JUDGMENT OF THE COURT
23 October 1997 *

In Case C-157/94,

Commission of the European Communities, represented by Richard B. Wainwright, Principal Legal Adviser, and Berend J. Drijber, of its Legal Service, acting as Agents, with an address for service in Luxembourg at the office of Carlos Gómez de la Cruz, of its Legal Service, Wagner Centre, Kirchberg,

applicant,

supported by

United Kingdom of Great Britain and Northern Ireland, represented by Lindsey Nicoll, of the Treasury Solicitor's Department, acting as Agent, assisted by David Anderson, Barrister, with an address for service in Luxembourg at the British Embassy, 14 Boulevard Roosevelt,

intervener,

v

Kingdom of the Netherlands, represented by Adrian Bos, Legal Adviser in the Ministry of Foreign Affairs, and Jaap W. de Zwaan and Johannes S. van den Oosterkamp, Deputy Legal Advisers in the same Ministry, acting as Agents, with an address for service in Luxembourg at the Netherlands Embassy, 5 Rue C. M. Spoo,

defendant,

* Language of the case: Dutch.

supported by

French Republic, represented by Catherine de Salins, Head of Subdirectorate in the Directorate for Legal Affairs, Ministry of Foreign Affairs, and Jean-Marc Belorgey, Chargé de Mission in the same directorate, acting as Agents, with an address for service in Luxembourg at the French Embassy, 8B Boulevard Joseph II,

and

Ireland, represented by Michael A. Buckley, Chief State Solicitor, acting as Agent, assisted by John D. Cooke SC and Jennifer Payne, Barrister, with an address for service in Luxembourg at the Irish Embassy, 28 Route d'Arlon,

interveners,

APPLICATION for a declaration that, by granting exclusive import rights for electricity intended for public distribution, the Kingdom of the Netherlands has failed to fulfil its obligations under Articles 30 and 37 of the EC Treaty,

THE COURT,

composed of: G. C. Rodríguez Iglesias, President, C. Gulmann, H. Ragnemalm and M. Wathelet (Presidents of Chambers), G. F. Mancini, J. C. Moitinho de Almeida, P. J. G. Kapteyn, J. L. Murray, D. A. O. Edward (Rapporteur), J.-P. Puissochet, G. Hirsch, P. Jann and L. Sevón, Judges,

Advocate General: G. Cosmas,
Registrars: H. von Holstein, Deputy Registrar,
D. Louterman-Hubeau, Principal Administrator,

having regard to the Report for the Hearing,

after hearing oral argument from the parties at the hearing on 7 May 1996, at which the Commission was represented by Richard B. Wainwright and Berend J. Drijber, the United Kingdom of Great Britain and Northern Ireland by Nicholas Green, Barrister, the Kingdom of the Netherlands by Johannes S. van den Oosterkamp, the French Republic by Marc Perrin de Brichambaut, Director of Legal Affairs, in the Ministry of Foreign Affairs, acting as Agent, and Jean-Marc Belorgey, and Ireland by Paul Gallagher SC and Jennifer Payne,

after hearing the Opinion of the Advocate General at the sitting on 26 November 1996,

gives the following

Judgment

1 By application lodged at the Court Registry on 13 June 1994, the Commission of the European Communities brought an action under Article 169 of the EC Treaty for a declaration that, by granting exclusive import rights for electricity intended for public distribution, the Kingdom of the Netherlands had failed to fulfil its obligations under Articles 30 and 37 of the EC Treaty.

2 In the Netherlands, Article 34 of the Elektriciteitswet of 16 November 1989 (Law laying down rules for the generation, import, transmission and sale of electricity, *Staatsblad* 535, hereinafter 'the EW') provides:

'1. Only the company designated for that purpose shall be authorized to import electricity intended for public distribution.

2. Paragraph 1 shall not apply to the import of electricity of under 500 V.'

3 NV Samenwerkende Elektriciteitsproduktiebedrijven (hereinafter 'SEP') was designated for that purpose by Ministerial order of 20 March 1990 (*Staatscourant* of 22 March 1990).

4 Under Article 37(1) of the EW, the supply to another person of electricity imported by any person other than SEP is prohibited. By virtue of that provision in conjunction with Article 34(1) of the same Law, final consumers are entitled to import electricity provided that it is for their own use.

5 Taking the view that the Netherlands legislation thus conferred on SEP exclusive import rights for electricity intended for public distribution (as regards electricity exceeding 500 V) and was therefore contrary to Articles 30 and 37 of the Treaty, the Commission, by letter of 9 August 1991, formally called on the Netherlands Government to submit its observations within a period of two months on the infringement of which it was accused.

6 By letter of 12 November 1991, the Netherlands Government denied any infringement and put forward a number of arguments to justify maintaining SEP's exclusive import rights under Articles 36 and 90(2) of the EC Treaty.

7 On 26 November 1992 the Commission addressed a reasoned opinion to the Kingdom of the Netherlands, in which it rejected the arguments put forward by the Netherlands Government and maintained, in particular, that the exceptions provided for in Articles 36 and 90(2) of the Treaty were not applicable to this case.

8 By letter of 26 March 1993 the Netherlands Government maintained its position, in consequence of which the Commission brought this action.

9 By two orders of 6 December 1994, the President of the Court granted leave to the French Republic and Ireland to intervene in support of the forms of order sought by the Kingdom of the Netherlands; by order of the same date he granted leave to the United Kingdom of Great Britain and Northern Ireland to intervene in support of the forms of order sought by the Commission.

The conformity of the exclusive import rights with Articles 30 and 37 of the Treaty

10 The Commission has observed that the fact that SEP enjoys a national import monopoly prevents producers in other Member States from selling their production to customers in the Netherlands other than that monopoly-holder, and potential customers in the Netherlands from freely choosing their sources of supply for electricity from other Member States.

11 SEP's exclusive import rights are therefore, in its view, liable to restrict trade between Member States and, being measures having an effect equivalent to quantitative restrictions on imports, contrary to Article 30 of the Treaty. They further constitute discrimination within the meaning of Article 37 of the Treaty, not only as regards exporters established in other Member States but also as regards users established in the Member State concerned.

12 The arguments concerning Article 37 should be examined first.

Article 37 of the Treaty

13 Under Article 37(1), the Member States are progressively to adjust any State monopolies of a commercial character so as to ensure that when the transitional period has ended no discrimination regarding the conditions under which goods are procured and marketed exists between nationals of Member States. That obligation applies to any body through which a Member State, in law or in fact, either directly or indirectly supervises, determines or appreciably influences imports or exports between Member States, and likewise to monopolies delegated by the State to others. Moreover, Article 37(2) requires the Member States in particular to refrain from introducing any new measure which is contrary to the principles laid down in paragraph 1.

14 Accordingly, without requiring the abolition of those monopolies, that provision prescribes in mandatory terms that they must be adjusted in such a way as to ensure that when the transitional period has ended the discrimination referred to has ceased to exist (Case 59/75 *Pubblico Ministero* v *Manghera* [1976] ECR 91, paragraph 5). Moreover, even before the expiry of the transitional period, it prohibited the Member States from introducing further discrimination of the kind referred to in Article 37(1).

15 As the Court held in *Manghera*, cited above (paragraph 12), and Case C-347/88 *Commission* v *Greece* [1990] ECR I-4747 (paragraph 44), exclusive import rights give rise to discrimination prohibited by Article 37(1) against exporters established in other Member States. Such rights directly affect the conditions under which goods are marketed only as regards operators or sellers in other Member States.

16 However, the Netherlands Government has denied that the rights at issue in this case are exclusive rights involving discrimination within the meaning of Article 37(1) of the Treaty since final consumers are free to import electricity for their own needs and exporters established in other Member States are therefore entitled to supply electricity to any person in the Netherlands.

17 It is not in dispute, however, that under the Netherlands legislation SEP alone is authorized to import electricity for public distribution. It follows that exporters established in other Member States can supply electricity only to a limited category of final consumers and that they thus suffer discrimination regarding marketing conditions as compared with SEP, which alone is authorized to import electricity for distribution or to sell it to, in particular, distribution companies.

18 It must also be observed that, for the prohibition of all discrimination between nationals of Member States provided for in Article 37(1) to be applicable, it is not necessarily a requirement that the exclusive rights to import a given product relate to all imports: it is sufficient if those rights relate to a proportion such that they enable the monopoly to have an appreciable influence on imports (see, to that effect, *Commission* v *Greece*, cited above, paragraph 41). It is not disputed that the exclusive import rights held by SEP for electricity intended for public distribution fall into that category.

19 The Netherlands Government has also denied that SEP can be regarded as a monopoly of a commercial character within the meaning of Article 37 of the Treaty, since its principal task is the planning and commissioning of production units and the pooling of production and transmission costs at national level and it does not therefore carry on any commercial activity in the strict sense.

20 It is clear, however, from the case-law of the Court that Article 37 of the Treaty applies to situations in which the national authorities are in a position to control, direct or appreciably influence trade between Member States through a body established for that purpose or a delegated monopoly (Case C-387/93 *Banchero* [1995] ECR I-4663, paragraph 26, and case-law cited). By their nature, exclusive import rights give rise to such a situation.

21 The Netherlands Government has contended, finally, that only the discriminatory exercise of exclusive rights, not merely the holding of them, is prohibited by Article 37 of the Treaty. It has contended that the exercise of SEP's import rights is not discriminatory since all electricity intended for public distribution, whether domestic or imported, passes through SEP, and final users in the Netherlands are all supplied with electricity under the same conditions. It has contended in that connection that SEP must take account of imports in its planning and is even obliged to import where to do so is more advantageous than obtaining supplies from Netherlands generating companies.

22 However, as the Court held in *Manghera*, cited above (paragraphs 9 and 10), the objective of Article 37(1) of the Treaty would not be attained if, in a Member State where a commercial monopoly exists, the free movement of goods from other Member States comparable to those with which the national monopoly is concerned were not ensured.

23 Such free movement is impeded by the very existence of exclusive import rights in a Member State since economic operators in other Member States are thereby deprived of the possibility of offering their products to customers of their choice in the Member State concerned. Moreover, in the present case, all imports must be incorporated in the plans drawn up by SEP.

Articles 30 and 36 of the Treaty

24 Since SEP's exclusive import rights are thus contrary to Article 37 of the Treaty, it is unnecessary to consider whether they are contrary to Article 30 or, consequently, whether they might possibly be justified under Article 36 of the Treaty.

25 Nevertheless, it is still necessary to verify whether the exclusive rights at issue might be justified, as the Netherlands Government has contended, under Article 90(2) of the Treaty.

Justification under Article 90(2) of the Treaty

26 The Commission's main argument, namely that Article 90(2) of the Treaty cannot be relied on to justify State measures incompatible with the Treaty rules on the free movement of goods, should be examined first.

The applicability of Article 90(2) of the Treaty to State measures which infringe the Treaty rules on free movement of goods

27 Article 90(1) of the Treaty imposes a general prohibition on the Member States, with regard to public undertakings and undertakings to which they grant special or exclusive rights, of enacting or maintaining in force measures contrary to the rules contained in the EC Treaty, in particular in Articles 6 and 85 to 94. That provision necessarily implies that the Member States may grant exclusive rights to certain undertakings and thereby grant them a monopoly.

28 Article 90(2) provides that undertakings entrusted with the operation of services of general economic interest are to be subject to the rules contained in the Treaty, in particular the rules on competition, in so far as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them, subject to the proviso, however, that the development of trade must not be affected to such an extent as would be contrary to the interests of the Community.

29 As the Court held in Joined Cases 188/80, 189/80 and 190/80 *France, Italy and United Kingdom* v *Commission* [1982] ECR 2545, paragraph 12, Article 90 concerns only undertakings for whose actions States must take special responsibility by reason of the influence which they may exert over such actions. It emphasizes that such undertakings, subject to the provisions contained in paragraph 2, are subject to all the rules laid down in the Treaty and, further, requires the Member States to respect those rules in their relations with those undertakings.

30 That being so, Article 90(1) must be interpreted as being intended to ensure that the Member States do not take advantage of their relations with those undertakings in order to evade the prohibitions laid down by other Treaty rules addressed directly to them, such as those in Articles 30, 34 and 37, by obliging or encouraging those undertakings to engage in conduct which, if engaged in by the Member States, would be contrary to those rules.

31 It is against that background that Article 90(2) lays down the conditions in which undertakings entrusted with the operation of services of general economic interest may exceptionally not be subject to the Treaty rules.

32 Having regard to the scope just attributed to paragraphs 1 and 2 of Article 90, and to their combined effect, paragraph 2 may be relied upon to justify the grant by a Member State, to an undertaking entrusted with the operation of services of general economic interest, of exclusive rights which are contrary to, in particular, Article 37 of the Treaty, to the extent to which performance of the particular tasks assigned to it can be achieved only through the grant of such rights and provided that the development of trade is not affected to such an extent as would be contrary to the interests of the Community.

33 In those circumstances, it is necessary also to verify whether, in accordance with the Commission's subsidiary argument, those conditions are not met in this case.

The necessity of the exclusive rights at issue for performance of SEP's tasks

34 The Commission has not denied that SEP is to be regarded as an undertaking entrusted with the operation of services of general economic interest within the meaning of Article 90(2) of the Treaty. It has claimed however that the Netherlands Government has put forward no argument to show that the other conditions for application of that provision are fulfilled in this case, in particular that the application of the Treaty rules would directly or indirectly obstruct the performance of SEP's particular tasks.

35 In that context, the Commission has stated that it is clear in particular from Case C-320/91 *Corbeau* [1993] ECR I-2533, paragraph 16, Case C-393/92 *Almelo and Others* v *Energiebedrijf Ijsselmij* [1994] ECR I-1477, paragraph 49, that Article 90(2) of the Treaty authorizes measures contrary to the Treaty only to the extent to which they are necessary to enable the undertaking concerned to perform its task of general economic interest under acceptable economic conditions and, therefore, only if they are necessary for the financial equilibrium of the undertaking itself. It has maintained, therefore, that it was incumbent on the Netherlands Government to establish that there would, in the event of elimination of the exclusive import rights at issue, be a risk of creaming-off by electricity importers, which would concentrate on their most lucrative activities, leaving the less lucrative to SEP, that such a risk would be liable to compromise SEP's economic viability and that there were no other measures less restrictive of trade which would also allow fulfilment of the relevant public-service obligations, such as in particular equalization of the costs associated with public service obligations as between SEP and importers.

36 It is necessary to consider successively whether the restrictive interpretation of the scope of Article 90(2) of the Treaty contended for by the Commission is correct and whether the requirements regarding the onus of proof which it seeks to impose on the defendant government are met in this case.

37 Being a provision permitting derogation from the Treaty rules, Article 90(2) must be interpreted strictly.

38 However, the wording of Article 90(2) itself shows that exemptions to the Treaty rules are permitted provided that they are necessary for performance of the particular tasks assigned to an undertaking entrusted with the operation of a service of general economic interest.

39 Moreover, in Case C-202/88 *France* v *Commission* [1991] ECR I-1223, paragraph 12, the Court held that, in allowing derogations to be made from the general rules of the Treaty in certain circumstances, Article 90(2) seeks to reconcile the Member States' interest in using certain undertakings, in particular in the public sector, as an instrument of economic or fiscal policy with the Community's interest in ensuring compliance with the rules on competition and the preservation of the unity of the common market.

40 The Member States' interest being so defined, they cannot be precluded, when defining the services of general economic interest which they entrust to certain undertakings, from taking account of objectives pertaining to their national policy or from endeavouring to attain them by means of obligations and constraints which they impose on such undertakings.

41 It must also be borne in mind that, in *Almelo*, cited above (paragraph 48), the Court accepted, with respect to a regional undertaking entrusted with electricity distribution, that the uninterrupted supply of electricity throughout the territory in respect of which the concession is granted to all consumers, whether local distributors or end-users, in sufficient quantities to meet demand at any given time, at uniform tariff rates and on terms which may not vary save in accordance with objective criteria applicable to all customers, is a task of general economic interest within the meaning of Article 90(2).

42 Similarly, the Commission, in its Decision 91/50/EEC of 16 January 1991 relating to a proceeding under Article 85 of the EEC Treaty (IV/32.732 — IJsselcentrale and others) (OJ 1991 L 28, p. 32), has already recognized that an undertaking entrusted with the main task of ensuring the reliable and efficient operation of the

national public electricity supply at costs which are as low as possible and in a socially responsible fashion provides services of general economic interest within the meaning of Article 90(2).

43 It must therefore be concluded that, for the Treaty rules not to be applicable to an undertaking entrusted with a service of general economic interest under Article 90(2) of the Treaty, it is sufficient that the application of those rules obstruct the performance, in law or in fact, of the special obligations incumbent upon that undertaking. It is not necessary that the survival of the undertaking itself be threatened.

44 As regards the question whether in this case the Netherlands Government has sufficiently demonstrated that SEP's exclusive import rights are necessary to enable it to fulfil the particular task assigned to it, it must be observed that, in its letter of formal notice, the Commission essentially confined itself to asserting that the Kingdom of the Netherlands could not maintain, vis-à-vis the other Member States, exclusive rights to import electricity which were, in its view, incompatible with Articles 30 and 37 of the Treaty.

45 In its response, the Netherlands Government gave a detailed description of the functioning of the national electricity supply system following the adoption of the EW and pointed out in particular that, under Article 2 of that Law, the task entrusted to SEP consists of ensuring, together with the electricity generating undertakings, 'the proper functioning of the public national electricity supply system at costs which are as low as possible and in a socially responsible manner'. Having expressed particular regret that the Commission did not in its formal letter of notice discuss the possible application of Article 90(2) of the Treaty, although it had recognized in Decision 91/50, cited above, that SEP was covered by that provision, the Netherlands Government set out the reasons for which in its view the entire public electricity supply system would be seriously upset if SEP's exclusive import rights were removed.

46 In its reasoned opinion, the Commission hardly discussed that point but concentrated rather on the legal considerations on the basis of which it adhered to its view that maintenance of the exclusive rights at issue was incompatible with Articles 30 and 37 of the Treaty. As regards Article 90(2), it merely stated that that provision did not apply to State measures contrary to those articles and that, in any event, the Netherlands Government had not demonstrated that the contested measures were proportionate to the objectives pursued.

47 In its observations on the reasoned opinion, the Netherlands Government described the national electricity supply system in even greater detail and criticized the Commission's failure to attach sufficient importance to the question whether such a system could function effectively if governed only by free market forces. It laid particular emphasis on the indissoluble links between the various components of the Netherlands system, especially between import rights and the obligation to keep public electricity supply costs at as low a level as possible, in accordance with Article 2 of the EW.

48 In its application, the Commission has essentially continued to reiterate its legal arguments, as set out in particular in paragraphs 34 and 35 of this judgment. At most, it has added that there is no reason to suppose that the elimination of the exclusive rights at issue would bring such pressure to bear on the positive financial results achieved by SEP, in 1993 in particular, that it would no longer be in a position to perform the tasks assigned to it. However, it has not analysed the various factors to which the Netherlands Government drew attention.

49 Before the Court, the Netherlands Government has repeated its view that SEP can only perform the tasks entrusted to it if imports of electricity for public distribution are channelled through it. It has again insisted that the rules governing

imports constitute an inseparable part of the national electricity supply system as a whole, which cannot be examined in isolation but must be taken in conjunction with the overall planning system established by the EW and managed by SEP. In that connection, it has claimed in particular that the rules governing imports were drawn up to ensure that that planning system was not thwarted by independent imports by generating and distribution companies and that their abolition would deprive the system of its raison d'être and its effectiveness.

50 In its reply, the Commission has continued to assert that the Netherlands Government has not demonstrated that maintenance of the exclusive rights at issue creates the income necessary for performance of the tasks entrusted to SEP. It has added that the Netherlands Government has not only failed to produce any information on the basis of which to determine the importance in financial terms of SEP's import monopoly, but has also failed to demonstrate a causal link between the removal of the exclusive rights and SEP's performance of its public service tasks.

51 It is true that it is incumbent upon a Member State which invokes Article 90(2), as a derogation from the fundamental rules of the Treaty, to show that the conditions for application of that provision are fulfilled.

52 However, as the Court has held in paragraphs 37 to 43 above, contrary to the Commission's contention, it is not necessary, in order for the conditions for the application of Article 90(2) of the Treaty to be fulfilled, that the financial balance or economic viability of the undertaking entrusted with the operation of a service of general economic interest should be threatened. It is sufficient that, in the absence of the rights at issue, it would not be possible for the undertaking to perform the particular tasks entrusted to it, defined by reference to the obligations and constraints to which it is subject.

53 Moreover, it follows from the *Corbeau* judgment, cited above (paragraphs 14 to 16), that the conditions for the application of Article 90(2) are fulfilled in particular if maintenance of those rights is necessary to enable the holder of them to perform the tasks of general economic interest assigned to it under economically acceptable conditions.

54 It is undeniable that, if SEP's exclusive import rights were removed, not only certain customers but also the distribution companies would obtain supplies on foreign markets when the prices charged there were lower than those charged by SEP. That possibility would indeed be one of the main purposes of opening up the market.

55 In view of the intrinsic characteristics of electricity and the manner in which it is produced, transmitted and distributed in the Netherlands, it is also clear that such opening up of the market would involve substantial changes in the way the national supply system is run, particularly with regard to SEP's obligation to contribute, through the planning for which it is responsible, to the proper functioning of that system on the basis of costs that are as low as possible and in a socially responsible manner.

56 Furthermore, the Commission has not disputed that obvious point but has merely listed, in general terms, certain alternative means which could have been adopted in place of the rights at issue, such as equalization of the costs linked with public-service obligations as between SEP and the importers.

57 In referring in such general terms to certain means as alternatives to the rights at issue, the Commission has not taken account of the particular features of the national electricity supply system highlighted by the Netherlands Government or

specifically considered whether those means would enable SEP to perform the tasks of general economic interest assigned to it in compliance with the obligations and constraints imposed upon it, of which the Commission has contested neither the legitimacy nor the legality.

58 Whilst it is true that it is incumbent upon a Member State which invokes Article 90(2) to demonstrate that the conditions laid down by that provision are met, that burden of proof cannot be so extensive as to require the Member State, when setting out in detail the reasons for which, in the event of elimination of the contested measures, the performance, under economically acceptable conditions, of the tasks of general economic interest which it has entrusted to an undertaking would, in its view, be jeopardized, to go even further and prove, positively, that no other conceivable measure, which by definition would be hypothetical, could enable those tasks to be performed under the same conditions.

59 In proceedings under Article 169 of the Treaty for failure to fulfil an obligation, it is incumbent upon the Commission to prove the allegation that the obligation has not been fulfilled and to place before the Court the information needed to enable it to determine whether the obligation has not been fulfilled (see Case 96/81 *Commission* v *Netherlands* [1982] ECR 1791, paragraph 6).

60 In that regard, it must be borne in mind that the purpose of the prelitigation procedure provided for by Article 169 of the Treaty is to enable the Member State to comply of its own accord with the requirements of the Treaty or, if appropriate, to justify its position (see, to that effect, Case 85/85 *Commission* v *Belgium* [1986] ECR 1149, paragraph 11). That is precisely what the Netherlands Government did by putting forward, in its reply to the Commission's letter of formal notice, a number of arguments to justify maintenance of the exclusive rights at issue under, in particular, Article 90(2) of the Treaty.

61 The reasoned opinion must contain a coherent and detailed statement of the reasons which led the Commission to conclude that the State in question failed to fulfil one of its obligations under the Treaty (see in particular Case C-289/94 *Commission* v *Italy* [1996] ECR I-4405, paragraph 16). In this case, the reasons given by the Commission were essentially legal considerations in relation to which the explanations given by the Netherlands Government were not relevant.

62 The purpose of the application, if the Commission brings proceedings before the Court, is to specify, by reference to the prelitigation procedure, the complaints on which the Court is called upon to rule and, at the very least in summary form, the legal and factual particulars on which those complaints are based (see in particular *Commission* v *Greece*, cited above, paragraph 28). In this case, the Commission confined itself essentially to purely legal arguments.

63 The terms of the dispute having been thus defined, the Court can judge only the merits of the pleas in law which the Commission has put forward. It is certainly not for the Court, on the basis of observations of a general nature made in the reply, to undertake an assessment, necessarily extending to economic, financial and social matters, of the means which a Member State might adopt in order to ensure the supply of electricity on the basis of costs that are as low as possible and in a socially responsible manner.

64 In view of the foregoing and, in particular, the fact that the Court has not accepted the legal approach on which both the Commission's reasoned opinion and its application were based, the Court is not in a position, in these proceedings, to consider whether, by granting exclusive import rights to SEP, the Kingdom of the Netherlands in fact went further than was necessary to enable that establishment to perform, under economically acceptably conditions, the tasks of general economic interest assigned to it.

65 However, for SEP's exclusive import rights to escape application of the Treaty rules under Article 90(2) of the Treaty, the development of trade must not be affected to such an extent as would be contrary to the interests of the Community.

The effect on the development of intra-Community trade

66 In the prelitigation procedure and before the Court, the Netherlands Government has explained, without being contradicted by the Commission, that imports of electricity by SEP in recent years have accounted for about 15% of total domestic demand for electricity and that, in the European Union, only Italy imports to a comparable extent. The Netherlands Government has also stated that the available capacity of cross-frontier lines is thus fully taken up, allowing for the necessary reserve capacity for emergencies.

67 The Commission has confined itself to pointing out that, for certain measures to be able to escape the application of the Treaty rules under Article 90(2), it is necessary not only that the application of those rules should directly or indirectly obstruct performance of the particular task assigned to the undertaking but also that the Community interest should not be affected; it has, however, provided no explanation to demonstrate that, because of SEP's exclusive import rights, the development of intra-Community trade in electricity has been and continues to be affected to an extent contrary to the interests of the Community.

68 In this case, it should have done so.

69 Given the explanations offered by the Netherlands Government, it was incumbent on the Commission, in order to prove the alleged failure to fulfil obligations, to define, subject to review by the Court, the Community interest in relation to

which the development of trade must be assessed. In that regard it must be borne in mind that Article 90(3) of the Treaty expressly requires the Commission to ensure the application of that article and, where necessary, to address appropriate directives or decisions to Member States.

70 In this case, such definition was particularly necessary since the only Community measure directly concerned with trade in electricity, namely Council Directive 90/547/EEC of 29 October 1990 on the transit of electricity through transmission grids (OJ 1990 L 313, p. 30), expressly states, in the sixth recital in its preamble, that there is increasing trade in electricity from year to year between the high-voltage electricity grids of Europe.

71 Since the Commission has been careful to state expressly that its application is concerned only with SEP's exclusive import rights and not other rights relating in particular to transmission and distribution, it was under an obligation, in particular, to show how, in the absence of a common policy in the area concerned, development of direct trade between producers and consumers, in parallel with the development of trade between major networks, would have been possible having regard in particular to the existing capacity and arrangements for transmission and distribution.

72 It follows from all the foregoing that the Commission's application must be dismissed.

Costs

73 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs, if they have been asked for in the other party's pleadings. Since the Commission has been unsuccessful, it must be ordered to pay the costs. Under Article 69(4) of those rules, Member States and institutions which have intervened in the proceedings are to bear their own costs.

On those grounds,

THE COURT

hereby:

1. **Dismisses the application;**

2. **Orders the Commission of the European Communities to pay the costs;**

3. **Orders the United Kingdom of Great Britain and Northern Ireland, the French Republic and Ireland, as interveners, to bear their own costs.**

Rodríguez Iglesias Gulmann Ragnemalm Wathelet

Mancini Moitinho de Almeida Kapteyn Murray

Edward Puissochet Hirsch Jann Sevón

Delivered in open court in Luxembourg on 23 October 1997.

R. Grass — Registrar

G. C. Rodríguez Iglesias — President