10. The grant of the exclusive right to transmit television signals does not constitute a breach of Article 7 of the Treaty. Discrimination by undertakings enjoying such exclusive rights against nationals of Member States by reason of their nationality is incompatible with this provision.

In Case 155/73

Reference to the Court under Article 177 of the EEC Treaty by the Tribunale of Biella for a preliminary ruling in the criminal proceedings pending before that court against

GIUSEPPE SACCHI

on the interpretation of Articles 2, 3, 5, 7, 37, 86 and 90 of the EEC Treaty,

THE COURT

composed of: R. Lecourt, President, A. M. Donner and M. Sørensen, Presidents of Chambers, R. Monaco, J. Mertens de Wilmars (Rapporteur), P. Pescatore, H. Kutscher, C. Ó Dálaigh and A. J. Mackenzie Stuart, Judges,

Advocate-General: G. Reischl
Registrar: A. Van Houtte

gives the following

JUDGMENT

Facts

The order making the reference and the written observations submitted under Article 20 of the Statute of the Court of the EEC may be summarized as follows:

I — Facts and procedure

Under Italian law television is a monopoly granted by the State to Radio Audizione Italiana (hereinafter called RAI), which involves on the one hand the monopoly of televised commercial advertising and on the other hand the prohibition on any other person or undertaking from receiving, for the purpose of their retransmission, audio-visual signals transmitted either from the national territory or from foreign stations.

Mr Sacchi, who has an unauthorised television relay undertaking (TELEBIELLA), alleged that this system did not conform with the EEC Treaty insofar as cable television was concerned. After he had refused to pay the licence fee on receivers for television relay, a refusal which Italian law treats as an offence, he was charged with 'being in possession in premises open to the public outside his place of residence of some television sets used for reception of transmissions by cable without having paid the prescribed licence fee'.

Since the national court doubted the legality of this fee, should it appear that the monopoly enjoyed by RAI, in particular as regards relay television, was contrary to the EEC Treaty, the following questions were referred to the Court by order dated 25 July 1973:

1. Whether the principle of the free movement of goods within the Common Market and consequent prohibition against isolation of national markets, which would impede full realization of a single market in Europe, as provided for in Articles 2 and 3 (f) of the Treaty, are basic principles of the Community giving rise to subjective rights in favour of individuals which, if infringed, even by Member States, can, under Article 5 of the Treaty, be protected by the national courts.

2. If the answer to Question 1 is in the affirmative, whether it is a breach of those principles for a Member State to grant a limited company the exclusive right, extending over the whole of its territory, to transmit television broadcasts of all kinds including those transmitted by cable and those for commercial advertising purposes, in view of the fact that such exclusive right has the following consequences for other subjects of the Community:

   (a) a ban on television advertisements (treated as products in their own right) being broadcast over the territory of the State concerned except through the agency of the company exclusively authorized for the purpose;

   (b) a ban on television advertisements (treated as necessary instruments for the promotion of trade) being broadcast for the purpose of advertising given products at regional or local centres within the territory concerned except through the company exclusively authorized for the purpose;

   (c) a ban on export, hire or distribution in any manner in the country concerned of television films, television documentaries and other productions capable of being broadcast by television except for the purposes of the authorized company.

3. Whether Article 86, taken together with Articles 2 and 3 (f) and Article 90 (1) of the Treaty, should be taken to mean that, regardless of the means employed, to establish a dominant position in a substantial part of the Common Market is illegal and prohibited when the undertaking which does so eliminates all forms of competition in the field in which it operates and over the whole territorial area of the Member State, even though it is entitled to do so in law.

4. If the answer to Question 3 is in the affirmative, whether a limited company on which a Member State has conferred by law the exclusive right, over the whole territory of the State, to carry out television bradcasting of all kinds including those transmitted by cable, and those for commercial advertising purposes, holds within that territory a dominant position which is

incompatible with Article 86 and is prohibited because, to the detriment of Community consumers who, in a wider sense, can be also regarded as users in general, the exclusive right beforementioned entails:

(a) elimination of all competition as far as it involves:

— broadcasting of advertisements (whether treated as products in their own right or as instruments for promoting trade)

— the release for transmission of films, documentaires and other television programmes produced in the Community;

(b) imposition of monopoly prices on television commercials (in the absence of any other competitor in the market), leading to the abuse of a dominant position;

(c) ability to restrict at will broadcasts advertising products not approved of by the authorized company, whether on political or commercial grounds;

(d) the possibility of preferential treatment for the advertising broadcasts of industrial or trade groups, again for reasons which are not strictly economic;

(e) the fullest discretionary power in the choice and distribution for broadcasting of productions, such as films, documentaries and other programmes, whose use may wholly depend on the authorized company's decisions.

5. If the answer to Question 4 is in the affirmative, whether individuals have a subjective right, enforceable in the national courts, to have the exclusive right, whose effects were described in 4, abolished.

6. Whether Article 37 (1) and (2) of the Treaty also applies in the case of a limited company on which a Member State has conferred the exclusive right to transmit broadcasts of any kind on its territory insofar as this affects:

(a) advertising programmes as described in Question 2 (a) and (b) above, and

(b) broadcasts of films, documentaries etc., produced in other Member States.

7. If the answer to Question 6 is in the affirmative, whether Article 37 (1) of the Treaty should be taken to mean that, with effect from 31 December 1969, when the transitional period expired, the authority enjoying the monopoly should be reorganized so as to ensure that differences of treatment are eliminated as they arise, or interpreted to mean that the authority with a monopoly should be deprived of any possibility of exercising discrimination, its exclusive rights as compared with other Member States lapsing in consequence with effect from 1 January 1970.

8. Whether Article 37 (1) and (2) of the Treaty is directly applicable and has created subjective rights for individuals which the national courts must protect.

9. If the answer to Question 7 and 8 are in the affirmative, whether, as from 1 January 1970, the exclusive rights conferred on a limited company to transmit television broadcasts of all kinds over the whole territory of a Member State must be regarded as having lapsed as far as advertisements, films and television documentaries coming from other Member States are concerned.

10. If the answer to Question 8 is in the affirmative, whether the new measures prohibited by the 'standstill' in paragraph 2 of Article

37, which is directly applicable, can include a wider interpretation of exclusive right (in the case in point, extension of the monopoly to television transmissions by cable).

11. Whether it is a breach of Article 7 of the Treaty to reserve for a limited company in a Member State the exclusive right to transmit television advertisements over the whole territory of that Member State.

The order of reference was filed at the Court Registry on 27 July 1973.

After hearing the report of the Judge-Rapporteur and the opinion of the Advocate-General, the Court decided to open the oral procedure without any preparatory inquiry.

The Commission, the German Government, the Italian Government and Mr Sacchi submitted written observations.

II — Observations submitted under Article 20 of the Statute of the Court of Justice

A — Observations of the Commission of the European Communities

After stating the different ways, particularly from the technical point of view, that radio television and cable television function and after pointing out the cultural, commercial and technical prospects of cable television on a local basis, the Commission analyses the system of television and relay television and in particular their use for commercial advertising in various member countries. In this connexion it stresses the influence of relay television in particular on the interpenetration of markets.

It continues by noting that although in the majority, if not in all Member States, the television service is a State monopoly or a delegated monopoly, the system is however subject, to a growing extent, especially as regards cable television, to pressures leading towards a wider choice of possibilities made available by technical developments.

The principle of free movement of goods (Questions 1 and 2)

The Commission is of the opinion that although the principle of free movement of goods and the principles contained in Articles 2, 3 (f) and 5 of the Treaty certainly constitute the foundations of the Community legal system, they are however not as such directly applicable in the sense that they give private parties individual rights which the national courts must safeguard. The function of these principles, the imperative nature of which has been stressed by the Court (Case 6/72, *Europemballage Corporation* (1973) E.C.R., p. 216) is to delimit the possible exemptions provided by the particular provisions of the Treaty so that the objectives of the Treaty may not be undermined.

As the Court has stated in respect of the second paragraph of Article 5, these provisions constitute general obligations on the part of the Member States, the substance of which depends, in each particular case, on the provisions of the Treaty or on rules which emerge from its general system.

The first question thus calls for a negative reply, and the second question does not arise if its form is strictly regarded, since it was raised only in the event of an affirmative reply to the first question.

It follows however from the previous considerations that the question as to the extent that the exclusive right granted to RAI and the prohibitions which flow from this exclusive right or from its exercise are incompatible with the Treaty and whether this incompatibility has a direct effect, depends on an analysis of the particular provisions of the Treaty which apply these general principles and in particular, according to the national court, of Articles 7, 37, 86

and 90 of the Treaty, which will be examined below.

Abuse of a dominant position by a public undertaking (Questions 3, 4 and 5)

Article 90 of the Treaty is, in the Commission's view, the one primarily relevant to the dominant position of RAI, since that position arises from the concession granted to it by the State, that is to say, by the measure of an authority. RAI is a public undertaking or, at least, an undertaking to which special or exclusive rights have been granted within the meaning of this provision, so that the Italian State can neither enact nor maintain in force as regards it any measure contrary to the rules of competition.

The grant of exclusive rights however does not constitute in itself an infringement of Article 90. Since Article 86 does not prohibit a dominant position as such nor even the granting of exclusive rights as regards private undertakings, Article 90 cannot give rise to liabilities greater than those arising under Article 86.

On considering whether the extension of exclusive rights over radio television to cable television could be regarded as incompatible with the prohibition on enacting measures contrary to the rules of competition, the Commission concedes that Article 90 allows a State to grant exclusive rights to an undertaking which would not necessarily give it a dominant position, but it is doubtful whether this power can always and necessarily include that of enacting a measure reinforcing the dominant position of a public undertaking, or one treated as such, so as to eliminate all possible competition.

It appears from the above analysis that a Member State which grants exclusive rights to an undertaking to make all kinds of television transmissions, including cable transmissions, over all its national territory, even for purposes of commercial advertising, does not by this fact alone infringe the rules of competition.

Although such a dominant position is as a structure not automatically condemned by the Community rules on competition, since such rules prohibit its abuse, they nevertheless impose not inconsiderable limits on the behaviour within the market of an undertaking which has such a position.

Behaviour, therefore, by the holder of the monopoly, capable of preventing the appearance of new forms of competition or involving the fixing of prices at too high a level or the refusal to transmit or a preference given to certain advertisements, be it for the purpose of safeguarding the commercial interests of the monopoly or for political reasons, or finally discrimination in televising items such as films or documentaries is capable of constituting an abuse which is prohibited, expressly so in certain cases, by Article 86.

Finally since Articles 86 and 90 (1) are, in the opinion of the Commission provisions which are directly applicable, individuals are given rights which the national courts must safeguard.

Commercial monopolies (Questions 6 to 10)

These questions relate to the interpretation of Article 37 of the Treaty regarding the progressive adjustment of monopolies of a commercial character so as to ensure that no discrimination exists between the nationals of Member States, and the obligation on Member States to refrain from introducing any new measure of a discriminatory nature.

According to the Commission, Article 37 applies only if three conditions are fulfilled: there must be a State monopoly or a delegated monopoly; the monopoly must be of a commercial character; it must appreciably influence trade between Member States. The second condition is not fulfilled in the case of RAI. The concept of a commercial

monopoly excludes monopolies of services, as is clear from the very position of Article 37 under the Title 'Free movement of goods', from the use in the text of the words 'product' and 'conditions under which goods are procured and marketed', and the reference in paragraph 2 to provisions dealing with the abolition of customs duties and quantitative restrictions, which provisions are unanimously regarded as being inapplicable to services.

The Commission likewise cites the judgment of the Court in Case 6/64 *(Costa-Enel,* Rec. 1964, p. 1165), according to which the monopolies to which it refers should 'relate to transactions concerning a commercial product'.

Even if it were not necessary to exclude in an abstract and general way monopolies of services from the scope of Article 37, it would nevertheless be necessary definitely to establish that the service in question is a commercial product, that it 'lends itself to competition and to trade between Member States' and 'plays an effective part in this trade' (Judgment *Costa-Enel).* It is necessary to assess the possibilities of discrimination inherent in the monopoly in question.

If Article 37 had to be understood as embracing services, there would be no doubt, according to the Commission, about the commercial nature of the activity constituted by television advertising.

The actual possibilities of competition should therefore be considered taking into account the new prospects offered as regards television by the availability of coaxial cable. Both the technical reasons which justify a monopoly for radio transmission (the limited number of available frequencies) and the obstacles to transmissions of televised programmes beyond frontiers are practically eliminated by the technique of diffusion by cable. Finally, the Commission likewise thinks that the monopoly in question is capable of playing an effective rôle in trade between Member States, as an aid to advertising.

As regards discrimination it is necessary to enquire whether the fact of adding to the monopoly in the production of national programmes a monopoly in the distribution of both national and foreign programmes does not intrinsically constitute a preferential system in favour of the national production and is not therefore discriminatory. The Commission refers in this respect to the arguments which it developed in Case 82/71 *(SAIL,* Rec. 1972, p. 131).

Taking into account the attitude it has adopted against the assimilation of monopolies of services to commercial monopolies within the meaning of Article 37, the Commission considers that it does not have to reply to Question 7, which concerns the effect of the expiration of the transitional period on the existence of the exclusive rights which the monopoly enjoys.

The Commission nevertheless recalls that in its observations in Case 82/71 *(SAIL)* it had already expressed the opinion that the adjustment provided for in Article 37 (1) must place in such a way that the monopoly may no longer give rise either actually or potentially to discrimination in trade between Member States to the detriment of imported or exported products. Monopolies could continue to exist only if they did not hinder the functioning of the Common Market, that is to say that the exclusive rights should be neutralized. Such neutralization does not necessarily imply that the exclusive rights must lapse, for each case must be considered individually.

Case 82/71 *(SAIL)* has likewise already enabled the Commission to show that in its view Article 37 (1) has become, in principle, directly applicable at the expiration of the transitional period. The Court has already declared that Article 37 (2) has a direct effect; the difference between it and Article 37 (1) is not the obligation which it contains,

but only the date on which the obligation became effective.

While it is true that Article 37 (1) provides that Member States shall 'progressively adjust' any State monopolies, which implies a certain discretionary power, the final obligation, that is to say the exclusion of all discrimination, is clear and precise, unconditional and not or Community institutions. In this subject to intervention by Member States respect the Commission refers to the judgment of the Court of 16 June 1966 in Case 57/65 *(Lütticke,* Rec. 1966, p. 294) relating to Article 95 of the Treaty.

Should, contrary to the view of the Commission, Article 37 be regarded as applicable to the case in question, the exclusive right granted to a limited company to make television transmissions could not be regarded as abolished, and the wide interpretation of this right could be considered as an infringement of the standstill aimed at by Article 37 (2) only in the event that it appeared that the exclusive right in question or its extension in fact entailed discrimination or the possibility of discrimination between nationals of Member States regarding the conditions under which goods are procured and marketed.

Question eleven

The Commission is of the opinion that Article 7 constitutes an ancillary rule when dealing with a sector for which the Treaty provides specific rules.

B — Observations of the German Government

The German Government states that radio and television is regarded in the Federal Republic as a public service. Since freedom of information by radio, guaranteed by the Constitution, involves a free organization for radio and television transmission, both as regards the State and as regards social groups or private pressure groups, a monopoly has been granted to companies subject to a limited legal control by the State but they are nevertheless public organizations.

The principle of free movement of goods (Questions 1 and 2)

The German Government is of the opinion that a negative reply should be given to the first question.

Although the principles of free movement of goods and free competition are fundamental to Community law, they do not as such give rise to subjective rights for individuals. Such rights can arise only from definite provisions of the Treaty (such as Articles 9 et seq., 30 et seq., 85 and 86) or of secondary Community law which defines and puts the said principles into practice.

Articles 2 and 3, one of which describes the objectives of the Treaty, the other the means to be taken to achieve them, could not, even if they were combined with Article 5, give rise to a direct effect, since the said Article 5 too lacks, as regards the obligation which it contains, the necessary specificity for immediate application.

On considering, in spite of the negative reply proposed to the first question, the compatibility of the existing monopolies for radio and television, including radio and television advertising, with the principles of free movement of goods and services, the German Government states that in its view the object of the provisions of the Treaty which put these principles into practice (Art. 30 et seq. and 59 et seq.) is to ensure equal outlets for domestic and imported products on the internal market, and the provisions do not prevent the existence of monopolies. This appears clearly, as regards monopolies of a commercial character, from the very wording of Article 37. The possibility that Member States may maintain and enlarge the monopoly in radio and television transmission does not mean, however, that any behaviour whatsoever on the part of the monopoly accords with

Community law, as is shown by the prohibition on discrimination in Article 37 itself.

Abuse of a dominant position by a public undertaking (Questions 3, 4 and 5)

Public undertakings within the meaning of Article 90 (1) are, in the German Government's view, subject to the prohibitions of Articles 85 and 86 of the Treaty. Nevertheless the prohibition on establishing a monopolistic position, the principle of which was confirmed by the judgment in *Continental Can* (Case 6/72, (1973) E.C.R., p. 215) could not apply as such to the public sector. Indeed Article 90 (1) shows that Member States are empowered to grant exclusive rights to public or private undertakings, even amounting to a monopoly. Moreover Article 90 (2) shows that in any case any prohibition on monopolies applies to undertakings entrusted with the operation of services of general economic interest or having the character of a revenue-producing monopoly only to the extent that such prohibition does not obstruct the performance of the particular tasks assigned to them.

Further, organizations concerned with transmitting radio and television are not in the German Government's view 'undertakings' within the meaning of the Treaty, since they provide a public service and, in accordance with the Constitution, they must have the status of free institutions to accomplish their tasks. These organizations are therefore undertakings within the meaning of the rules on competition only as regards some of their activities. In this event, however, it is Article 90 (2) which should apply and this is so likewise as regards the transmission of advertisements, which forms part of 'services of general economic interest'. Indeed, the radio and television transmission of advertisements is possible only within the framework of more general programmes whilst, on the other hand, by reason of its impact on the formation of public opinion, it must reflect the guidelines and the principles governing radio and television transmission in general. There is exemption from the rules of competition nevertheless only to the extent that their application would obstruct the performance of this task of general interest. Here too a case-by-case examination is called for.

The German Government considers that it does not have to reply to the fifth question which arises only in the event of an affirmative reply to the fourth question. It appears, in any event, from the case law of the Court that citizens can deduce individual rights from the obligations of Member States only where such obligations are sufficiently precise and refer to a duty to refrain which is not subject to reservations.

Commerical monopolies (Questions 6 and 10)

In the view of the German Government the reply to the sixth question is negative.

The public television service, even as regards advertising, is not a commercial monopoly, but part of a monopoly of services. Moreover trade in films between Member States is not trade in products but trade in services, as appears from the fact that the EEC Directive No 63/607 of the Council of 15 October 1963 liberalizing the import, loan and use of films (OJ No 159 of 2 November 1963, p. 2661) was based on Article 63 (2).

This fact makes a reply to Questions 7, 8, 9 and 10 unnecessary.

The prohibition on discrimination (Question 11)

The German Government considers that the prohibition on discrimination in Article 7 of the Treaty is not infringed when a Member State grants a monopoly of commercial television to a company resident in its territory.

C — *Observations of the Italian Government*

According to the Italian Government the questions raised by the Tribunale of Biella are inadmissible and unjustified. It is not within the spirit of Article 177 to bring before the Court of Justice purely theoretical hypotheses, but questions the answer to which determines the application of internal law. There is no case for making a reference for a preliminary ruling if the national law can be applied without reference to Community law or if the national court still has to determine the applicable internal law. In the present case the preliminary question of whether a fee is likewise due for the possession of apparatus for receiving television by cable depends entirely on national law.

As to the merits the Italian Government observes that a radio and television service is a natural monopoly rather than a legal and economic monopoly, in the sense that the object of the enterprise by its nature allows only operation by one or a limited number. The law which attributes the operation of something in such a situation to the State does not therefore create the monopoly but limits itself to reserving it to the State for the purpose of avoiding its appropriation by private monopolies.

The principle of the free movement of goods (Questions 1 and 2)

The Italian Government is of the opinion that the reply to the first question must be in the negative. Under Articles 2 and 3 (f) of the Treaty Member States are required to pass laws in conformity with the interests of the legal system of the Community without nevertheless being bound by definite obligations giving rise to subjective rights in favour of individuals.

Since the reply to second question depends on an affirmative reply to the first, it too must be negative.

Abuse of a dominant position by a public undertaking (Questions 3 to 5)

The Italian Government does not consider that television services come under the scope of Article 86, for they are not an economic activity but operate a public service of a cultural, recreational and informative nature. The advertising activity of television is purely utilitarian and ancillary and is intended to meet the costs of the service whilst avoiding an increase in the licence fee. Moreover Article 86 prohibits only practices that may affect trade between Member States.

As regards Article 90, the Italian Government recalls that under Article 90 (2) the rules of competition are applied to undertakings entrusted with the operation of services of general economic interest only insofar as they do not obstruct the performance, in law or in fact, of the particular tasks assigned to them.

Commercial monopolies (Questions 6 to 10)

According to the Italian Government, when the Member States defined in the Treaty the rules governing national monopolies having a commercial character, they did not intend to include in this concept television services, which are usually regarded as public utility organizations and which engage in advertising activities only on a purely utilitarian and ancillary basis.

The prohibition on discrimination (Question 11)

The spirit of Article 7 of the Treaty is to avoid discrimination against the subjects of Member States in the exercise of economic and commerical activities and to prevent nationality from giving rise to advantages or disadvantages. The exclusive grant of television services to a single organization implies that none of the other subjects, whatever his nationality, may exercise the activity in question.

D — Observations of the defendant

The defendant observes first of all that the activities of TELEBIELLA, of which he is the director, do not relate to RAI's monopoly, but are subject to the press laws, as constituting a network of information.

Passing next to an examination of the questions raised, the defendant states that he would like to bring his argument under two headings. The first relates to the principle of the free movement of goods in a wide sense and likewise embracing the interpretation of the concept 'State monopolies of a commercial character' within the meaning of Article 37 of the Treaty (Questions 1, 2, 6 to 10 and even 11). The second heading concerns the problem of the abuse of a dominant position by a public undertaking or one enjoying exclusive rights under the national law, which would bring into question the interpretation of Articles 86 and 90 of the Treaty (Questions 3, 4 and 5).

The principle of the free movement of goods and commercial monopolies (Questions 1, 2 and 6 to 11)

Advertising should be regarded as an intangible asset in its own right, or at least as having, to the products to which it relates, the relationship of accessory to principal, and on this double basis it is subject to the customs union and the principle of the free movement of goods. It appears from the case law of this Court that intangible assets — such as electricity — come under the application of these rules (Case 6/64 *Costa/Enel,* Rec. 1964, p. 1157) and all products on which a monetary value can be placed, and which are as such capable of being the object of commerical transactions, must be regarded as goods. (Case 7/68, *Commission v Italie,* Rec. 1968, p. 625).

This assimilation of the advertisement with the product is indispensable for progressive unification of the market, effective equality of opportunity for penetration and distribution which is not beyond the means of all save the large multinational undertakings.

The fact that the national court, in its first question, has referred to the principle of the free movement of goods rather than to the various articles in the Treaty which apply it in detail, is because the instances do not on their own reveal the whole scope of the principle. The principle of the free movement of goods must indeed be understood and applied as one of the fundamental freedoms guaranteeing the functioning of the market.

It follows that it cannot be reduced to a simple guarantee of the sale of goods within the Common Market, but it must likewise ensure their sale with a view to consumption, so that any measure is prohibited which, outside the strict circumstances laid down in the Treaty, restricts the use of certain goods. The principle of free movement must therefore cover everything for which different arrangements are not expressly provided. There is no doubt as to the direct effect of the fundamental rule thus recognized, since the general principle is as precise, clear and free from ambiguity as the particular applications which the Treaty makes of it.

In the light of this an affirmative reply should be given not only to the first question relating to the direct effects of the principle of free movement but also the first two parts (a) and (b) of the second question. The advertisement enjoys as an intangible asset the guarantee of free movement. It enjoys it also in its capacity of a support and accessory for the movement of products. This free movement implies the free preparation of the latter for sale and the free exercise of activities on which the movement of goods depends, such as distribution and marketing.

Question 2 (c) enquires whether the principles of free movement of goods is infringed by the ban on export, hire or distribution of television films, television documentaries and other pro-

ductions capable of being broadcast by television except for the purposes of the authorized company. The reply should likewise be in the affirmative, since the objects bearing the advertisements televised fall without any doubt within the category of 'goods'. It is essential, moreover, that once the free movement of the advertisement televised has been recognized, the free movement of the carrier should also be recognized.

According to the defendant it is necessary to extend the examination of the question raised to that of whether the restrictions imposed on the movement of the television signal do not come under the prohibition on measures having equivalent effect to quantitative restrictions as defined in Articles 30 et seq. of the Treaty. A Commission Directive (No 70/50 of 22 December 1969, OJ No L 13 of 19 January 1970) has shown that this concept covers measures indiscriminately affecting all products both national and foreign when they are not 'necessary for the attainment of an objective within the scope of the powers for the regulation of trade left to Member States by the Treaty'. The restrictions on the use of means or vehicles of advertising resulting from RAI's monopoly have a greater effect on foreign producers by reason of the important part played by cable television in the advertising sector, particularly as regards selective advertising, and by reason of the restricted opportunities for advertising on the official networks. The objective of the restrictions thus exceeds the scope of the effects appropriate to a regulation of trade since it relates to a control of information. Since the government measures are thus incompatible with Community law, they should have been abolished at the latest as from the establishment of the customs union, to the extent that the abolition of quantitative restrictions is laid down as a directly applicable rule.

As regards the questions relating to the monopoly and the prohibition on discrimination, the sixth and seventh questions rightly raise the problem of the delimitation of the scope of the application of Article 37 of the Treaty, especially as to whether it covers the monopoly of television.

Although at first sight Article 37 does not relate to the activities of the 'invisible' sector, the fact must nevertheless be taken into account that the concept of 'services' in Chapter 3 of Title III of Part Two of the Treaty, as appears from Articles 60 and 61, has a residual character, that is to say much more limited than the concept of 'services' in national laws.

Further, it appears from Article 59 that the scope of the Community rules on services relates to the abolition of obstacles to the provision of services from a Member State for the benefit of a beneficiary in another Member State. It therefore does not cover the transmission of advertisements by cable coming from a public undertaking of a Member State, since this transmission is necessarily local. Taking into account, moreover, what has been said regarding the character of an advertisement as an intangible asset or an ancillary product, it must be concluded that Article 37 applies to the monopoly of television advertising.

Further, all the conditions for the application of Article 37 obtain. There is intervention, at least indirect, by the law in the transmission of the television signal by the control of the erection of facilities for telecommunication and by the grant of exclusive rights to operate on television frequencies; the monopoly is indeed concerned with transactions relating to commercial products or an entity relating to economic activity, capable of forming the subject matter of competition and trade between Member States; finally, transactions relating to advertising have a very real weight in intra-Community trade and there is discrimination to the prejudice of foreign suppliers by the fact that fundamentally different situations as regards the needs

of advertising (opportunities for access to the national market, the preferences of the consumer and linguistic obstacles) are treated alike in comparison with the Italian producers. These considerations provide an answer to the eleventh question of the national court. Since it is caught by Article 37, the television monopoly as regards advertising has lapsed under the second paragraph thereof.

The defendant refers to the judgment of the Court in Case 6/64 *(Costa/Enel,* Rec. 1964, p. 1149) regarding the direct applicability of Article 37 (2).

As regards the tenth question the defendant sets out what he regards as the infringement of the standstill required by Article 37 (2).

Law No 645 of 27 February 1936 entitled 'Postal and Telecommunications Code' envisaged only television by Hertzian waves. Subsequent to the expiration of the transitional period, Law No 156 of 29 March 1973 (GU No 113 of 3 May 1973) extended this monopoly to cable television by providing that 'facilities for the transmission of sound and visual programmes by cable ... are likewise deemed to constitute radio facilities ...'. The 1973 Law, moreover, attached a penal sanction to the unauthorized installation and operation of cable television, which sanction did not previously obtain. Finally another breach of the 'standstill' requirement arose from the Presidential Decree of 15 December 1972 extending the exclusive rights of RAI, which would have lapsed on 31 December 1972, to 31 December 1973.

In this respect the second question of the national court must be recognized as having no relation to the problems under discussion. The 1973 Law did not have the character of a law interpreting the previous 1936 Law but enacted new rules.

According to the defendant Questions 7, 8 and 9 do not raise only the question of the breach of the standstill requirement contained in Article 37 (2), but, in a more radical manner, that of the legality of the monopoly as it exists with regard to the provisions of Article 37 (1). The object of Article 37 is to achieve during the transitional period an adjustment of monopolistic structures to exclude the possibility after the expiration of this period of maintaining or introducing discrimination against competitors. Should it appear that the maintenance of exclusive rights necessarily involves recourse to discriminatory measures, the reconciliation sought by Article 37 would be impossible and the monopoly itself would be brought into questions as such, since its 'adjustment' would be shown to be impossible to achieve. According to the defendant the danger of discrimination cannot be removed without abolishing the exclusive rights of the monopoly, in particular as regards advertising and trade in films intended for television. It is not possible to argue the contrary by reason of the fact that Article 37 does not provide for the abolition of monopolies but for their adjustment, since the monopoly exists in any event as regards third countries. In short there would be a monopoly involving exclusive rights as regards products coming from third countries whilst for products coming from Member States the monopoly could not longer operate as such. Every company producing films, documentaries and advertisements should have access to the national market of every Member State without being obliged to have recourse to a monopolistic corporation (as in France or Italy) or to an oligopoly (as in the Federal Republic of Germany). This point of view is confirmed by the draft Regulation relating to the tobacco market (OJ C 25/70 of 28. February 1970), Article 1 of which provides that in spite of commercial monopolies in certain Member States 'tobaccos manufactured in other Member States may be imported freely and directly. Suppliers of these tobaccos shall be entitled to establish their own wholesale

distribution network in every Member State and to maintain supplies there'.

The real danger of discrimination arises in the present case from the fact that virtually all the shares of RAI-TV are registered in the name of the Istituto per la Ricostruzione Industriale (IRI). When there is a risk of conflict of interest between an undertaking of IRI and a competing Community undertaking, RAI-TV and SIPRA (the company having the advertising rights) cannot maintain a position of neutrality. The defendant refers in this respect to the judgment of this Court and the opinion of Mr Advocate-General Roemer, in Case 82/71 *(SAIL,* Rec. 1972, p. 119).

Abuse of a dominant position by a public undertaking (Questions 3, 4 and 5)

According to the defendant it is doubtful whether RAI can be described as a public undertaking within the meaning of Article 90, but if it could be so described it is not in any event an undertaking entrusted with the operation of services of general economic interest or having the character of a revenue-producing monopoly within the meaning of Article 90 (2), so that the restrictions on the application of the rules relating to competition which paragraph 2 allows do not obtain in the case of a television undertaking. Thus as a public undertaking RAI is fully subject to Article 90 (1).

The measures prohibited by this provision relate rather to the Member States than to the actual undertakings. In other words it is not necessary in the case of a public undertaking, as it is under Article 86 in respect of a private undertaking, to find that there is an abuse of a dominant position; Article 90 is infringed as soon as legislative measures of a Member State aim at allowing a public undertaking to achieve a result which undertakings are prohibited from obtaining.

In any event a television relay monopoly is an abuse of a dominant position within the meaning of Article 86.

It appears from the judgment of the Court of Justice of 22 February 1973 in the Continental Can case (Case 6/72 *Europemballage Corporation v Commission* [1973] E.C.R., p. 215) that Article 86 is aimed not only at practices which may cause damage to consumers directly, but also at those which are detrimental to them through their impact on an effective competition structure and, further, that, for this provision to apply, it is not necessary that there should be complete elimination of all competition but that any abuse may occur if a dominant position is strengthened in such a way that it 'substantially fetters competition'. Therefore the activity of an undertaking holding in fact and in law the position of a monopoly involving the elimination of competition in such a way that the strengthening of this position is not even necessary, is incompatible with the Treaty. Since the monopoly involves the elimination of competition, abuse of the dominant position arises from the existence of the monopoly. There is in this respect a parallel between what may be deduced from Article 37 with regard to the prohibition on discrimination by commercial monopolies and what the concept of the abuse of the dominant position involves as regards public undertakings enjoying a legal position of a monopoly.

Finally and in any event, an abuse of a dominant position is constituted by the extension of the original monopoly of radio television to cable television. It involves, in the light of the *Europemballage Corporation* judgment, an infringement of the standstill obligation on undertakings in a dominant position prohibiting them from strengthening this position to the extent of impairing an effective competition structure.

At the hearing on 19 February 1974 the defendant, represented by G. M. Ubertazzi and F. Capelli of the Milan

Bar, the Italian Government, represented by its Ambassador A. Maresca and Mr Saveresi, the German Government, represented by M. Seidel, and the Commission, represented by A. Marchini Camia, made oral observations.

In particular they replied to questions put to them by the Court.

(a) The first question requested the German and Italian Governments, the Commission and the defendant to supply additional information relating to the possible assimilation of audio-visual signals transmitted by television-relay undertakings, for purposes of advertising in particular, to products or goods referred to by the provisions of Title I of Part Two of the Treaty.

The Commission and the German and Italian Governments do not think that such an assimilation can be made. The Commission considers that the free movement of television advertisements comes mainly under the freedom to provide services. It observes nevertheless that certain aspects of copyright and kindred rights likewise come under the free movement of goods, as the Court found in its judgment of 8 June 1971 (Case 78/70, *Deutsche Grammophon v Metro,* Rec. 1970, p. 487).

The German and Italian Governments rule out any assimilation of a television signal with a product. The transmission of television signals takes place within the framework of the performance of a public service, a sphere which comes entirely and exclusively under national sovereignty. The German Government admits that as regards certain commercial practices of television-relay undertakings, audio-visual signals could strictly be regarded as the provision of services.

In the defendant's view television signals must be regarded as 'goods' on two counts, that is as a form of energy, and as a product of intellectual activity. A second argument, which relates more particularly to televised advertisements, derives from the functional relationship between the advertisement and the goods advertised. Finally, a third argument of a more general nature in favour of the position taken up by the defendant derives from the fact that under Article 60 of the Treaty the scope of the provisions relating to services is restricted in relation to the more general application of the provisions regarding free movement of goods.

(b) A second question related to 'the reasons that certain laws (particularly in Italy) prohibit the so-called "import of signals", that is to say their reception with a view to retransmission, while other national laws do not seem to contain this prohibition'.

The Commission and the German Government consider that the prohibition derives from the exclusive rights which the concessionary of the television service enjoys, to which must be added the State monopoly as regards telecommunications. In the Italian Government's view restrictions on the setting up and operation of telecommunications services come under the exclusive and sovereign competence of the State and do not prevent the free movement of the films televised.

In the defendant's view restrictions on the import of television signals must be regarded in the more general framework of control of mass media and from the point of view of the desire of States to exercise exclusive control over public opinion.

(c) A third question inquired 'whether present technical and economic conditions permit the establishment or administration of more than one television cable network in the same district or locality, or whether such conditions necessitate or favour the establishment of monopolies in fact or in law as regards the creation and administration of such networks'.

The Commission and the defendant consider that there are in truth no technical or economic obstacles. A multiplication of networks would not

even be necessary, for the number of channels which a cable makes available would enable several cable companies to use it simultaneously without risk of interference. The German and Italian Governments consider that the monopoly constitutes the most economically rational method of operation. The Italian Government observes that a monopoly of the means of diffusion does not necessarily imply a monopoly in the free provision of services.

(d) Questioned on the reasons which led the legislature to extend the monopoly of Hertzian television to cable television, the Italian Government observes that there has not been any extension, since cable television has always come under the sphere which the Italian State has reserved to itself as regards telecommunication. There was nothing to show that the new law on television broadcasts established for cable boradcasts too a new management monopoly in favour of RAI or any other organization.

(e) A question addressed to the Commission invited it to state its point of view on televised commercial advertising in relation to the principle of freedom to provide services. The Commission replies that freedom to provide services must be understood as meaning that an advertiser in a Member State could not be prevented from contracting with a television establishment in another Member State with a view to screening advertisements in this latter State.

(f) Invited to take up a position on the argument developed by the Italian and German Governments relating to the applicability of Article 90 of the Treaty, in particular Article 90 (2), to television advertising both by radio and by cable, the Commission states:

1. It is not ruled out that radio and television organizations must be regarded as undertakings, even as far as their transmissions which do not have an advertising character are concerned.
2. These organizations cannot be regarded as entrusted with the operations of 'services of general economic interest' within the meaning of Article 90 (2), at least as regards their advertising activity.
3. Even if the applicability of Article 90 (2) to television organizations had to be admitted, the Commission does not see how the setting up of cable television stations and the import of programmes from abroad which would result could provide any obstacle to the performance of the tasks entrusted in the form of exclusive rights to the existing television undertakings.

(g) A final question invited the Commission to take up a position on the applicability of the Commission Directive No 70/50/EEC of 22 December 1969 to television advertising both by radio and by cable.

Basing itself on the wording of Article 2 (3) (m) and Article 3 of the Directive, the Commission points out that measures are prohibited which prohibit or limit advertising and which make imports more difficult without this being necessary to attain an objective remaining within the framework of the power which the Treaty leaves to Member States of adopting regulations, or when the effects of the restrictive measures are out of proportion to their purpose.

The Advocate-General delivered his opinion on 20 March 1974.

Law

1 By order dated 25 July 1973, filed at the Registry of the Court on 27 July 1973, the Tribunale of Biella raised various questions, under Article 177 of the EEC Treaty, on the interpretation of Articles 2, 3, 5, 7, 37, 86 and 90 of the Treaty.

The national court is concerned with penal proceedings against the operator of a private television-relay station for being in possession in premises open to the public of television sets used for the reception of transmissions by cable without having paid the prescribed licence fee.

The questions raised must enable the Tribunale of Biella to decide whether various provisions of Italian law are compatible with the Treaty, which provisions reserve to the State the exclusive right to operate television, and in particular cable television, and more particularly insofar as this exclusive right extends to commercial advertising.

A — The competence of the Court

2 The Italian Government has cast doubt on the admissibility of the reference for a preliminary ruling by alleging that an answer to the questions raised was not necessary to enable the court to determine the proceedings with which it is concerned.

3 Article 177, which is based on a clear separation of functions between the national courts and this Court, does not allow this Court to judge the grounds for the request for interpretation.

The objection therefore cannot be upheld.

B — Questions 1, 2, 6, 7, 8 and 9

4 The first two questions basically ask whether the principle of the free movement of goods within the Common Market applies to television signals, in particular in their commercial aspects, and whether the exclusive right granted by a Member State to a limited company to make all kinds of television transmissions, even for commercial advertising purposes, constitutes a breach of the said principle.

5 The reply is governed by the prior answer to the question whether television advertising must be treated as products or goods within the meaning of Articles 3 (a), 9 and the heading of Title I of Part Two of the Treaty.

6 In the absence of express provision to the contrary in the Treaty, a television signal must, by reason of its nature, be regarded as provision of services.

Although it is not ruled out that services normally provided for remuneration may come under the provisions relating to free movement of goods, such is however the case, as appears from Article 60, only insofar as they are governed by such provisions.

It follows that the transmission of television signals, including those in the nature of advertisements, comes, as such, within the rules of the Treaty relating to services.

7 On the other hand, trade in material, sound recordings, films, apparatus and other products used for the diffusion of television signals are subject to the rules relating to freedom of movement for goods.

As a result, although the existence of a monopoly with regard to television advertising is not in itself contrary to the principle of free movement of goods, such a monopoly would contravene this principle if it discriminated in favour of national material and products.

8 In the same way, the fact that an undertaking of a Member State has an exclusive right to transmit advertisements by television is not as such incompatible with the free movement of products, the marketing of which such advertisements are intended to promote. It would however be different if the exclusive right were used to favour, within the Community, particular trade channels or particular commercial operators in relation to others.

As is stressed by Article 3 of the Commission Directive of 22 December 1969 on the abolition of measures having an effect equivalent to quantitative restrictions on imports and are not covered by other provisions adopted in pursuance of the EEC Treaty (OJ L 13/29 of 19 January 1970), measures governing the marketing of products where the restrictive effect exceeds the effects intrinsic to trade rules are capable of constituting measures having an effect equivalent to quantitative restrictions.

Such is the case, in particular, where the restrictive effects are out of proportion to their purpose, in the present case the organization, according to the law of a Member State, of television as a service in the public interest.

9 Since the sixth question relates to the interpretation of Article 37 of the Treaty, it is fitting to examine it in conjunction with the problems raised by the provisions relating to the free movement of goods, among which this article is placed.

This question asks whether Article 37 (1) and (2) applies in the case of a limited company on which a Member State has conferred the exclusive right to transmit broadcasts of any kind on its territory including advertising programmes and broadcasts of films and documentaries produced in other Member States.

10 Article 37 concerns the adjustment of State monopolies of a commercial character.

It follows both from the place of this provision in the Chapter on the elimination of quantitative restrictions and from the use of the words 'imports' and 'exports' in the second indent of Article 37 (1) and of the word 'products' in Article 37 (3) and (4) that it refers to trade in goods and cannot relate to a monopoly in the provision of services.

Thus televised commercial advertising, by reason of its character as a service, does not come under these provisions.

11 Questions 7 and 9 do not arise since they were put only in the event of an affirmative reply to Question 6. The same is the case as regards Question 8.

C — Questions 3, 4 and 5

12 Questions 3, 4 and 5 relate to whether exclusive rights granted by a Member State to a limited company in relation to television broadcasts, and the exercise of such rights, are compatible with the competition rules of the Treaty.

The third question inquires whether Articles 86 and 90 of the Treaty taken together should be interpreted as meaning that an undertaking referred to in Article 90 (1) is prohibited from acquiring a dominant position, even as a result of an act of the national authorities, when the effect is to eliminate all forms of competition in the field in which it operates over the whole territorial area of the Member State.

If the answer to the third question is in the affirmative, the fourth question enquires whether a limited company on which a Member State has conferred by law the exclusive right to carry out television broadcasts of all kinds including those transmitted by cable, and those for commercial advertising purposes, holds a dominant position which is incompatible with Article 86, or at least abuses its dominant position by engaging in certain practices tending to eliminate competition and which are particularized by the national court.

If this question is answered in the affirmative, the fifth question asks whether the prohibitions referred to in the previous questions have a direct effect and confer rights on individuals which the national courts must safeguard.

13 The Italian and German Governments have suggested that since television undertakings fulfil a task which concerns the public and is of a cultural and informative nature, they are not 'undertakings' within the meaning of the provisions of the Treaty.

At least (it is argued) they are entrusted with a service of general economic interest so that they are subject to the rules contained in the Treaty and in particular to the rules on competition only insofar as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them.

14 Article 90 (1) permits Member States *inter alia* to grant special or exclusive rights to undertakings.

Nothing in the Treaty prevents Member States, for considerations of public interest, of a non-economic nature, from removing radio and television transmissions, including cable transmissions, from the field of competition by conferring on one or more establishments an exclusive right to conduct them.

However, for the performance of their tasks these establishments remain subject to the prohibitions against discrimination and, to the extent that this performance comprises activities of an economic nature, fall under the provisions referred to in Article 90 relating to public undertakings and undertakings to which Member States grant special or exclusive rights.

The interpretation of Articles 86 and 90 taken together leads to the conclusion that the fact that an undertaking to which a Member State grants exclusive rights has a monopoly is not as such incompatible with Article 86.

It is therefore the same as regards an extension of exclusive rights following a new intervention by this State.

15 Moreover, if certain Member States treat undertakings entrusted with the operation of television, even as regards their commercial activities, in particular advertising, as undertakings entrusted with the operation of services of general economic interest, the same prohibitions apply, as regards their behaviour within the market, by reason of Article 90 (2), so long as it is not shown that the said prohibitions are incompatible with the performance of their tasks.

16 In the fourth question the national court has cited a certain number of acts capable of amounting to abuse within the meaning of Article 86.

17 Such would certainly be the case with an undertaking possessing a monopoly of television advertising, if it imposed unfair charges or conditions on users of its services or if it discriminated between commercial operators or national products on the one hand, and those of other Member States on the other, as regards access to television advertising.

18 The national court has in each case to ascertain the existence of such abuse and the Commission has to remedy it within the limits of its powers.

Even within the framework of Article 90, therefore, the prohibitions of Article 86 have a direct effect and confer on interested parties rights which the national courts must safeguard.

D — Question 11

19 The eleventh question asks whether it is a breach of Article 7 of the Treaty to reserve for a limited company in a Member State the exclusive right to transmit television advertisements over the whole territory of that Member State.

20 It follows from the above considerations that the grant of an exclusive right in the nature of that referred to by the national court does not constitute a breach of Article 7, but discriminatory acts on the part of undertakings enjoying such exclusive rights with regard to nationals of Member States by reason of their nationality are incompatible with this provision.

Costs

21 The costs incurred by the Commission of the European Communities and by the Italian and German Governments, who have submitted observations to the Court, are not recoverable, and as these proceedings are, insofar as the parties to the main action are concerned, a step in the action pending before a national court, the decision on costs is a matter for that court.

THE COURT

in answer to the questions referred to it by the Tribunale of Biella by order of 6 July 1973, hereby rules:

1. **The transmission of television signals, including those in the nature of advertisements, comes, as such, within the rules of the Treaty relating to services. However, trade in material, sound recordings, films, apparatus and other products used for the diffusion of television signals is subject to the rules relating to freedom of movement for goods.**

2. **The fact that an undertaking of a Member State has the exclusive right to transmit advertisements by television is not as such incompatible with the free movement of products, the marketing of which such advertisements are intended to promote. It would however be different if the exclusive rights were used to favour,**

within the Community, particular trade channels or particular commercial operators in relation to others.

3. Article 37 of the Treaty refers to trade in goods and cannot relate to a monopoly in the provision of services.

4. The fact that an undertaking to which a Member State grants exclusive rights within the meaning of Article 90, or extends such rights following further intervention by such States, has a monopoly, is not as such incompatible with Article 86 of the Treaty.

5. Even within the framework of Article 90, the prohibitions of Article 86 have a direct effect and confer on interested parties rights which the national courts must safeguard.

6. The grant of the exclusive right to transmit television signals does not as such constitute a breach of Article 7 of the Treaty. Discrimination by undertakings enjoying such exclusive rights against nationals of Member States by reason of their nationality is however incompatible with this provision.

Lecourt Donner Sørensen Monaco Mertens de Wilmars
Pescatore Kutscher Ó Dálaigh Mackenzie Stuart

Delivered in open court at Luxembourg on 30 April 1974

A. Van Houtte — Registrar

R. Lecourt — President

OPINION OF MR ADVOCATE-GENERAL REISCHL DELIVERED ON 20 MARCH 1974 [1]

Mr President,
Members of the Court,

Mr Sacchi, the defendant in the national proceedings which have led to the reference which has to be dealt with today, is the owner and director of an undertaking, which for short is called 'TELEBIELLA'. This undertaking was launched in September 1972; its business

1 — Translated from the German.