JUDGMENT OF THE COURT
23 October 1997 *

In Case C-159/94,

Commission of the European Communities, represented by Richard B. Wainwright, Principal Legal Adviser, and Hendrik van Lier, Legal Adviser, acting as Agents, with an address for service in Luxembourg at 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

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,

defendant,

* Language of the case: French.

supported by

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,

intervener,

APPLICATION for a declaration that, by establishing exclusive import and export rights for gas and electricity, the French Republic has failed to fulfil its obligations under Articles 30, 34 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 Hendrik

van Lier, the United Kingdom of Great Britain and Northern Ireland by Nicholas Green, Barrister, 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 14 June 1994, the Commission of the European Communities brought an action under Article 169 of the EC Treaty for a declaration that, by establishing exclusive import and export rights for gas and electricity, the French Republic had failed to fulfil its obligations under Articles 30, 34 and 37 of the EC Treaty.

2 In France, Article 1 of Law No 46-628 of 8 April 1946 on the nationalization of electricity and gas (JORF of 9 April 1946, hereinafter 'the 1946 Law'), provides:

'As from the enactment of this Law,

(1) the generation, transmission, distribution, import and export of electricity;

(2) the production, transport, distribution, import and export of combustible gas, shall be nationalized.'

3 Under Articles 2 and 3 of the 1946 Law, the management of the nationalized electricity and gas undertakings was entrusted to public undertakings of an industrial and commercial nature called, respectively, Électricité de France (EDF), Service National, and Gaz de France (GDF), Service National.

4 It is clear from the 1946 Law and from the documents before the Court that the nationalization of the electricity and gas industries did not make EDF and GDF sole operators as regards all the functions listed in Article 1 of the Law. It did so however with regard to imports and exports.

5 In the case of electricity, that was also true of transmission, which is entrusted exclusively to EDF under a concession agreement concluded with the State on 27 November 1958 for a period of 75 years. On the other hand, under Article 8 of the 1946 Law certain electricity-generating undertakings or plants were excluded from nationalization. As a result, in 1993, out of total electricity production in France of 450.6 TWh (terawatt-hours), 26.8 TWh were not produced by the power stations operated by EDF or under its authority. Similarly, under Article 23 of the 1946 Law, local authority distribution services existing at the time of nationalization were authorized to continue to operate and, according to the documents before the Court, distribute about 6% of the electricity consumed in France.

6 In the case of gas, transport through the high-pressure network, used for deliveries to distributors and industrial undertakings with direct connections, is covered by concessions granted by the State for a period of 30 years. GDF is the principal concessionaire but there are two others, of which one serves 12 French *départements* and the other uses an independent mains network. Distribution to end consumers on the low-pressure networks is carried out on the basis of concessions granted by local authorities for a period usually of 30 years. According to the documents before the Court, GDF is the principal concessionaire and only 4% of distribution is carried out by gas suppliers operating under local-authority concessions. GDF is not a gas producer.

7 Taking the view that the exclusive rights to import and export electricity and gas reserved by the 1946 Law to the State and entrusted to public undertakings are incompatible with Articles 30, 34 and 37 of the Treaty, the Commission, by letter of 9 August 1991, formally called on the French Government, under Article 169 of the Treaty, to submit its observations within a period of two months on the infringement of which it was accused.

8 By letter of 10 October 1991 the French Government denied any infringement and contended, in particular, that the maintenance of exclusive import and export rights for EDF and GDF was justified under both Article 36 and Article 90(2) of the EC Treaty.

9 On 26 November 1992 the Commission addressed a reasoned opinion to the French Republic, in which it rejected the arguments put forward by the French 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.

10 By letter of 25 January 1993 the French Government maintained its position, in consequence of which the Commission brought this action.

11 By order of 14 December 1994, the President of the Court granted leave to Ireland to intervene in support of the forms of order sought by the French Republic; by order of the same day 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.

Admissibility

12 Although the French Government has not formally raised an objection of inadmissibility, it has expressed doubts as to the admissibility of the Commission's application since, it has contended, it was only in its application that the Commission dealt with the French Government's arguments relating to Articles 30 and 90(2) of the Treaty set out in the Government's observations in response to the letter of formal notice.

13 The French Government has pointed out, in particular, that in its reasoned opinion the Commission confined itself to asserting that the aim of ensuring security of energy supplies could not be relied on to justify exclusive rights to import electricity, whereas in its application it has accepted such a possibility, but maintained that means less restrictive of trade were available to attain that aim. Moreover, whereas in its reasoned opinion the Commission rejected outright the possibility that Article 90(2) of the Treaty could apply to this case on the ground that it relates only to conduct on the part of undertakings of the kind referred to in Article 90(1), it has ultimately conceded in its application that the Court has held that that provision allows Member States under certain conditions to confer on undertakings of the kind referred to in Article 90(2) exclusive rights which hinder compliance with the competition rules and so proceeded to consider whether, in this case, those conditions were in fact fulfilled.

14 The French Government has contended that in so doing the Commission has substantially changed its position with respect to two fundamental issues following the reasoned opinion and thus both failed to have regard to the purpose of the prelitigation procedure, as defined in the first paragraph of Article 169 of the Treaty, and, more generally, failed to observe the rights of the defence of the Member State involved.

15 In that regard, it must be remembered that the aim of the prelitigation procedure provided for by Article 169 of the Treaty is to give the Member State an opportunity to justify its position or, if appropriate, to enable it to comply of its own

accord with the requirements of the Treaty. The proper conduct of that procedure thus constitutes an essential guarantee which is required not only in order to protect the rights of the Member State concerned but also to ensure that any contentious procedure will have a clearly defined dispute as its subject-matter (see the order of 11 July 1995 in Case C-266/94 *Commission* v *Spain* [1995] ECR I-1975, paragraph 17).

16 It is therefore necessary, in assessing the admissibility of the application, to examine the conduct of the prelitigation procedure.

17 In its letter of formal notice, the Commission stated that the French Republic could not maintain, vis-à-vis other Member States, exclusive rights to import and export electricity and gas, which in its view were incompatible with Articles 30, 34 and 37 of the Treaty.

18 In its reply, the French Government put forward a number of economic and legal arguments justifying maintenance of the exclusive rights at issue. In particular, it contended that maintenance of those rights was justified under Articles 36 and 90(2) of the Treaty.

19 In its reasoned opinion, the Commission hardly considered the economic aspect 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, 34 and 37 of the Treaty. As regards Article 36 of the Treaty, it contended that it was incumbent on the defendant Member State to prove that the grant of exclusive rights to import and export electricity and gas was the least restrictive means available to it to guarantee security of supply, the only consideration which fell to be taken into account under that article. As regards Article 90(2), it simply asserted that that provision did not apply to State measures which were contrary to Articles 30, 34 and 37 of the Treaty.

20 In its observations on the reasoned opinion, the French Government elaborated on the economic and legal arguments which it had put forward earlier. In particular, it drew attention to the consequences of the position taken by the Commission which, by criticizing certain aspects of the organization of the French electricity and gas industries, was attacking an organization which satisfactorily met national energy policy objectives, despite the fact that at present there was no Community policy capable of replacing it.

21 The French Government also emphasized the need to take account, in any critical analysis of the exclusive import and export rights, which constitute only part of that organization, of the specific situation of each Member State. Finally, it described the French organization in detail in order to show that the exclusive rights were necessary for fulfilment of the public-service tasks entrusted to EDF and GDF.

22 In its application, as in its reasoned opinion, the Commission has essentially confined itself to repeating its legal arguments. It has maintained its position that Article 90(2) of the Treaty cannot be relied on to justify a State measure incompatible with Articles 30, 34 and 37. It is only as a secondary point, in the light of the judgments in Case C-320/91 *Corbeau* [1993] ECR I-2533 and Case C-393/92 *Almelo and Others* v *Energiebedrijf IJsselmij* [1994] ECR I-1477, both of which post-dated its reasoned opinion, that it has considered the question whether the conditions for the application of Article 90(2), as interpreted by the Court, were fulfilled in this case.

23 However, on that point, the Commission has merely stated that, in any event, the French Government has not shown that, if the market were opened up, there would be a risk of creaming-off by importers and exporters of electricity and gas, who would concentrate on the most lucrative activities and leave the less lucrative to EDF and GDF, that such a risk would be liable to jeopardize the economic viability of EDF and GDF or that there were no other measures, less restrictive of trade, which would also allow fulfilment of the relevant obligations, such as public support or equalization of the costs associated with public service obligations as

between EDF and GDF, on the one hand, and the importers and exporters on the other.

24 In those circumstances, the Commission's complaints relate only to the maintenance of the exclusive import and export rights of EDF and GDF, although it has reserved its position regarding the other aspects of the organization of the electricity and gas industries in France.

25 Further, the Commission's contention is that, if exclusive import and export rights are considered incompatible with Articles 30, 34 and 37 of the Treaty, the French Government must bear the sole burden of proving justification for maintaining such rights under either Article 36 or Article 90(2).

26 The Commission's application being so limited, it does not go beyond the scope of the letter of formal notice and the reasoned opinion. It is therefore admissible.

The conformity of the exclusive import and export rights with Articles 30, 34 and 37 of the Treaty

27 The Commission has observed that the fact that EDF and GDF enjoy a national import monopoly prevents producers in other Member States from selling their production to customers in France other than those monopoly-holders, and potential customers in France from freely choosing their sources of supply for electricity and gas from other Member States.

28 The exclusive import rights of EDF and GDF 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.

29 The Commission has maintained that the same considerations apply *mutatis mutandis* to the exclusive export rights enjoyed by EDF and GDF. The holders of such rights naturally tend to allocate national production to the national market, to the detriment of demand from other Member States, and they should therefore be regarded as discriminatory within the meaning of Articles 34 and 37 of the Treaty.

30 The arguments concerning Article 37 should be examined first.

Article 37 of the Treaty

31 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.

32 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).

33 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 conditions under which goods are marketed only as regards operators or sellers in other Member States.

34 Similarly, exclusive export rights inherently give rise to discrimination against importers established in other Member States since that exclusivity affects only the conditions under which goods are procured by operators or consumers in other Member States.

35 In that connection, the French Government has conceded that available national production both of electricity and of gas is reserved as a matter of priority to users within French territory. Accordingly, it must be concluded that EDF's and GDF's exclusive export rights have, if not the object, at least the effect of specifically restricting patterns of exports and thereby establishing a difference in treatment between domestic trade and export trade, in such a way as to provide a special advantage for the French domestic market (on that point, see in particular, with regard to Article 34 of the Treaty, Case C-47/90 *Delhaize* v *Promalvin* [1992] ECR I-3669, paragraph 12).

36 As regards exclusive import rights, the French Government has objected that the conditions under which trade is carried on in the Community's electricity industry are largely uniform and that neither end-users nor distributors anywhere enjoy freedom to choose their suppliers, so that EDF is not in a more favourable

situation than operators in other Member States and the import monopoly which it enjoys does not affect, to the detriment of the latter, the conditions of competition in France as compared with those prevailing in the other Member States.

37 The same applies, according to the French Government, to the gas industry, in that marketing conditions are similar in all the Member States even though, in many, there is no statutory monopoly on imports.

38 That objection, based on a comparison between the circumstances prevailing in the Member State where there is a monopoly and those prevailing in the other Member States, cannot, however, be upheld.

39 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.

40 The existence of exclusive import rights in a Member State deprives economic operators in other Member States of the opportunity to offer their products to consumers of their choice in the Member State concerned, regardless of the conditions which they encounter in their Member State of origin or in other Member States.

Articles 30, 34 and 36 of the Treaty

41 Since the maintenance of the exclusive import and export rights at issue is therefore contrary to Article 37 of the Treaty, it is unnecessary to consider whether they are contrary to Articles 30 and 34 or, consequently, whether they might possibly be justified under Article 36 of the Treaty.

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

Justification under Article 90(2) of the Treaty

43 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

44 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.

45 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.

46 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.

47 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.

48 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.

49 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.

50 In those circumstances, it is necessary to examine the subsidiary arguments put forward by the Commission to show that the conditions for the application of Article 90(2) are not met in this case.

The meaning of the term 'particular tasks' in Article 90(2) of the Treaty

51 The Commission has not denied that EDF and GDF are to be regarded as undertakings entrusted with the operation of services of general economic interest within the meaning of Article 90(2) of the Treaty.

52 It has taken the view, however, that it is clear, in particular from the judgment in *Corbeau*, cited above (paragraph 16), that that provision allows measures contrary to the Treaty only to the extent to which they are necessary to enable the undertaking concerned to perform its tasks of general economic interest under economically acceptable conditions and, therefore, only if, in the absence of such measures, the economic viability of the undertaking itself would be threatened.

53 Being a provision permitting derogation from the Treaty rules, Article 90(2) must be interpreted strictly. However, the restrictive interpretation of its scope for which the Commission has contended cannot be accepted.

54 First, 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.

55 Second, 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.

56 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.

57 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).

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

59 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.

Definition of the particular tasks entrusted to EDF and GDF

60 The French Government has claimed that EDF and GDF have been entrusted by the State, by means of various legal instruments, with supplying the country with electricity and gas in compliance with various public-service obligations and with contributing actively to the implementation of national environment and regional policies.

61 The public-service obligations mentioned by the French Government are: the obligation to supply all customers, in the case of EDF throughout the national territory and, in the case of GDF, in the areas served; ensuring continuity of supply; endeavouring to provide the most competitive tariffs and the lowest costs for the community; and observing equal treatment between customers.

62 The French Government has contended that the elimination of EDF's and GDF's exclusive import and export rights would compromise the due performance of some or even all of those obligations and would render more difficult or indeed impossible the contributions which those undertakings are required to make to environmental protection and regional policy.

63 The Commission has maintained that, of the public-service obligations mentioned by the French Government, only those which derive from legislative provisions or regulations can constitute particular tasks within the meaning of Article 90(2) of the Treaty, entrusted to EDF and GDF.

64 The Commission has submitted that, in any event, the constraints of environmental protection and regional policy cannot form part of the particular tasks entrusted to EDF and GDF since those constraints apply more or less generally to all economic operators.

65 It is true that, for an undertaking to be regarded as entrusted with the operation of a service of general economic interest within the meaning of Article 90(2) of the Treaty, it must have been so entrusted by an act of public authority (see Case 127/73 *BRT* v *SABAM and NV Fonior* [1974] ECR 313, paragraph 20, and Case 66/86 *Ahmed Saeed Flugreisen and Others* v *Zentrale zur Bekämpfung Unlauteren Wettbewerbs* [1989] ECR 803, paragraph 55).

66 However, that does not mean that a legislative measure or regulation is required. The Court has already recognized that an undertaking may be entrusted with the operation of services of general economic interest through the grant of a concession governed by public law (see *Almelo*, cited above, paragraph 47). That is so *a fortiori* where such concessions have been granted in order to give effect to the obligations imposed on undertakings which, by statute, have been entrusted with the operation of a service of general economic interest.

67 That is clearly the case with EDF and GDF. Under Article 36 of the 1946 Law they, as public undertakings to which concessions for nationalized electricity or gas have been granted, must observe the current terms and conditions of the concession. The State, local authorities and, where appropriate, third parties retain all the rights deriving from those terms and conditions and any other agreements. Moreover, Article 37 of the 1946 Law provides that standard terms and conditions are to be laid down by public administrative regulations.

68 Furthermore, for obligations imposed on an undertaking entrusted with the operation of services of general economic interest to be regarded as falling within the particular tasks entrusted to it, they must be linked to the subject-matter of the service of general economic interest in question and designed to make a direct contribution to satisfying that interest.

69 That cannot apply to obligations regarding the environment and regional policy imposed on undertakings entrusted with supplying the country with electricity and gas unless such obligations are specific to those undertakings and to their business.

70 In its defence, the French Government refers to no specific obligation of that kind imposed on EDF or GDF, but merely states, without further clarification, that the contributions made by those two establishments to national environmental and regional policies go beyond mere compliance with rules under the general law.

71 It should nevertheless be borne in mind that it is clear from the case-law of the Court (see *Almelo*, cited above, paragraph 49) that such obligations or constraints may be taken into consideration for the purpose of considering to what extent derogations from the Treaty rules which it is sought to justify are necessary in order to enable the undertaking in question to perform the tasks of general interest entrusted to it.

72 As regards the public-service obligations referred to by the French Government, the Commission, in its reply, has conceded that the terms and conditions annexed to the agreement, referred to in paragraph 5 of this judgment, under which EDF was granted a concession in respect of the general electricity supply network, concluded on 27 November 1958 between the State and EDF, specifically include the obligations of supplying all customers (Article 10), ensuring continuity of supply (Article 11) and treating customers equally (Article 24).

73 However, the Commission has contended that EDF's obligation to seek the most competitive tariffs and the lowest costs for the community also derives from those terms and conditions.

74 As to GDF, the Commission has pointed out that the French Government referred quite generally to the concessions and terms and conditions in force, without drawing attention to any specific provisions.

75 As regards EDF's alleged obligation to seek the most competitive tariffs and the lowest costs, the terms and conditions annexed to the EDF concession agreement provide, in Article 17, for maximum tariffs, which vary according to the region and to the characteristics of the supply, as defined in Article 24.

76 Under Article 20 of the terms and conditions, the concessionaire is entitled to modify the maximum tariffs so that they reflect changes in cost prices deriving from structural changes in either production or consumption of energy, provided, in particular, that the aggregate income to be received, for the country as a whole, from the amended tariff does not exceed the income which would have been produced by the unmodified tariff and that there is a period of at least one year between any two successive adjustments.

77 Article 22 of the terms and conditions provides that the maximum tariffs may be reviewed at the request of the State or of the concessionaire. Reviews are possible in particular if a change in economic or technical circumstances, outside the control of the concessionaire and not offset by the tariff-variation clauses which enable account to be taken of inflation, creates an imbalance, in either direction, between the concessionaire's expenditure and resources, which has a significant and lasting impact on the concession in force and if the creation of new production, transmission or distribution facilities produces a significant and lasting improvement in the conditions for operation of the concession.

78 The Commission has claimed that those provisions relate only to optional changes and impose no specific obligation on the concessionaire to seek the lowest costs in its normal activities. It has added that pursuit of improved economic efficiency is *a priori* one of the objectives of any undertaking, making it doubtful whether that can be one of the particular tasks, within the meaning of Article 90(2) of the Treaty, assigned to an undertaking entrusted with the operation of a service of general economic interest.

79 The French Government has taken the view that those provisions of the terms and conditions, although not excluding tariff increases, are clearly designed, first, to establish a link between the sale price and the cost price and, second, to call upon the concessionaire to minimize its cost price by adjusting to technical and economic circumstances.

80 It is true that those provisions lay down, in strict terms, the only conditions under which adjustments or reviews of the maximum tariffs are possible. Furthermore, they prohibit excessively frequent adjustments which might provide the concessionaire with higher aggregate income and therefore increase the total cost borne by consumers as a whole. Moreover, upward adjustments of tariffs are authorized only to offset a significant and lasting imbalance in the conditions under which the concession operates.

81 However, there is nothing to indicate that the maximum tariffs in force are necessarily the lowest possible tariffs. Accordingly, neither the limits laid down for the adjustment of tariffs nor those for upward revision are such as to guarantee that the objective of securing the most competitive tariffs and the lowest cost will be attained.

82 It must also be noted that, in the event of a significant and lasting improvement in the conditions under which the concession operates, Article 22 of the terms and conditions merely grants authority to reduce the maximum tariffs.

83 It follows that the considerations put forward by the French Government do not support the conclusion that EDF is under an obligation to seek to secure the most competitive tariffs and the lowest costs for the community.

84 As regards GDF's public-service obligations, it is true, as the Commission has pointed out, that, in its defence, the French Government has merely given a list without indicating precise legal sources.

85 However, the French Government has also indicated that the nature of the tasks entrusted to GDF is the same as that of those entrusted to EDF, that they derive directly from the 1946 Law and that the public-service obligations of GDF, like those imposed on EDF, are set out in the concessions and associated terms and conditions, in particular those provided for in Article 36 of the 1946 Law.

86 Furthermore, the French Government stated in the prelitigation phase that the 1946 Law made GDF, like EDF, a public-service concessionaire subject to certain special obligations. Thus, in response to the letter of formal notice, it referred to obligations of supply, equal treatment, continuity, adjustment of operating

conditions and sale at the lowest cost. In its reply to the reasoned opinion, it stated that those obligations were the subject of requirements in the terms and conditions applicable to operators responsible for public transport and distribution services.

87 In those circumstances, the fact that the French Government has not provided details regarding the exact wording of the provisions of the terms and conditions in question and produced the relevant texts only when lodging its rejoinder cannot prevent it from relying on the public-service obligations invoked in these proceedings.

88 On the basis of the texts produced, namely the terms and conditions of the concession for long-distance transport of gas by pipeline for the purpose of supplying combustible gas, which were approved by decree submitted to the Conseil d'État (Council of State) and which are attached, with the necessary adjustments in each case, to the various concession contracts, and the standard terms and conditions for the concessions granted to GDF by local authorities for public distribution of gas, also approved by decree on the basis of Article 37 of the 1946 Law and attached to the concession agreements concluded by those authorities, it must be held that GDF is subject to obligations of continuity (Article 19 of both sets of terms and conditions), supply (Article 17 of the terms and conditions for distribution) and equal treatment as between consumers (Article 21 of the terms and conditions for distribution).

89 In view of the foregoing considerations, it is appropriate to examine the necessity of maintaining EDF's and GDF's exclusive import and export rights, but only in relation to the public-service obligations of which the French Government has proved the existence, namely the obligations of supply, continuity of supply and equal treatment between customers or consumers.

The necessity for EDF's and GDF's exclusive import and export rights

90 As the Court has observed in connection with admissibility, the French Government, in the prelitigation phase, explained at length the reasons for which in its view, in the event of elimination of their exclusive import rights, EDF and GDF would no longer be able to supply the country with electricity and gas in accordance with the public-service obligations at issue.

91 Before the Court, the French Government has essentially reiterated the considerations put forward in the prelitigation procedure. It has contended in particular, with regard to EDF, that in the event of elimination of its exclusive import and export rights certain customers would monopolize the most competitive production sources, namely those which, it may be assumed, are less expensive than the energy offered by EDF, with the result, first, either that the cost of supplies to all other consumers would increase or that the economic and financial balance of the establishment would be compromised, and second, that equality of treatment would be undermined. Moreover, it would not be economically possible to maintain EDF's supply obligation in relation to customers who were free to obtain supplies elsewhere.

92 In the case of gas, the French Government has stressed that, if GDF's exclusive import and export rights were removed, operators would tend to resort, in order to improve their competitiveness, to markets offering the best spot prices and to give up long-term contracts, which would give rise to a high risk of interruptions in gas supplies for the country. Furthermore, if GDF continued to be subject to the obligation to ensure security of supply for the country and the obligation to supply the areas served, its financial equilibrium would necessarily be undermined since direct importers could make spot purchases at very low cost when normal circumstances prevailed and return, in times of crisis, to GDF, which would be obliged to supply them. Those operators would then be able to obtain supplies on better terms than GDF by means of short-term purchases and would thus

complete unfairly with the public undertaking, which would alone bear the permanent extra costs inherent in a long-term policy of security of supply, and those extra costs would inevitably be passed on to GDF's customers and would necessarily mean that it lost customers.

93 However, the Commission has chosen not to take a position on that point and has concentrated its submissions on the legal considerations examined above. For the rest, it has claimed that the French Government was under an obligation to show that the conditions for the application of Article 90(2) are fulfilled in this case but has failed in particular to show that elimination of the exclusive rights at issue would be liable to endanger the economic viability of EDF and GDF or that there are no other less restrictive measures capable of ensuring fulfilment of the obligations at issue.

94 It is true that it is incumbent on 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.

95 However, as the Court has held in paragraphs 53 to 59 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 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 its public-service obligations.

96 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.

97 It is undeniable that, if the exclusive import and export rights were removed, certain customers would obtain supplies on foreign markets and certain producers or exporters would sell their products there when the prices charged there were respectively lower and higher than those charged by EDF and GDF. That possibility would indeed be one of the main objectives of opening up the market.

98 In view of the intrinsic characteristics of electricity and gas and the manner in which they are produced, transmitted or transported and distributed, it is also clear that any such opening up of the market would involve substantial changes in the way those industries are run, particularly with regard to performance of the obligations of supply, continuity of supply and equal treatment as between customers or consumers.

99 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 grants or equalization of the costs linked with public-service obligations.

100 However, those assertions take no account of the particular features of the national system for the supply of electricity (in particular the importance of nuclear power) and gas (in particular the lack of domestic resources of natural gas), to which the French Government has drawn attention. Nor has the Commission specifically

considered whether the means which it suggests would enable EDF and GDF to perform the tasks of general economic interest entrusted to them, observing all the obligations and constraints imposed on them, of which the Commission has challenged neither the legitimacy nor the legality.

101 Whilst it is true that it is incumbent upon a Member State which invokes Article 90(2) to demonstrate that the conditions laid down in 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 of the tasks of general economic interest under economically acceptable conditions 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.

102 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).

103 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 French 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.

104 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 French Government were not relevant.

105 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.

106 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 and gas in its national territory, continuity of supply and equal treatment for all customers and consumers.

107 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 maintaining exclusive import and export rights for EDF and GDF, the French Republic has in fact gone further than was necessary to enable those establishments to perform, under economically acceptable conditions, the tasks of general economic interest assigned to them.

108 However, for the exclusive import and export rights of EDF and GDF 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

109 In its defence, the French Government has explained, without being contradicted by the Commission, that, despite the existence of those rights, the French electricity industry has been fully integrated into the European market and in particular has participated, within the Union for the Coordination of the Production and Transport of Electric Power in Europe (UCPTE), since it was set up in 1951, in the development of trade in energy between major networks. It has stated that such trade between major networks accounted for about 10% of total consumption in the Community of twelve and is the only trade covered by Community rules, under Council Directive 90/547/EEC of 20 October 1990 on the transit of electricity through transmission grids (OJ 1990 L 313, p. 30).

110 As regards gas, the French Government has observed that, in 1992, more than 90% of French consumption was accounted for by imports, of which 14% came from

the Netherlands, and has maintained that it is not GDF's exclusive import rights which prevent additional imports from other Member States of the Community but rather the limitation of resources and the position of the exporting countries.

111 The Commission has merely referred, in its application, to the existence of that condition for the application of Article 90(2) of the Treaty and has stated in its reply, without further details, that the abolition of the exclusive import and export rights would allow and foster the development of trade in the interests of the Community.

112 Those statements do not, however, prove that, as a result of EDF's and GDF's exclusive import and export rights, the development of intra-Community trade in electricity and gas has been and continues to be affected to an extent contrary to the interests of the Community.

113 In view of the explanations given by the French 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.

114 In this case, such definition was particularly necessary since the only Community measures directly concerned with trade in electricity and gas, namely Directive 90/547 and Council Directive 92/296/EEC of 31 May 1991 on the transit of natural gas through grids (OJ 1991 L 147, p. 37), expressly state, in the sixth and eighth

recitals in their respective preambles, that there is increasing trade in electricity and natural gas from year to year between the high-voltage electricity grids and high-pressure gas grids.

115 Since the Commission has been careful to state expressly that its application is concerned only with exclusive import and export rights and not other rights relating in particular to transmission or transport 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 without, among other things, a right of access for such producers and consumers to the transmission and distribution networks.

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

Costs

117 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, 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