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

TABLE OF CONTENTS

Facts and procedure 491

Form of order sought by the parties 498

The application for the annulment of the decision as a whole 498

1. Infringement of essential procedural requirements 498

— Arguments of the parties 498

— Legal assessment 499

2. Breach of Article 86 of the Treaty 503

— Arguments of the parties 503

— Legal assessment 515

— The definition of the relevant products 515

— The existence of a dominant position 517

— The extent of the relevant geographical market 517

— The existence of an abuse 517

— Effects on trade between Member States 522

3. Breach of Article 90(2) of the Treaty 524

— Arguments of the parties 524

— Legal assessment 524

The alternative application for the annulment of Article 2 of the decision 526

* Language of the case: English

1. Whether Article 2 of the decision is unnecessary 526

2. Whether Article 2 of the decision is contradictory 527

3. Infringement of Article 3 (1) of Regulation No 17 of the Council 528

— Arguments of the parties 528

— Legal assessment 528

4. Infringement of the Berne Convention 530

— Arguments of the parties 530

— Legal assessment 531

5. Failure to comply with the principle of proportionality 532

Costs 534

In Case T-69/89,

Radio Telefis Eireann, whose offices are in Dublin, represented by Willy Alexander, Harry Ferment and Gerard van der Wal, of the Hague Bar, instructed by Gerald F. McLaughlin, Director of Legal Affairs of Radio Telefis Eireann, and by Messrs Eugene F. Collins and Son, Solicitors, Dublin, with an address for service in Luxembourg at the Chambers of Ernest A. L. Arendt, 4 Avenue Marie-Thérèse,

applicant,

v

Commission of the European Communities, represented by Jacques Bourgeois, a member of its Legal Service, 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 Service, 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 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, Radio Telefis Eireann (hereinafter referred to as 'RTE') sought the annulment of the Commission Decision of 21 December 1988 (hereinafter referred to as 'the decision') in which the Commission found that RTE's policies and practices, at the material time, in relation to publication of its 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 the British Broadcasting Corporation ('the BBC') and

BBC Enterprises Limited (Case T-70/89) and Independent Television Publications Ltd ('ITP') (Case 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 RTE reserved the exclusive right to publish the weekly programme schedules for RTE1 and RTE2 in the *RTE Guide*, its own magazine for presenting its programmes.

4 RTE is a statutory authority established by the Broadcasting Authority Act 1960 and the Broadcasting Authority (Amendment) Act 1976. One of its main tasks is to provide, as a public service, a national radio and television broadcasting service, over which it enjoys a legal monopoly. In the discharge of its functions, RTE must take particular care to promote the Irish language and Irish culture. Section 17(a) of the Broadcasting Authority Act 1960, as amended by section 13 of the Broadcasting Authority (Amendment) Act 1976, provides that RTE must 'be responsive to the interests and concerns of the whole community, be mindful of the need for understanding and peace within the whole island of Ireland, ensure that the programmes reflect the various elements which make up the culture of the people of the whole island of Ireland, and have special regard to the elements which distinguish that culture and in particular for the Irish language'.

5 For its financing, RTE is required under of Section 24 of the 1960 Act 'so to conduct its affairs as to secure that its revenue becomes at the earliest possible date, and thereafter continues, at least sufficient' in order to balance its annual accounts and to make suitable provision for capital buildings and plant development. RTE obtains its resources in three ways: from licence fees, advertising and publishing.

6 Under Section 16(2)(j) of the 1960 Act, RTE is empowered, after obtaining the consent of the competent minister, 'to prepare, publish and distribute, with or without charge, such magazines, books, papers and other printed matter as may seem to [it] to be conducive or incidental to its objects'. Accordingly, in 1961 RTE was authorized to publish a television programme magazine, the *RTE Guide*. That magazine is intended to present and promote RTE programmes, including cultural programmes and those catering for minority interests. According to the applicant, it was published at a loss for the first 20 years of its existence. It is now, however, 'an important source of income' for RTE operations, the profit being returned by RTE to the radio and television programme production budget. For example, the total turnover (sales and advertising) for the publication and sale of the magazine exceeded IRL 3.9 million in 1985.

7 In 1988 the *RTE Guide* sold about 123 000 copies in Ireland and 6 500 in Northern Ireland, the prices being IRL 0.40 and UKL 0.50 respectively. Those figures indicate *inter alia*, according to the applicant, that in the Irish Republic only 11.5% of households or other establishments with television, that is to say 3.7% of viewers, bought the *RTE Guide*.

8 At the time of the adoption of the decision, the *RTE Guide* published the television programme listings for RTE1 and RTE2 only, supplemented by cast lists and synopses. It also contained short comments or articles, in Irish and English, concerning certain programmes, feature articles, background information, readers' letters and a considerable amount of advertising space.

9 At the material time, RTE's policy towards third parties with regard to information concerning its programmes was as follows: it provided daily and periodical 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, if the following day was a public holiday, the listings for two days, subject to certain conditions as to the format of publication. Weekly and Sunday newspapers were also permitted to publish 'highlights' of the week's television programmes. RTE ensured strict compliance with the licence conditions, by taking legal proceedings, where necessary, against publications which failed to comply with them.

10 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 RTE, BBC, 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 RTE1 and RTE2 — an Irish court, in response to an application from RTE, the BBC 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 that each weekly schedule is the result of a great deal of preliminary consideration and work and of the exercise of skill and judgment. It is the creation of RTE. ... I am satisfied by the evidence that RTE's weekly programme schedules as published in *RTE Guide* are literary works and compilations in the ordinary sense of the latter word within s. 8 and s. 2 of the Copyright Act 1963, that RTE have shown that they are entitled to copyright in these schedules and that the defendants by the publication of their *TV Guide* for the week 31 May to 6 June 1986, have breached that copyright by reproducing a substantial part of RTE's copyright material' ([1990] ILRM 534, especially pp. 541-542).

11 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 are 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 and on 4 March 1988 it sent RTE a statement of objections. On the conclusion of that proceeding, on 21 December 1988, the Commission adopted the decision with which the present action is concerned.

12 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).

13 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).

14 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'.

15 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 Article 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

16 RTE, the applicant, claims that the Court should:

(a) Declare the Decision void;

(b) 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 incurred by the Commission.

The application for the annulment of the decision as a whole

17 In support of its application for a declaration that the decision is void in so far as it finds that there has been an infringement of Article 86, the applicant alleges infringement of essential procedural requirements, breach of Article 86 of the EEC Treaty interpreted in relation to copyright, and failure to comply with Article 90(2) of the EEC Treaty.

1. *Infringement of essential procedural requirements*

— Arguments of the parties

18 The applicant claims that the Commission did not consult the Advisory Committee in accordance with the formal requirements of Article 10 of Regulation No 17. This plea in law comprises two parts. The applicant maintains, first, that 'there are indications' that the documents accompanying the notice convening the Advisory Committee were incomplete. The 'approved minutes of the hearing' and the draft decision were missing. Secondly, the applicant states that the meeting of the Advisory Committee, which lasted five days, began on 28 November 1988, that is to say less than 14 days after dispatch of the convening notice, contrary to Article 10.

19 The applicant claims that those formalities are essential requirements. By virtue of the combined provisions of Article 10(5) of Regulation No 17 and Article 9(4) of Regulation No 99/63 of the Commission of 25 July 1963 on the hearings provided for in Article 19(1) and (2) of Council Regulation No 17 (Official Journal, English Special Edition 1963-1964, p. 47), the minutes of the hearing must be made available to the Advisory Committee. As the applicant points out, Article 9(4) of Regulation No 99/63 requires that the essential content of the statements made by each person heard at the oral hearing be recorded in minutes which are to be read and approved by him. Pursuant to Article 10(5) of Regulation No 17, 'the consultation [of the Advisory Committee] shall take place at a joint meeting convened by the Commission; such meeting shall not be held earlier than 14 days after dispatch of the notice convening it. The notice shall, in respect of each case to be examined, be accompanied by a summary of the case together with an indication of the most important documents, and a preliminary draft decision'.

20 The Commission contends that the procedure followed was in conformity with the provisions referred to by the applicant. The Advisory Committee met on 2 December 1988, that is to say 14 days after dispatch of the convening notice. According to the Commission, the members of the committee had before them the complaint, the letter opening the procedure, the statement of objections, the replies to the statement of objections and a draft of the decision. The committee was told that the minutes of the hearing of 15 and 16 September 1988 had not yet been finalized in the light of the parties' various comments. The committee members made no request for any further materials. The Commission stresses that it is not compulsory for the committee to have the final minutes of the hearing before it when it is consulted.

— *Legal assessment*

21 With regard to the first part of the plea in law, to the effect that the documents accompanying the notice convening the Advisory Committee were incomplete, it must be borne in mind that Article 10(5) of Regulation No 17 requires the Commission to provide 'in respect of each case to be examined, . . . a summary of the case together with an indication of the most important documents, and a preliminary draft decision'. The substance of the obligations under that provision, and the question whether or not they constitute essential requirements, must be determined in each case in the light of the purpose of providing the documents, which is to enable the committee to carry out its advisory task in full knowledge of

the facts. The committee must be informed of the main points of fact and law in the proceedings relating to the implementation of Articles 85 and 86 on which it is consulted. Although that consultation falls within the framework of cooperation between the Commission and the Member States and is not intended to set up adversarial proceedings against the undertakings concerned, the committee must have, in particular — in accordance with the general principle that the undertakings involved in infringement proceedings are entitled to be heard — entirely objective information on the views and essential arguments of those undertakings expressed in their comments on all the objections raised against them by the Commission once the investigation is completed.

22 The minutes of the hearing are thus, in principle, among the 'most important documents' within the meaning of Article 10(5) of Regulation No 17, and must therefore be sent to the committee when it is convened. It is to be noted that the Advisory Committee is convened after the undertakings have had the opportunity to express their views on the objections raised against them — in writing, in their comments in reply to the statement of objections, and then, where applicable, orally at the hearing. Article 1 of Regulation No 99/63 on the hearings provided for in Article 19(1) and (2) of Regulation No 17 provides that the Commission is to hold a hearing before consulting the Advisory Committee on Restrictive Practices and Monopolies. Moreover, as regards the hearing, Article 9(4) of Regulation No 99/63 provides that the essential content of the statements made by each person is to be recorded in minutes which are to be read and approved by him.

23 However, it is not an essential procedural requirement that the minutes of the hearing be sent to the Advisory Committee unless, in a specific case, it proves necessary in order to enable the committee to deliver its Opinion in full knowledge of the facts, that is to say without being misled in a material respect by inaccuracies or omissions. That is not the case when the minutes of the hearing do not contain any important new information not contained in the written comments, accompanying the notice convening the Advisory Committee, made by the undertaking concerned in reply to the statement of objections. In such an event, the fact that the Commission did not send the minutes of the hearing to the Advisory Committee when it was convened does not affect the applicant's right to a fair hearing and has no repercussions on the outcome of the consultation procedure. The omission cannot, therefore, render the whole administrative procedure invalid and thereby call into question the legality of the final decision.

24 In the present case, the Court finds that the applicant does not allege that the failure to send the minutes of the hearing, duly approved on its behalf, to the committee was likely to mislead the committee in any material respect. The applicant does not put forward the slightest argument to that effect; in particular, it provides no evidence as to the existence of any difference between its written comments in reply to the statement of objections, which were sent to the committee, and its observations made orally at the hearing. Nor does an examination of the papers in the case reveal anything to cast doubt on the assumption that the Advisory Committee had all the necessary information at its disposal when it met, without there being any need to send to it the final minutes of the hearing. In the particular circumstances of the case, in view of the fact that it is not even alleged that the minutes of the hearing contained any important new information not contained in the documents accompanying the notice convening the Advisory Committee, and that there is no evidence to that effect in the papers in the case, the Court finds that the Commission's failure to send those minutes to the committee was not an omission of such a kind as to prevent the committee from reaching a decision on the basis of sufficiently complete information and thus affect the applicant's right to a fair hearing. In the present case, therefore, there are no grounds for holding that the fact that the final minutes of the hearing were not sent to the Advisory Committee when it was convened constitutes an infringement of an essential procedural requirement affecting the validity of the Commission's final decision.

25 That analysis follows the line taken by the Court of Justice in its judgments in the 'Quinine' and 'Dyestuffs' cases. The Court of Justice held, with regard to the importance of the minutes of the hearing of the parties, that the fact that the Commission or the Advisory Committee acted on the basis of a version of the minutes of the hearing which was not final and did not take into account the amendments suggested by the undertaking concerned, 'could only amount to a defect in the administrative procedure capable of vitiating the decision which results therefrom on the grounds of illegality if the document in question was drawn up in such a way as to be misleading in a material respect' (judgment of 15 July 1970 in Case 44/69 *Buchler* v *Commission* [1970] ECR 733, paragraph 17; see also the judgments of 14 July 1972 in Case 51/69 *Bayer* v *Commission* [1972] ECR 745, paragraph 17, and Case 48/69 *ICI* v *Commission* [1972] ECR 619, paragraph 31). In that light, only the placing at the disposal of the Advisory Committee of such information contained in the final minutes of the hearing as might enlighten that body on a material point constitutes an essential procedural requirement, failure to comply with which would justify the annulment of the Commission's final decision. The fact that the minutes of the hearing are not sent to the Advisory Committee is likely to mislead the committee only when those minutes contain important new information not contained in previous documents,

such as the comments of the undertakings concerned on the statement of objections, which were sent to the Advisory Committee when it was convened, and that is not the case here.

26 The second part of the plea based on infringement of essential procedural requirements concerns the period of 14 days which Article 10(5) of Regulation No 17 provides must elapse between the dispatch of the notice convening the Advisory Committee and the holding of the joint meeting. It must be pointed out first that the period of 14 days laid down in Article 10(5) of Regulation No 17 is complied with if the consultation in a particular case takes place at a joint meeting of the Commission and the Advisory Committee not earlier than the 14th day after dispatch of the notice convening the committee. In the present case, the applicant adduces no evidence to support its assumption that the Commission failed to comply with that 14-day period. The Commission cannot, therefore, be required to produce evidence to refute the applicant's vague allegations, which are not accompanied by any detailed arguments (see the judgment of the Court of Justice of 7 April 1965 in Case 11/64 *Weighardt* v *Commission* [1965] ECR 285, especially at p. 299).

27 Moreover, it must be noted that in any event the 14-day period constitutes a purely internal procedural rule. Admittedly, it is not impossible that failure to comply with that period may, in certain specific situations, affect the outcome of the consultation procedure and perhaps have repercussions on certain aspects of the Commission's final decision with regard to the undertaking concerned. That may be so, in particular, if the committee has not had sufficient time to acquaint itself with the important aspects of the case and to reach a decision in full knowledge of the facts. In circumstances such as those, a delay in convening the committee may have harmful consequences for the undertaking concerned, and may thus vitiate the entire procedure. However, failure to comply with the 14-day period cannot, by itself, render the Commission's final decision unlawful if the notice convening the committee was nevertheless sent in circumstances enabling that body to deliver its Opinion in full knowledge of the facts. In such a hypothesis, it was possible for the committee to give accurate consideration to the legal situation of the undertaking, and the failure to comply with the 14-day period is not such as to have harmful consequences for the applicant. The Court of Justice has consistently held that a failure to comply with an internal procedural rule of that kind cannot render the final decision unlawful unless it is sufficiently substantial and had a harmful effect on the legal and factual situation of the party alleging a procedural irregularity. It is to be noted that, in its judgment in *Bayer* v *Commission*, the Court of Justice held that the failure to comply with the period

which had been prescribed in that case, for the applicant's own benefit, for the submission of observations on the draft minutes of the hearing could affect the legality of the decision only if the irregularity were such as to give rise to misunderstandings on essential points (Case 51/69, cited above, paragraphs 16 and 17 of the judgment; see also the judgment of the Court of Justice of 15 July 1970 in Case 41/69 *ACF Chemiefarma* v *Commission* [1970] ECR 661, paragraphs 48 to 52, and its judgment of 10 December 1987 in Case 277/84 *Jänsch* v *Commission* [1987] ECR 4923, paragraph 11).

28 For all the above reasons, both parts of the first plea in law must be dismissed.

2. *Breach of Article 86 of the Treaty*

— *Arguments of the parties*

29 This plea in law comprises four parts. RTE claims that there has been a failure to comply with Article 86 with regard not only to the conditions, relating to the size of the relevant market and the effect on trade between Member States, for that article to be applicable, but also to the concepts of dominant position and abuse within the meaning thereof.

30 In the first place, the applicant contests the Commission's finding of the existence of a dominant position. It disputes the definition of the relevant products adopted in the decision. Unlike the Commission, it considers that the relevant products are not solely the weekly programme listings and television magazines in which those listings are published. On the contrary, they include 'all advance programme information supplied to the public on a weekly or daily basis, since there exists a high degree of substitutability between the various forms of programme information'. In that respect, the applicant relies on a market survey indicating that only 19% of television viewers use the *RTE Guide* — most viewers mainly consult the daily press to find out about television programmes. This shows that the information on daily schedules is, as far as viewers are concerned, substitutable for information on the weekly television schedules.

31 For the determination of its position on the market in information on its own television schedules, the applicant relies on the judgment of the Court of Justice of 13 February 1979 in Case 85/76 (*Hoffmann-La Roche* v *Commission* [1979] ECR 461, paragraph 38 of the judgment). It infers that 'the correct test for dominance is whether RTE, in publishing its weekly schedules, has the power to behave to an appreciable extent independently of its competitors, its customers and ultimately of the consumers'. The applicant considers that that is not the case. Two factors severely restrict any possibility of independent conduct on RTE's part. On the one hand, there is competition from the daily newspapers which constitute the main source of information on television programmes and, on the other, there is strong competition from the BBC and ITV regarding both the sale of their respective television guides and the size of television audiences. The applicant states that it depends on the *RTE Guide* to promote its broadcasting services and in particular its own programme personalities in an environment of very strong competition in Ireland with the BBC and ITV, which broadcast high-quality English-speaking services and publish their own weekly guides. As far as daily newspapers are concerned, the applicant points out that it supplies its advance weekly programme listings free on request to all newspapers, with permission to publish a comprehensive guide to its radio and television programmes which can be received in Ireland and Northern Ireland on the same day and, in certain circumstances, on the following day.

32 Having defined its position on the market, the applicant rejects the reasons which nevertheless led the Commission to find the existence of a dominant position. Unlike the Commission, it contends that the fact that each broadcasting company is the sole source of information on its own programme listings is not sufficient to establish the existence of a dominant position within the meaning of Article 86. In support of that view, the applicant states that if the criterion applied by the Commission were to be adopted, every undertaking — with the exception of 'producers of undifferentiated goods' — would hold a dominant position, within the meaning of Article 86, on the market for its own products. The applicant suggests that, in the present case, third parties wishing to publish a weekly magazine are not dependent for that purpose on permission to publish its weekly listings, in so far as the success of a magazine of that kind does not, in the applicant's view, depend on the inclusion of weekly programme listings, which would certainly enhance the magazine's circulation but are not necessary for its viability.

33 The second part of the plea as to infringement of Article 86 relates to the size of the relevant market. The applicant maintains, contrary to the Commission's contention, that the geographical market represented by Ireland and Northern Ireland does not constitute a substantial part of the common market within the meaning of Article 86. It states that the Court of Justice has held that the volume of consumption of the product in question in a specific territory is decisive in determining whether that territory amounts to a substantial part of the common market (judgment of 16 December 1985 in Joined Cases 40 to 48, 50, 54 to 56, 111, 113 and 114/73 *Suiker Unie and Others* v *Commission* [1975] ECR 1663). The applicant states in the first place that the size of the market for television guides within a given territory corresponds to the number of people who pay the television licence fee in that territory. It states that since, in the geographical market in question, about one million households pay the licence fee as compared with 120 million households in the Community as a whole, Ireland and Northern Ireland represent less than 1% of the total common market in the relevant product. Article 86 is therefore inapplicable.

34 In the third part of its plea based on infringement of Article 86, the applicant denies that its programme information policy constituted an abuse within the meaning of Article 86. Essentially, it claims that by acting in the manner complained of in the decision, it was merely protecting the specific subject-matter of its copyright in its own programme listings, which cannot constitute an abuse within the meaning of Article 86.

35 The applicant relies on the judgment of the Court of Justice of 5 October 1988 in Case 238/87 (*Volvo* v *Veng* [1988] ECR 6211) to maintain that the conduct complained of is covered by the protection afforded by Community law to the very subject-matter of its copyright in its listings. It claims that the only distinguishing feature in this case is that Magill is prevented from making a product for which it sees a market because of RTE's refusal to grant it a licence to publish its weekly listings, in which copyright subsists. The Court of Justice has accepted that such a refusal is lawful, holding in the aforementioned *Volvo* v *Veng* case, which concerned exclusive rights in registered designs, although its terms may also be applied to copyright, that 'the right of the proprietor of a protected design to prevent third parties from manufacturing and selling or importing, without its consent, products incorporating the design constitutes the very subject-matter of his exclusive right. It follows . . . that a refusal to grant such a licence cannot in itself constitute an abuse of a dominant position' (paragraph 8 of the judgment). Consequently, the applicant considers that the condemnation of its policy regarding its listings deprives it of the very substance of its copyright, in breach of the Community rules.

36 As regards the possibility, to which the Court of Justice drew attention in *Volvo* v *Veng*, of the abuse, within the meaning of Article 86 of an intellectual property right by its proprietor, the applicant states that no such conduct has been found by the Commission in this instance. It emphasizes that the practices at issue were described as abusive in the decision, firstly on the ground that they prevented 'the meeting of a substantial potential demand existing on the market for comprehensive TV guides' and, secondly, that their purpose was to protect the position of the *RTE Guide* on the market.

37 The applicant observes that the Commission has not proved that there is a demand among consumers for a comprehensive guide. Moreover, in any event the circumstances just referred to do not justify undermining the very substance of its copyright by virtue of which 'only RTE has the power to decide whether [the] schedules are published and if so by whom, in what form, etc.'. The refusal to grant a licence cannot therefore in any way be regarded as an abuse of a dominant position, even if there were a strong demand for the product which could have been produced under such a licence. The applicant also claims that, in the present case, its conduct cannot be regarded as abusive, in so far as it authorizes and encourages the publication of complete daily television listings.

38 Similarly, the applicant rejects the Commission's argument that it sought to expand its licence to broadcast radio and television programmes to include a monopoly in the subsidiary market of publications. The applicant claims that its copyright in its listings and the exercise of that right are totally unrelated to its licence to broadcast. In the applicant's view, the copyright protection of its listings, as literary works and compilations within the meaning of sections 2 and 8 of the Irish Copyright Act 1963, is itself sufficient to justify the conduct complained of, regardless of any consideration concerning its legal monopoly in national broadcasting. In support of its contention, the applicant points out that, in the judgment delivered on 26 July 1989 by the Irish High Court (*RTE* v *Magill*, cited above; see paragraph 10 above), Mr Justice Lardner considered that each weekly listing must be regarded as a creation of RTE, in so far as it is the result of a great deal of preliminary consideration and work and of the exercise of skill and judgment. Consequently, RTE's objection to any publication of its weekly listings by third

parties is 'the direct result of the exclusive right to use the protected creation with a view to the manufacture and first sale of commercial products, which constitutes the substance of the right'. The applicant refers in that connection to the judgment of the Court of Justice of 3 March 1988 in Case 434/85 *Allen & Hanburys* v *Generics* [1988] ECR 1245, paragraph 11.

39 The fourth part of the plea of infringement of Article 86 is based on the contention that the contested practices do not have any appreciable effect on trade between the Member States. The applicant observes that the only territory of another Member State in which RTE broadcasts can be received is Northern Ireland or, more accurately, a part of Northern Ireland. Sales of *RTE Guide* in another Member State are consequently of only peripheral significance. In terms of magnitude, they correspond to less than 5% of the sales in Ireland, whereas the size of the 'television market' in the United Kingdom is more than 20 times the size of that market in Ireland, according to the figures set out in recital 6 in the preamble to the contested decision. The applicant also states that the Northern Irish market represents less than 1.6% of the British television market and less than 0.3% of the Community television market. In view of all those figures, the applicant considers that the contested conduct is not liable to have an appreciable effect on trade between the Member States because the market for information on RTE programmes is Ireland alone, 'with an insignificant overflow in a small border area of another Member State'. In support of its contention, it refers to the abovementioned judgment of 26 July 1989 in which the Irish High Court took the view that Magill and the other defendant companies had not proved, among other things, that RTE's contested policy was liable to have an appreciable affect on trade between Member States.

40 The Commission rejects all the applicant's arguments concerning the alleged breach of Article 86.

41 As regards the first part of the plea in law, concerning 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. One relates to its own programme listings for the week ahead, over which it enjoys a monopoly. The other 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 RTE — for which there is a specific demand. 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 *RTE Guide*, which thus enjoyed a monopoly.

42 With regard to the second part of the plea based on infringement of Article 86, the Commission maintains that, contrary to the applicant's contention, the relevant geographical market does constitute a substantial part of the common market. It disputes, first, the applicant's proposed criterion that the market concerned in Ireland and Northern Ireland represents less than 1% of all television licences in the Community, since that presupposes that there is a single market for broadcasting, which is hardly the case at present. In that connection, it points out that one factor contributing to the limited amount of trade in television services lies in the absence of comprehensive television guides. The Commission then stresses the importance of Ireland's cultural identity and points out that the 3.7 million citizens of Ireland do constitute a substantial market. Moreover, from a legal point of view, a market encompassing the territory of one Member State and a part of the territory of another Member State must necessarily be regarded as a substantial part of the common market. The Commission makes a further point concerning the relevant geographical market: the fact that the abuse, committed in Ireland and Northern Ireland, takes effect only in Ireland — that is to say, within a narrowly defined area — as regards Magill, tends to confirm that that area is the relevant geographical market.

43 As regards the third part of the plea, the Commission seeks to demonstrate that the conduct at issue constitutes an abuse, and 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.

44 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.

45 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* [1988] ECR 2605, paragraphs 10 to 16).

46 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.

47 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.

48 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'.

49 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 RTE 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, RTE 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.

50 The Commission further 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.

51 With regard to the fourth part of the plea based on infringement of Article 86, concerning the effect on 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, in particular, that if Magill were to publish a comprehensive television guide in Ireland, it is obvious that there would be a demand for such a guide in Northern Ireland, where viewers can receive the same programmes as in Ireland. In view of the fact that television guides are the best-selling magazines, it is clear, according to the Commission, that the effect on trade between Member States was appreciable. Further proof lies in the fact that, according to the information provided by RTE at the hearing in the application for interim measures, some 20 undertakings wished to publish a comprehensive guide in Ireland.

52 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 RTE, the BBC and ITP 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 RTE, the BBC and ITP.

53 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.

54 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.

55 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 RTE 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.

56 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.

57 The applicant also rejects the Commission's claim that RTE 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, RTE 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.

58 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.

59 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'.

— *Legal assessment*

60 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, must examine five 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. In the third place, the Court must deal with the question of the size of the relevant geographical market. Fourthly, it must decide whether or not the conduct at issue constitutes an abuse. Fifthly, the Court must rule on the effects of that conduct on trade between Member States.

— The definition of the relevant products

61 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 with the market for information on television programmes in general.

62 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

63 With regard to the applicant's position on the relevant market, the Court notes that RTE 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 *RTE Guide*, 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 position 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 extent of the relevant geographical market

64 As regards the size of the relevant geographical market, the Court finds that the geographical market represented by Ireland and Northern Ireland, that is to say by the territory of one Member State and a part of that of another Member State, is undeniably a substantial part of the common market, without it being necessary to take into consideration the share of the Community market in television magazines represented by Ireland and Northern Ireland (see, *inter alia*, the judgment of 9 November 1983 in Case 322/81 *Michelin* v *Commission*, cited above, paragraph 28).

— The existence of an abuse

65 Having established that the applicant occupied a dominant position on a substantial part of the common market at the material time, the Court must determine whether or not its policy on the distribution of information concerning RTE'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.

66 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* [1982] ECR 2853, 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).

67 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).

68 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.

69 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 3711, paragraph 12).

70 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).

71 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.

72 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).

73 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 *RTE Guide*. 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 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 *RTE Guide*. The applicant's conduct cannot, therefore, be covered in Community law by the protection conferred by its copyright in the programme listings.

74 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 RTE channels, in order to maintain the monopoly enjoyed, through the publication of the *RTE Guide*, 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.

75 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.

— Effects on trade between Member States

76 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).

77 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.

78 For all those reasons, the plea based on a breach of Article 86 must be dismissed as unfounded.

3. *Breach of Article 90(2) of the Treaty*

— *Arguments of the parties*

79 The applicant, referring to the judgment of the Court of Justice of 30 April 1974 in Case 155/73 (*Sacchi* [1974] ECR 409), claims that it is an undertaking entrusted with the operation of services of general economic interest within the meaning of Article 90(2) of the Treaty. It maintains that by virtue of that provision, Article 86 may not be applied to it since to do so would seriously obstruct its performance of the task assigned to it, which is to provide a national broadcasting service, placing particular emphasis on Irish langauge and culture.

80 RTE maintains in particular that, for historical reasons, it must cope with considerable obstacles in discharging its duty to promote Irish language and culture. Those difficulties are aggravated by competition from numerous television channels broadcasting in English whose programmes can be received in Ireland. Against that background, publication of the *RTE Guide*, which, in the applicant's opinion, would not be viable if it had to face competition from weekly general television magazines, is essential to promote and publicize RTE programmes. Publication of the *RTE Guide* is also an important source of income.

81 The Commission contends that even if RTE is an undertaking entrusted with the operation of services of general interest, it is required, in the context of its commercial activity, to comply with the competition rules, pursuant to Article 90(2), 'so long as it is not shown that the said prohibitions are incompatible with the performance of [its] tasks' (judgment of 30 April 1974 in Case 155/73 *Sacchi*, cited above). The Commission states that the Broadcasting Authority Act 1960 establishing RTE does not assign to it, or allow it to reserve to itself, publication of a magazine setting out its weekly listings. The condition for exemption from the competition rules under Article 90(2) is thus not satisfied.

— *Legal assessment*

82 It must first be pointed out that, as the Commission rightly states, an undertaking such as RTE entrusted with the operation of a national public broadcasting service is subject to the rules governing competition in accordance with Article 90(2) of

the Treaty unless it is demonstrated that to apply those rules would be incompatible with the performance of its tasks (see the judgment of the Court of Justice of 30 April 1974 in Case 155/73 *Sacchi*, cited above, paragraph 15; the judgment of 3 October 1985 in Case 311/84 *CBEM* v *CLT and IPB* (Telemarketing) [1985] ECR 3261, paragraphs 17 and 19; the judgment of 11 April 1989 in Case 66/86 *Ahmed Saeed Flugreisen and Others* v *Zentrale zur Bekämpfung unlauteren Wettbewerbs* [1989] ECR 803, paragraph 56; and the judgment of 23 April 1991 in Case C-41/90 *Höfner and Elser* v *Macrotron*, cited above, paragraph 24).

83 In the present case, the applicant has not established that the prohibition, inherent in Article 86, against its reserving the exclusive right to publish its advance weekly programme listings in any way affects the performance of its tasks as a broadcaster. It is to be noted that, as an authority entrusted with providing a national radio and television broadcasting service, RTE has been authorized to publish the *RTE Guide* with a view not only to presenting and promoting its programmes — and in particular its cultural and Irish-language programmes — but also to contributing to its funding. It is difficult to discern how the publication of general television magazines by third parties, and the applicant's consequent adaptation to the requirements of the market, could impede the attainment of the public service objectives to which the applicant refers, in particular the promotion of programmes with a high cultural content, of minority appeal or in Irish. On the contrary, the fact that the applicant reserves to itself publication of information on its weekly programmes seems to be justified only on commercial grounds, and therefore in no way contributes to the performance of the cultural, social and educational tasks assigned to RTE. Article 86 therefore applies to the conduct at issue, and the prohibition of that conduct is not incompatible with the performance of RTE's public service tasks.

84 The plea based on infringement of Article 90(2) of the Treaty cannot therefore be upheld.

85 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

86 The applicant puts forward five pleas in support of its alternative conclusions seeking the partial annulment of the decision, confined to Article 2 in so far as it imposes compulsory licensing. It maintains, first, that Article 2 is unnecessary and contradictory. It also alleges infringement of Article 3 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'). Finally, it claims that Article 2 does not comply with the principle of proportionality.

1. *Whether Article 2 of the decision is unnecessary*

87 The applicant claims that the order that it supply its weekly listings to third parties on request and on a non-discriminatory basis, contained in Article 2 of the decision, is unnecessary since RTE already supplies its weekly listings on the basis described above.

88 The Commission maintains that that is a disingenuous objection. It contends that 'RTE's licensing policy discriminates against those like the complainants who publish on a weekly basis'.

89 It is sufficient, in that regard, to point out that Article 2 of the decision does not just order the applicant to make its weekly listings available to third parties on a non-discriminatory basis, which was, indeed, already the applicant's practice when the decision was adopted. It also orders RTE to permit third parties on request and on a non-discriminatory basis to publish those listings, by means of licences if need be.

90 The plea that Article 2 of the decision is unnecessary must therefore be dismissed as unfounded.

2. *Whether Article 2 of the decision is contradictory*

91 The applicant maintains that Article 2 of the decision is contradictory in so far as, on the one hand, it orders RTE immediately to bring the infringement to an end by authorizing publication of its weekly listings and, on the other, it calls on RTE to submit to the Commission, for approval, within a period of two months after notification of the decision proposals as to the terms on which it considers that third parties should be authorized to publish weekly programme listings.

92 The Commission counters that criticism by observing that 'the first sentence of Article 2 offers the parties one way of bringing their infringement to an end: to begin to make the data available freely and without discrimination. The last three sentences describe the alternative procedure for doing so: to adopt a licensing policy . . . subject to terms deemed acceptable by the Commission'.

93 In that regard, the Court finds that the aspect pointed out by the applicant is contradictory in appearance only. Clearly Article 2 orders RTE, ITP and the BBC forthwith to permit publication of their programme listings by third parties. It goes on, however, to specify that such permission may be granted in the form of a licence subject to certain conditions relating to quality; it provides that the undertakings concerned which decide to take that course have two months to draw up a proposal to submit to the Commission for approval. Contrary to appearances, that option is not inconsistent with the order to bring the infringement to an end forthwith, which does not lay down any penalty in the event of non-compliance but merely specifies how the obligation to bring the infringement to an end may be complied with, taking into account the constraints inherent in drawing up such a licensing system.

94 Consequently, the plea that Article 2 is contradictory cannot be upheld.

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

— *Arguments of the parties*

95 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 RTE 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'. It stresses that the solution adopted by the Commission thus deprives the holder of an intellectual property right of the very substance of that right.

96 The Commission, on the other hand, maintains that in Article 2 of the decision it did 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*

97 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).

98 In the present case, the Court finds that the constituent elements of the infringement revealed by the consideration of the first plea in law justify the measures imposed in Article 2 of the decision. The requirement that the applicant supply ITP, the BBC 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. 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 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.

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

4. *Infringement of the Berne Convention*

— *Arguments of the parties*

100 Also in the alternative, the applicant maintains that even if Article 3 of Regulation No 17 authorizes the Commission to prescribe 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.

101 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*

102 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 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 States. 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).

103 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 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.

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

5. *Failure to comply with the principle of proportionality*

105 The applicant considers that the obligations imposed upon it in the decision are disproportionate and unreasonable. It claims that Article 2 requires it to grant a large number of licences and to monitor compliance with the terms of them. Such monitoring would entail a disproportionate burden in terms of cost and personnel for a relatively small organization like RTE; it would also require censorship of numerous publications, leading to all sorts of disputes.

106 The Commission considers that the decision is in conformity with the principle of proportionality which, it has consistently been held, means that the charges imposed on market participants must not exceed 'what is appropriate and necessary to attain the objective sought'.

107 It must be stressed that this is really an aspect of the same plea as that based on infringement of Article 3(1) of Regulation No 17, considered above. The principle of proportionality is implicit in that provision, which empowers the Commission to impose obligations on the undertakings concerned, for the sole purpose of bringing the infringement to an end. As the Commission rightly maintains, the principle of proportionality means, in this case, that the charges imposed on the undertakings in order to bring an infringement of competition law to an end must not exceed what is appropriate and necessary to attain the objective sought, namely the re-establishment of compliance with the rules infringed (on the principle of proportionality, see in particular the judgment of the Court of Justice of 24 September 1985 in Case 181/84 *Man (Sugar)* v *IBAP* [1985] ECR 2889, paragraph 20).

108 It is therefore sufficient to point out that it is clear from the Court's findings concerning the plea of infringement of Article 3 of Regulation No 17 that the order addressed to the applicant to authorize third parties on request and on a non-discriminatory basis to publish its programme listings, possibly by granting a licence subject to certain conditions, is an appropriate and necessary measure in order to bring the infringement to an end. In the circumstances of the present case, it is thus in no way disproportionate or unreasonable.

109 It follows that the plea of failure to comply with the principle of proportionality must be dismissed as unfounded.

110 Consequently, the alternative conclusions seeking the annulment of Article 2 of the decision must be rejected, and the application must be dismissed in its entirety.

Costs

111 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