rights, and they claim that there is no shortage of statements to that effect in academic writings.

Even in the abstract terms in which it has been posed, the problem raises quite a number of concerns. Furthermore, it does not appear to have been resolved even by the judgment in *Commission* v *Greece*, since in that case the Court did not have to establish whether the Commission had made lawful use of the power under Article 90(3) by adopting a decision against an infringement, but only whether that decision had the same effects as a decision under Article 189.

31. In the event of a Member State's failure 'to fulfil an obligation under this Treaty', the Treaty provides for general machinery for bringing proceedings. It is based on the formal notification of the Commission's charge, followed by an application to the Court for a declaration that an infringement has occurred. Within that machinery there is in fact a specific guarantee that, even before judicial proceedings have commenced, the principle of *audi alteram partem* and the rights of the States in the broad sense will be safeguarded. Article 90(3) does not expressly envisage any such guarantee. Moreover, although the logical arrangement of the procedure under Article 169 is itself subject to certain exceptions — being substantially inverted in Article 93 for example — nevertheless the derogations from Article 169 are expressly set out in the Treaty — not only in Article 93(2) but also in Articles 100a and 225. Nor can it be overlooked that, in the sphere of infringement of the rules on competition, it is true for the Commission to declare that the infringement has occurred, but it must respect the principle that the charges may be contested and that the accused must be allowed to reply to the charges in the pre-litigation stage. Indeed this is provided for in Article 93(2).

No such provision nor any express derogation is to be found in Article 90(3), as the Commission itself has had to acknowledge in order to justify the absence of any real adversary proceedings in this case (defence, p. 33).

32. I also wonder whether a further difficulty may not arise in part as a result of the type of measure employed by the Commission. Whilst it is already by no

means certain whether a *decision* adopted under Article 90(3) can constitute a suitable and lawful alternative to proceedings brought under Article 169, the use of a *directive* seems even less appropriate, since as an instrument it is inherently unsuited to bringing an infringement to an end, especially when — as here — it is addressed to the Member States *en bloc*.

No light is shed by the explanation given by the Commission, which confined itself to stating that it preferred to avail itself of Article 90(3) rather than Article 169 because Article 169 did not have 'the same direct and immediate effect' (defence, p. 12); the assurance that the Commission held prior consultations with the Member States and the other institutions is equally uninstructive. Neither observation seems sufficient to compensate for the lack of an explicit derogation from Article 169 and the absence of the minimum guarantees of fair hearing which are to be found in repressive procedures.

I therefore consider that, as a matter of principle, the Commission is not entitled to resort to a directive as provided for in Article 90(3) as a means of bringing repressive proceedings as an alternative to proceedings under Article 169.

Statement of reasons

33. However, when it gives judgment in this case, the Court may perhaps more profitably concentrate on the essential point, namely that relating to the statement of reasons of the contested directive, and leave the question of principle to be resolved on more propitious occasions. As the issue concerns a procedure for an infringement — and moreover a procedure seeking to remove a legal situation whose existence, as such, the Treaty presumes to be lawful — in any event the Commission should have specifically and analytically established the existence of the infringement.

34. In this case that inquiry by the Commission, which is necessary in a procedure which purports to be repressive and must in any case allow the Court to carry out a final review of its legality, seems inadequate even on first reading. That remark applies not only to Articles 2 and 7 of the directive, which are necessarily and closely connected, but also to Article 6, which might in principle be subjected to some extent to an independent assessment from the other points of view considered.

In particular, with regard to Article 30 of the Treaty, it is stated that the grant of special or exclusive rights to import and market goods 'can, and often does, lead to restrictions on imports' (paragraph 3 of the preamble). With regard to Article 37 of the Treaty it is stated that the rights at issue 'are exercised in such a way as, in practice, to disadvantage equipment from other Member States, notably by preventing users from freely choosing the equipment that best suits their needs in terms of price and quality, regardless of its origin. The exercise of these rights is therefore not compatible with Article 37 in all the Member States' (paragraph 5 of the preamble).

35. It does not seem to me that concise statements of that kind are capable of affording a basis for establishing that an infringement has occurred; that is certainly not so where, as in this case, it is claimed that the very existence of the system of exclusive rights constitutes the infringement. The actual wording used (the monopoly which is '*generally*' granted in the form of exclusive rights, which '*often*' extend to terminal equipment and '*can and often [do], lead to restrictions on imports*', to the extent of '*disadvantaging*' such equipment '*in practice*') does not amount to much in comparison with the particularly rigorous standard required in order to rebut the presumption contained in Article 90(1) (and hence in Article 37) to the effect that the system of special or exclusive rights is lawful *in se*. In other words, I would reiterate that the fact that a monopoly — and often, in practice, other similar arrangements — is likely to impair the proper functioning of the common market and freedom of competition was duly considered by the draughtsmen of the Treaty, who none the less chose to tolerate it, so that the Commission directive, on the one hand, reveals nothing new and, on the other, by simply abolishing the monopoly or the system of exclusive rights without taking the trouble of providing an appropriate statement of reasons, radically alters the basic framework set out in Article 90(1).

First, the inadequacy of the statement of reasons is even more blatant having regard to the fact that a directive addressed to all the Member States and seeking, according to the Commission, to repress infringements does not even state that all the Member States have committed infringements of that kind or specified the legislative provisions or practices by which they did so. The need so to do was all the greater in that it appears from the preamble, and even more from the documents before the Court, including the statements made by the Commission in its defence, that in some of the States the monopoly or system of exclusive rights is only partial as respects the types of terminal under consideration, or that there is even absolute freedom, as seems to be the case — paradoxically — in the applicant State itself (see Annex III to the defence). Moreover, in other States the system does not obstruct trade in any way or is not discriminatory or complies with rules on competition (see, for instance, the Italian Government's observations, at p. 9, which have not been contested by the Commission). Secondly, there is relevance in the applicant State's argument that all special or exclusive rights do not fall within the ambit of the free movement of goods, since at least some of the 'terminals' may be indissociable from the telecommunications network and, in any event, more properly come within the ambit of services.

36. The whole of the above also gives an indication of the scope for review by the Court, whose assessment parameters must exist prior to the institution of judicial proceedings and cannot be identified on an *ex post facto* basis. Suffice it to say that the Court has not been placed in a position to know whether the alleged infringements were committed by all or only some of the Member States, whether they relate to all terminal equipment or only to some, and which manner of operating is specifically alleged to conflict with the Treaty, over and above the fact that a system of exclusive or special rights (it is even unclear which category is meant) simply exists.

37. Similarly, the other assumption made in the directive, namely that the special or exclusive rights are contrary *per se* to the prohibition of abuses of a dominant position laid down in Article 86 of the Treaty, does not, in my opinion, point to any different conclusion. The Commission observes first (in paragraph 13 of the preamble) that 'the telecommunications bodies hold individually or jointly a monopoly on their national telecommunications network' and that the networks constitute as many markets; from this it concludes that those bodies occupy a dominant position in a substantial part of the market. The Commission further observes that the exclusive or special rights vested in the telecommunications bodies have the effect of 'restricting users to renting such equipment' (without specifying which equipment is meant), when it would be cheaper for them to purchase the equipment, which effectively means that users have to accept additional services and that outlets are limited and technical progress impeded, contrary to Article 86(b) and (d) (although the Commission does not specify how).

As may be seen — and there is no need to explore the uncertain meanderings of the charges laid — we are faced once again with a clear *petitio principii* and hence not with an analytical statement of reasons such as, I repeat, was required, but with assertions which are as bald as they are peremptory. It is sufficient to consider what is required in the case of a Commission decision challenging the abuse of a dominant position by an undertaking, and to note the incisive, specific, detailed reasons which the Commission thought itself bound to set out in the decisions under Article 90(3), similarly designed to repress infringements on the part of *Greece*,[12] *Spain*,[13] and more recently the *Netherlands*.[14]

38. In the final analysis, the directive at issue confines itself to declaring that which it is supposed to prove. It deduces the general existence of what it sets out to prove from the fact that a system of exclusive or special rights actually exists in all of the Member States in the sector (which is also considered globally) of telecommunications terminal equipment. If the Court were to subscribe to those declarations that would not be the outcome of an appraisal of factual and legal data coupled with a review of the legality of the contested directive, but purely and simply an act of faith, a course which in any event I cannot commend to the Court.

39. It cannot validly be objected that 'in a directive, which by its nature is a general measure addressed to all the Member States, there is no need to examine each individual situation in detail' (defence p. 27). That may hold good as a general rule in the case of a 'normal' directive, but not where, as has been presumed so far in this case, the measure in question is one which sets out to establish an infringement of the Treaty.

40. In the light of the considerations set out so far, I consider that I may draw an initial conclusion. If the Commission directive sought, as the Commission itself repeatedly argued in its written statements of defence and at the hearing, to declare that

12 — Decision of 24 April 1985, OJ 1985 L 152, p. 25; that decision was at issue in Case 226/87 *Commission* v *Hellenic Republic*, cited above.

13 — Decision of 22 June 1987, OJ 1987 L 194, p. 28.

14 — Decision of 12 January 1990, OJ 1990 L 10, p. 47.

infringements of the Treaty had occurred in all the Member States, and if it therefore purported to be an exercise of the duty and power of supervision, in the sense of the power to review the legality of the conduct of the Member States, then, even if all the other problems are set aside, it is vitiated at least by its inadequate statement of reasons.

41. Certainly, the obligation to state reasons would have been much less onerous if, rather than reviewing the legality of the conduct of one or more Member States, the Commission had made a *legislative decision proper*, by regulating the sector of telecommunications terminals in one way rather than another, even by means of the abolition of the monopolies or systems of exclusive rights, which are *ex hypothesi* present in a number of Member States. In that case, the determination of the operation or simply the existence of a monopoly or system of exclusive rights in one, several or all the Member States as constituting a particular infringement would not be the purpose but the motive for its adoption; and a directive would, in the final analysis, be a perfectly appropriate instrument.

Lack of competence in the true sense of the expression

42. This is the second key to the interpretation of the contested directive, to which I alluded at the beginning and which is clearly put forward for appraisal by the Court in so far as it is claimed — independently of the contested existence of the alleged infringements — that the Commission had no power to abolish the systems of exclusive rights throughout the Member States and thereby regulate the sector of telecommunications terminals by virtue of powers conferred by Article 90(3), rather than to set in motion a normal legislative procedure (say under Article 100a); furthermore, it is disputed, particularly by the Belgian Government, whether the Commission made a genuine decision relating to industrial policy.

43. It cannot be ruled out that this may be the right key to the interpretation of the directive at issue. Indeed, there is no shortage of evidence to that effect — first and foremost, the general scheme of the directive and the reasons given for it.

Indeed, in my opinion a statement of reasons which is so manifestly unspecific and inadequate compared with the type of measure required in order to declare that there has been an infringement and with the earlier examples of decisions adopted pursuant to Article 90(3) to which I referred above constitutes, not a defect in the directive due to an accidental error on the part of the Commission, but proof that the power conferred by Article 90(3) was exercised in a manner different from that which has been considered so far and different from that which appeared from the 'transparency' directive and the other decisions that have been mentioned.

I am referring in particular to phrases such as 'can, and often does, lead to restrictions on imports from other Member States', and to the statement that the grant of exclusive or special rights over the management of the network and the telecommunications services 'often' extends to the supply of terminal equipment. I am also thinking of paragraph 2 of the preamble, where it is observed that several Member States have,

in response to technical and economic developments, 'reviewed their grant of special or exclusive rights in the telecommunications sector' and that the proliferation of types of terminal equipment and the possibility of the multiple use of terminals mean that users must be allowed a free choice. Those considerations are more consonant with the imposition of a new direction on the sector than with the mere requirement of putting an end to infringements (and unspecified infringements at that).

44. It is significant that the abolition of the systems of special or exclusive rights in the terminals sector has been followed by a directive on telecommunications services adopted in the same terms, having the same general scheme and a similar statement of reasons, Article 2 of which is worded in virtually the same way as the article at issue in these proceedings. [15] The fact would be unusual, to say the least, had a mere declaration of an infringement been involved, as the Belgian Government rightly observed at the hearing; in any event, however, it does tend to cause one to suspect the existence of a general perspective, which itself results from the liberalizing pressure which has affected the Community institutions, and especially the Council, in recent years.

45. In that connection, it seems worthwhile mentioning Council Directive 86/361/EEC of 24 July 1986 [16] on the initial stage of the mutual recognition of type approval for telecommunications terminal equipment, which speaks of the need 'for a more comprehensive framework to be drawn up in preparation for a second stage which would create an open and unified market in telecommunications terminal equipment, bearing in mind that for telecommunications this has to include both the free movement of equipment and unimpeded connection to networks, in accordance with the harmonized requirements' (tenth recital in the preamble).

46. Equally significant is a Council Resolution of 30 June 1988 [17] in which the Council, *acting on a proposal from the Commission* and on the basis of considerations largely similar to those underlying the directive contested in these proceedings, invites the Commission 'to propose, where required, the measures necessary for pursuing the achievement of these goals, to be taken in priority areas on the basis of the appropriate Community procedures, in particular for the creation of the common market for telecommunications services and equipment'. Prior to that it gives its general support to 'the objectives of the action programme set out in the communication of 9 February 1988, which relates to the opening of the common telecommunications market to competition up to 1992, having regard also to Articles 8a and 8c of the Treaty, introduced by the Single European Act, and to the strengthening of European competitiveness, while safeguarding the public service goals of telecommunications administrations'.

47. Moreover, the Commission, on the basis of the same clear requirements relating to its defence which caused it to tend to reduce the scope of the directive in the proceedings

15 — Doc C(89) 671 fin. The directive has not yet been notified.

16 — OJ 1986 L 217, p. 21.

17 — OJ 1988 C 257, p. 1.

before the Court to the mere repression and prevention of infringements, could not avoid making a number of telling remarks, in particular:

A directive, which by nature is a general measure addressed to all Member States, does not need a detailed statement of reasons (defence, p. 27);

The choice of a directive under Article 90(3) rather than proceedings under Article 169 was triggered, on the assumption that 'measures contrary to the Treaty had been adopted or retained in force in most of the Member States' (but neither the measures nor the Member States are identified), by the need (which is, however, of a general nature) to 'incorporate all aspects of the market in telecommunications terminal equipment into a single coherent act so as to enable the Commission to continue effectively to carry out its duty of supervision' (defence, p. 30);

Having regard to the important technological advances which have been made in the telecommunications sector in recent years and the growing number of complaints about *'possible infringements'* of the rules on the free movement of goods and freedom of competition, the Commission 'did not intend to confine itself to isolated measures designed merely to repress *established or presumed infringements* but rather to *define*, on the basis of a thorough examination of the market and Member States' observations, *the obligations incumbent on the Member States* in their relations with telecommunications undertakings to which they have granted special or exclusive rights' (rejoinder, p. 10; emphasis supplied).

48. That last remark of the Commission appears to me correctly to reflect the perspective guiding its actions, which goes beyond, or even dispenses with the supervisory power envisaged by the Treaty. The aim is to lay down general, abstract rules for the sector ('define the obligations incumbent on the Member States'), and that exceeds the limits of Article 90(3) and falls within the competence of the Council.

During the hearing, moreover, in reply to the specific question whether, in the event of an infringement of Article 30 by a public body holding an exclusive right, the Commission would respond by using the Article 169 procedure or by abolishing the public body pursuant to Article 90(3), the agent for the Commission said that, in order to confer *effet utile* on Article 90(3), it was 'necessary to go beyond that which could be achieved by merely bringing proceedings for failure to fulfil obligations'; thus he did not rule out the adoption of a measure abolishing the public body holding exclusive or special rights.

49. That is consistent with the essence of the Commission's position, which is that, far from exercising a regulatory or legislative power in the proper sense, it confined itself to redressing existing infringements and

preventing future ones, in keeping with the exercise of the power and duty of supervision which the Treaty imposes on it. However, even on that — if you like, simplified — view, agreement clearly still has to be reached on the prevention of future infringements, since the assessment will differ widely according to the content and scope with which the Commission in fact endows the preventive measure. Certainly, the preventive effect will be achieved on a satisfactory and permanent basis by abolishing the legal situation which is liable to give rise to infringements of the Treaty, but whether doing so is a merely preventive action is very doubtful, just as I would not be sure whether abolition of the Member States' tax-raising 'monopoly' would constitute prevention of breaches of the prohibition on Member States' introducing charges having equivalent effect to customs duties; or whether, in order to avoid distortions of competition as between public and private undertakings, public undertakings should be wound up.

50. Consequently, the view that the contested directive is on a different plane to the mere repression of existing infringements and the prevention of future ones seems to me to be completely justified. Moreover, the European Parliament has taken just that view (see, for example, the resolution of 23 November 1989 concerning the 'parallel' directive on telecommunications services, reference EP 136-784). This view has even been announced officially by the Commission itself in a communication of 9 February 1988 in the context of a series of legislative measures. [18]

18 — Doc. COM(88)48 final.

The question which the applicant State and, above all, a number of the States which have intervened in the proceedings are in essence asking, namely whether the Commission can be recognized as having a legislative power which, regardless as to whether there are infringements or not, causes there to be new rules for the sector concerned must, in my view, certainly be answered in the negative.

51. In the first place I do not consider that it is possible to dispense with the principle set out in quite unequivocal terms by the Court in its judgment on the 'transparency' directive: the power conferred on the Commission by Article 90(3) 'is limited to the directives and decisions which are necessary to perform effectively the duty of surveillance imposed upon it by that paragraph' (paragraph 13); this is unlike the powers conferred on the Council, inasmuch as 'Article 94 authorizes the Council to make any appropriate regulations for the application of Articles 92 and 93' (paragraph 13).

It may readily be inferred from the principle as set out in that judgment that the Commission, unlike the Council, is not empowered to adopt all appropriate measures for the application of Article 90(1) (for present purposes), but only such measures as are necessary for the more effective performance of the duty of supervision. This certainly does not enable the Commission to be recognized as having legislative powers whereby, proceeding on the premise that infringements may have occurred in a given sector and using a measure addressed without distinction to all the Member States, it can define the limits

of lawful conduct on the part of the Member States and on that basis require at the same time the abolition of a monopoly or a system of exclusive rights. The Court held in fact that the Commission may adopt such directives and decisions as are necessary for the performance of the duty of supervision: it did not hold that the Commission may eliminate the very requirements for performing that duty.

The set of rules on competition (Article 85 to Article 94) is structured in such a way that the right to define, and possibly to supplement, the conditions for the implementation of the Treaty provisions is reserved to the Council whereas the Commission, for its part, is vested with supervisory and executive powers.

52. In this context it seems useful to refer to the Opinion of Mr Advocate General Reischl in the case on the 'transparency' directive. After finding that Article 169 and Article 90(3) are not interchangeable, he observes that the Commission's competence is limited to the application of Article 90, which covers only the adoption of measures 'of an implementing or technical nature', whereas the Council's competence extends to the adoption of implementing provisions designed to incorporate and give effect to the Treaty provisions; he maintains that this limitation is conducive to the balance between the institutions on which the Treaty is based and also explains why there was a derogation from the procedural guarantees attaching to a legislative procedure, such as the Parliament's separate right of initiative and to express an opinion; and he adds that, even in the light of Article 222, the Commission 'may not claim a general power to lay down special status for public undertakings' (*France, Italy and United Kingdom* v *Commission* [1983] ECR 2583, at 2584 et seq.)

It is sufficient to observe in this connection that Article 87(1) and (2) empowers the Council *inter alia* to define, if need be, in the various branches of the economy, the scope of Articles 85 and 86 (see in particular Regulation No 141 of the Council exempting transport from the application of Council Regulation No 17; Official Journal English Special Edition 1959 to 1962, p. 291).

Likewise, in the field of State aid it is the Council which has the power to decide that an aid scheme must be regarded as being compatible with the common market, by way of derogation from the provisions of Article 92, and when such a decision is justified by exceptional circumstances.

53. In the second place, one should not overlook the position of Article 90 within the system of the Treaty. Its insertion amongst the competition rules applicable to undertakings, rather than in the part dealing with the institutions, is certainly not fortuitous.

The one apparent exception to that policy of the authors of the Treaty is the power which the last sentence of Article 91(2) confers on the Commission with regard to dumping (within the common market), namely to 'lay down appropriate rules for the application of this paragraph'. However, this exception is apparent because in fact it concerns only implementing rules (Commission Recommendations No 8 of 11 March 1960 and No 21 of 25 March 1960).

54. Finally, it is undisputed that the supervisory power conferred by Article 90(3) is connected with the first indent of Article 155 ('shall ensure that the provisions of this Treaty . . . are applied') and not with the third indent ('shall have its own power of decision . . . '). It is therefore certain that the power to adopt decisions and directives can only be strictly subservient to the duty of supervision and cannot extend to a general legislative measure serving to regulate the structure of a given sector by means of the abolition of a public system of special or exclusive rights.

Furthermore, the numerous statements and measures from the Commission itself, but still more from the Council, in recent years with regard to the telecommunications sector, of which I have quoted no more than a few phrases, taken as a whole map out an essentially planning instrument, whose natural short-term development may reasonably be supposed to consist in regulating the sector on a preceptive basis and hence by means of a legislative process initiated by proposals from the Commission and, once the European Parliament has contributed its opinion, finalized by the Council. When viewed against that background — which moreover will be free of substantial disagreements as to the merits of the liberalization — the directive adopted by the Commission in splendid isolation, which 'sought, following a thorough examination of the market and the observations made by the Member States, to specify the obligations of the Member States in their relations with telecommunications undertakings' appears to be an anomalous anticipation of the legislative process, inasmuch as the obligations on the part of the Member States had not previously been defined or 'specified' in the light of the general provisions of the Treaty (and this also explains the inadequacy of the statement of reasons).

55. The applicant's invocation of Article 4 and the principle that the institutions must act within the limits of their powers, and its reference to the balance between Community institutions, are therefore not unfounded. The adoption by the Commission of a legislative measure which, although intended to prevent infringements, amends the very basis for the presence of the State in a particular sector of the economy seems, in my view, to alter the balance between the institutions and therefore cannot be held by the Court to be lawful.

Conclusion

56. In the light of the observations set out above, I propose that the Court should declare void Articles 2, 6 and 7, and also Article 9 as far as is necessary, of Commission Directive 88/301/EEC of 16 May 1988 on competition in the markets in telecommunications terminal equipment, and that it should order the Commission to bear the costs.