JUDGMENT OF THE COURT (Fifth Chamber)
3 October 1985 *

In Case 311/84

REFERENCE to the Court under Article 177 of the EEC Treaty by the Tribunal de commerce [Commercial Court], Brussels, for a preliminary ruling in the proceedings pending before that court between

Centre belge d'études de marché — Télémarketing (CBEM) SA

and

Compagnie luxembourgeoise de télédiffusion SA,

Information publicité Benelux SA

on the interpretation of Article 86 of the EEC Treaty

THE COURT (Fifth Chamber)

composed of: Lord Mackenzie Stuart, President, O. Due, C. Kakouris, U. Everling and Y. Galmot, Judges,

Advocate General: C. O. Lenz
Registrar: P. Heim

after considering the observations submitted on behalf of:

Centre belge d'études de marché — Télémarketing SA, the plaintiff in the main proceedings, by W. Pissoort of the Brussels Bar,

Compagnie luxembourgeoise de télédiffusion SA, the first defendant, by Mr Kirschen and Mr Huisman of the Brussels Bar,

Information publicité Benelux SA, the second defendant, by Mr Colinet of the Brussels Bar,

* Language of the Case: French.

the Commission of the European Communities, by its Legal Adviser, N. Coutrelis,

after hearing the Opinion of the Advocate General delivered at the sitting on 11 July 1985,

gives the following

JUDGMENT

(The account of the facts and issues which is contained in the complete text of the judgment is not reproduced)

Decision

1 By an order of 21 December 1984, which was received at the Court on 27 December 1984, the Vice-President of the Tribunal de commerce, Brussels, sitting on behalf of the President of the Tribunal in proceedings for an interim injunction, referred to the Court for a preliminary ruling under Article 177 of the EEC Treaty two questions on the interpretation of Article 86 of the Treaty.

2 Those questions were raised in proceedings brought by the Centre belge d'études de marché — Télémarketing SA (hereinafter referred to as 'Centre belge') against the Compagnie luxembourgeoise de télédiffusion SA (hereinafter referred to as 'Compagnie luxembourgeoise'), which runs the RTL television station, and against Information publicité Benelux SA (hereinafter referred to as 'Information publicité'), which is RTL's exclusive agent for television advertising aimed at the Benelux countries. In its action Centre belge is claiming an injunction restraining the Compagnie luxembourgeoise and Information publicité from refusing to sell it television time on the RTL station for telephone marketing operations using a telephone number other than that of Information publicité.

3 It appears from the documents before the Court that Centre belge is a trading company which, since 1978, has been studying the technique known as 'tele-sales' or 'telemarketing', whereby an advertiser places in one of the media, in the present case television, an advertisement carrying a telephone number which those at whom the advertisement is aimed may call either to obtain information on the product offered or to respond to the advertising campaign in some other way.

4 Centre belge organized its first telemarketing operation on the RTL television station in 1982. In 1983 it concluded an agreement with Information publicité for a period of 12 months which gave it the exclusive right to conduct telemarketing operations on the RTL station aimed at the Benelux market. The telephone number shown to television viewers was that of Centre belge, which made its telephone lines and team of telephonists available to advertisers and to the television station.

5 On the expiry of that agreement Information publicité notified advertisers that from April 1984 RTL would no longer accept advertising 'spots' involving an invitation to make a telephone call unless the telephone number used in Belgium was that of Information publicité. It was against that notice that Centre belge brought an action for an injunction before the Tribunal de commerce, claiming *inter alia* that it constituted an abuse of a dominant position within the meaning of Article 86 of the EEC Treaty.

6 In its order for reference the Vice-President of the Tribunal de commerce states that Compagnie luxembourgeoise and its subsidiary, Information publicité, dominate the market in television advertising aimed at viewers in French-speaking Belgium by reason of the fact that in Belgium itself there is as yet no commercial advertising on national television stations and the advertising of other French-language stations which can be received in Belgium is aimed only rarely or not at all at the Belgian public. However, the Vice-President of the Tribunal de commerce raises the question whether the two undertakings occupy a dominant position within the meaning of Article 86 of the Treaty, since under the relevant treaties and laws Compagnie luxembourgeoise has a legal monopoly in the market and there is no real freedom of establishment.

7 As regards telemarketing activities, the Vice-President comes, after considering the forms of agreement which Centre belge entered into and the conduct of the parties in the main action, to the conclusion that, if Centre belge is engaged in an activity ancillary to advertising, it must be regarded as operating on behalf of advertisers rather than on behalf of the broadcaster. Telemarketing constitutes a separate market from that of television advertising and one which is extremely open and in which extensive competition is possible. If Compagnie luxembourgeoise and Information publicité do occupy a dominant position in the television advertising market for the purposes of Article 86, the question then arises whether their conduct amounts to an abuse of that position.

8 In those circumstances the Vice-President of the Tribunal de commerce stayed the proceedings and referred the following questions to the Court for a preliminary ruling:

'(1) The interpretation of the concept of a dominant position

Is there a dominant position within the meaning of Article 86 of the EEC Treaty where an undertaking enjoys a legal monopoly for the supply of certain goods or services and where, as a result, competition in the supply of those goods or services is excluded? Does the concept of a dominant position imply a real possibility of competition suppressed or extinguished by the action of the party which occupies the dominant position or may it apply in a context in which such competition cannot exist or is, in any event, extremely limited?

(2) Interpretation of the concept of abuse of a dominant position

Where, in the situation envisaged in the first question, it is accepted that the undertaking in question occupies a dominant position within the meaning of Article 86 of the Treaty, must the conduct of such an undertaking be interpreted as constituting an abuse of a dominant position, where that conduct consists in reserving for itself or for a subsidiary under its control, to the exclusion of any other undertaking, an ancillary activity which could be carried out by a third undertaking as part of its activities?'

9 It must be observed at the outset that several of the arguments put to the Court by the parties to the main proceedings and by the Commission relate to problems which are not covered by the above questions. They include arguments relating to the financial and commercial relations between Compagnie luxembourgeoise and Information publicité, the nature and geographical extent of the market or markets in issue, the position in law and in fact of Compagnie luxembourgeoise and Information publicité on those markets, the question whether the conduct of the companies has any effect on trade between Member States and the reasons for requiring that the telephone number of Information publicité be used in any telemarketing transactions involving the RTL station.

10 In that regard it must be emphasized that, by virtue of the division of jurisdiction provided for by Article 177 in preliminary-ruling proceedings, it is for the national

court alone to assess the relevance of such arguments and to make a fresh request to the Court if it considers that it is necessary to obtain a further ruling on the interpretation of Community law for the purpose of giving its judgment. The Court need not therefore consider those arguments.

First question

11 In substance the first question asks whether Article 86 of the Treaty applies to an undertaking holding a dominant position on a particular market where that position is due not to the activities of the undertaking itself but to the fact that by reason of provisions laid down by law there can be no competition or only very limited competition on the market.

12 The Centre belge proposes that the Court should answer that question in the affirmative. It maintains that, according to the case-law of the Court, an undertaking holding a monopoly in a particular service has a dominant position on the market in that service within the meaning of Article 86 and that that article applies to the conduct of broadcasting organizations. Compagnie luxembourgeoise cannot rely on the proviso in Article 90 (2), since it is not an undertaking 'entrusted with the operation of services of general economic interest' for the purposes thereof.

13 Compagnie luxembourgeoise states that the Court held, in its judgment of 30 April 1974 in Case 155/73 (*Sacchi* [1974] ECR 409), that a State may, for reasons of public interest of a non-economic nature, remove radio and television broadcasting from competition by conferring a monopoly on an undertaking. Extending the scope of the question put to the Court, Compagnie luxembourgeoise proposes, therefore, that the Court should reply that it is not as such incompatible with Article 86 of the Treaty for an undertaking to which a State has granted exclusive rights within the meaning of Article 90 to enjoy a monopoly.

14 Information publicité does not agree with the abstract definition of a dominant position which in its opinion is suggested by the question. It maintains that it is not possible to disregard the product or service at issue or the extent of the relevant market. Further, to fall within the provisions of Article 86 the dominant position must affect trade between Member States and exist within a substantial part of the common market. Information publicité therefore proposes that the Court should

reply that the existence of a legal monopoly does not in itself entail a dominant position within the meaning of Article 86.

15 In the Commission's view, the notion of a dominant position, as defined by the Court, refers to a factual situation independent of the reasons giving rise to that situation. The question must therefore be answered in the affirmative.

16 With regard to the first question, it must first of all be remembered that, according to the established case-law of the Court, most recently confirmed by the judgment of 9 November 1983 in Case 322/81 (*Michelin* v *Commission* [1983] ECR 3461), an undertaking occupies a dominant position for the purposes of Article 86 where it enjoys a position of economic strength which enables it to hinder the maintenance of effective competition on the relevant market by allowing it to behave to an appreciable extent independently of its competitors and customers and ultimately of consumers. The fact that the absence of competition or its restriction on the relevant market is brought about or encouraged by provisions laid down by law in no way precludes the application of Article 86, as the Court has held, *inter alia*, in its judgments of 13 November 1975 in Case 26/75 (*General Motors* v *Commission* [1975] ECR 1367), 16 November 1977 in Case 13/77 (*Inno* v *ATAB* [1977] ECR 2115) and most recently in its judgment of 20 March 1985 in Case 41/83 (*Italy* v *Commission* [1985] ECR 880).

17 Although it is true, as Compagnie luxembourgeoise has pointed out, that it is not incompatible with Article 86 for an undertaking to which a Member State has granted exclusive rights within the meaning of Article 90 of the Treaty to enjoy a monopoly, it is none the less apparent from the same article that such undertakings remain subject to the Treaty rules on competition and in particular those contained in Article 86. In its aforesaid judgment of 30 April 1974 in the *Sacchi* case, the Court also stressed that, if certain Member States treat undertakings entrusted with the operation of television, even as regards their commercial activities and in particular advertising, as undertakings entrusted with the operation of services of general economic interest, the prohibitions of Article 86 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.

18 The reply to the first question must therefore be that Article 86 of the EEC Treaty must be interpreted as applying to an undertaking holding a dominant position on a particular market, even where that position is due not to the activities of the undertaking itself but to the fact that by reason of provisions laid down by law there can be no competition or only very limited competition on that market.

Second question

19 The second question asks whether an undertaking holding a dominant position on a particular market, by reserving to itself or to an undertaking belonging to the same group, to the exclusion of any other undertaking, an ancillary activity which could be carried out by another undertaking as part of its activities on a neighbouring but separate market, abuses its dominant position within the meaning of Article 86.

20 Centre belge considers that such conduct constitutes an abuse under several provisions of Article 86. Where a television station subjects the sale of broadcasting time for any telemarketing operation to the use of the telephone number of an exclusive advertising agent belonging to the same group, such conduct amounts to a refusal of sale to other telemarketing undertakings. As regards advertisers, such conduct amounts to the imposition of an associated service and the limitation of markets prohibited by Article 86 (d) and (b). Ultimately it enables the agent to impose on advertisers unfair prices contrary to Article 86 (a).

21 Compagnie luxembourgeoise and Information publicité maintain that, where an undertaking to which a State has granted exclusive rights and which thus occupies a dominant position reserves to itself or to a company with which it has common interests ancillary activities which could be carried out by another undertaking, this does not in itself amount to an abuse of a dominant position. The undertaking which occupies the dominant position must in addition use it to obtain advantages which it could not obtain if there were effective competition and its conduct must be likely to harm consumers, for example, by the imposition of unfair prices or conditions.

22 Compagnie luxembourgeoise maintains that the decision no longer to use the services of Centre belge and its telephonists cannot be regarded as an abuse when it is due to the laws of trade; nor can the requirement that advertisers, in any 'tele-answer' operation conducted by RTL, should use only the telephone number of RTL's exclusive agent amount to an abuse when it is inspired by the close links between the two services supplied and is necessary in practice to preserve the television station's image.

23 The Commission infers from the judgment of the Court of 6 March 1974 in Joined Cases 6 and 7/73 (*Commercial Solvents and Others* v *Commission* [1974] ECR 223) that there is an abuse of a dominant position for the purposes of Article 86 where an undertaking which occupies a dominant position on a market and which is thus able to control the activities of other undertakings on a neighbouring market decides to establish itself on the second market and for no good reason refuses to supply the product or service in question on the market where it already occupies a dominant position to the undertakings whose activities are centred on the market which it is penetrating.

24 Even if the conduct in issue in the main proceedings were to be regarded not as a refusal to supply but as the imposition of a contractual condition, it would, in the Commission's view, be contrary to Article 86. First, Information publicité, as a seller of television time, imposes on all other undertakings for telemarketing operations a condition which it does not impose on itself for the same operations, namely the condition that it must not use its own telephone number; that is an unfair trading condition within the meaning of Article 86 (a). Secondly, Information publicité subjects the conclusion of contracts to the acceptance of supplementary obligations which have no connection with the subject of the contracts, and that is contrary to Article 86 (d).

25 In order to answer the national court's second question, reference must first be made to the aforesaid judgment of 6 March 1974 (*Commercial Solvents*), in which the Court held that an undertaking which holds a dominant position on a market in raw materials and which, with the object of reserving those materials for its own production of derivatives, refuses to supply a customer who also produces those

derivatives, with the possibility of eliminating all competition from that customer, is abusing its dominant position within the meaning of Article 86.

26 That ruling also applies to the case of an undertaking holding a dominant position on the market in a service which is indispensable for the activities of another undertaking on another market. If, as the national court has already held in its order for reference, telemarketing activities constitute a separate market from that of the chosen advertising medium, although closely associated with it, and if those activities mainly consist in making available to advertisers the telephone lines and team of telephonists of the telemarketing undertaking, to subject the sale of broadcasting time to the condition that the telephone lines of an advertising agent belonging to the same group as the television station should be used amounts in practice to a refusal to supply the services of that station to any other telemarketing undertaking. If, further, that refusal is not justified by technical or commercial requirements relating to the nature of the television, but is intended to reserve to the agent any telemarketing operation broadcast by the said station, with the possibility of eliminating all competition from another undertaking, such conduct amounts to an abuse prohibited by Article 86, provided that the other conditions of that article are satisfied.

27 It must therefore be held in answer to the second question that an abuse within the meaning of Article 86 is committed where, without any objective necessity, an undertaking holding a dominant position on a particular market reserves to itself or to an undertaking belonging to the same group an ancillary activity which might be carried out by another undertaking as part of its activities on a neighbouring but separate market, with the possibility of eliminating all competition from such undertaking.

Costs

28 The costs incurred by the Government of the Federal Republic of Germany and by the Commission of the European Communities, which have submitted observations to the Court, are not recoverable. As these proceedings are, in so far as the parties to the main proceedings are concerned, in the nature of a step in the proceedings pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT (Fifth Chamber),

in answer to the questions referred to it by the Vice-President of the Tribunal de commerce, Brussels, by order of 21 December 1984, hereby rules:

(1) **Article 86 of the EEC Treaty must be interpreted as applying to an undertaking holding a dominant position on a particular market, even where that position is due not to the activity of the undertaking itself but to the fact that by reason of provisions laid down by law there can be no competition or only very limited competition on that market.**

(2) **An abuse within the meaning of Article 86 is committed where, without any objective necessity, an undertaking holding a dominant position on a particular market reserves to itself or to an undertaking belonging to the same group an ancillary activity which might be carried out by another undertaking as part of its activities on a neighbouring but separate market, with the possibility of eliminating all competition from such undertaking.**

Mackenzie Stuart Due

Kakouris Everling Galmot

Delivered in open court in Luxembourg on 3 October 1985.

P. Heim
Registrar

A. J. Mackenzie Stuart
President