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'ARTICLE 90 EC AND PRIVILEGED RIGHTS'

LL.M. Dissertation, Academic Year 1995/96,
by

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ABBREVIATIONS

CMLR	*Common Market Law Review*
Court	*European Court of Justice*
DG	*Directorate-General*
EC	*European Community/Communities, Treaty Establishing the European Community*
ECJ	*European Court of Justice*
ECLR	*European Competition Law Review*
ECR	*European Court Reports* (official reports of the judgments of the European Court, English version)
EEC	*European Economic Community*
ELR	*European Law Review*
OJ	*Official Journal* (of the European Communities)

Unless otherwise stated, cases cited were decided by the ECJ and Articles cited are Articles of the EC Treaty.

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Chapter 1

Introduction

Aim and method

Member States must observe certain limits in light of Article 90 when they grant special or exclusive rights to enterprises. This dissertation will attempt to analyse to what extent Article 90 in conjunction with other Treaty Articles imposes limits on not only the *exercise* of such rights but also on their very *existence*. Thus, the aim of the dissertation is to review and assess, in the light of the case law of the Court of Justice and various initiatives of the Commission, how far Article 90 may be relied on to attack the very existence of legal monopolies. In other words, the dissertation examine the scope and nature of judicial control under Community law of the existence of monopoly rights.

The Court has confirmed that certain monopoly rights infringe Article 90(1) and that the Commission has the power under Article 90(3) to address directives or decisions to Member States requiring them to withdraw such rights. The significance of this development is that it strengthens the powers of the Community, in particular those of the Commission, to limit the intervention of Member State governments in their own economies where the greater interests of Community trade and fair competition are at risk and raises doubts as to the legitimacy of national monopolies in a wide range of sectors.

It is maintained in this dissertation that the development first of all has lead to a situation where it is not only the exercise of special and exclusive rights that may be incompatible with Community law but also the very existence of such rights. It is suggested, however, that the development has gone further and reached a point where the grant and maintenance of special and exclusive rights has to be justified according to certain requirements and that the approach under Community law, when assessing whether justification can be obtained, is based on a presumption of illegality instead of, as the text of Article 90(1) indicates, a presumption of legality.

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The methodological approach, when assessing these issues, will be will be based on analysis of the relevant case law of the Court and the Commission's practice and legislative measures. This analysis will be supplemented with references to relevant literature and viewpoints contained therein.

Limitations

Even though the application of Article 90 is of a rather late date compared to most of the Treaty Articles it is applied in conjunction with, anyone who attempts to review the scope of Article 90 will be faced with problems of limitation, as in so many other areas of Community law. The aspects which can be taken into consideration are numerous. Thus, choices had to be made in order to limit the issues included in the dissertation.

Emphasis is placed on Article 90(1). It is not the intention to analyse the scope of Article 90(2) and (3). Thus, there will be no specific analysis of the Commission's competence under the latter paragraph and the implications of this competence. Likewise, there will be no specific analysis of the scope and peculiarities of Article 90(2). However, some attention will be devoted to this provision since it is suggested that an assessment of privileged rights under the provision is part of the application of Article 90(1).

With regard to Article 90(1), focus is put on special and exclusive rights. There will be no specific analysis of public undertakings as such, although Article 90(1) also concerns these enterprises. That does not mean, however, that privileged rights held by a publicly owned undertaking will be exempted from the analysis in the dissertation.[1] On the contrary, it is usually the case that Member States grant such rights to enterprises which they own.

Moreover, the dissertation will not go beyond the aim stated above. Thus, it is the judicial control under Community law of the existence of monopoly rights which will be examined and not the far reaching consequences that this control may result in. Issues such as Article 90's impact on the institutional balance of

[1] A public undertaking is not necessarily the holder of special and exclusive rights.

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the Community and the balance between Member States' freedom to intervene in their own economies and the interests of Community are left untouched; not least when taking the intended volume of this dissertation into consideration.

The structure of the dissertation is to some extent based on selective materials instead of including numerous cases, legislative proposals etc. in the analysis conducted.[2] For example, a case such as *GB-Inno*[3] is not included in the analysis even though some commentators place particular emphasis on this judgment.[4] Likewise, following the adoption and subsequent approval by the Court of the Commission's directives under Article 90(3) in the telecommunications sector,[5] the Commission has taken several initiatives to liberalise other industry sectors. However, most of these initiatives are left untouched since it is considered that they do not provide any substantive amendments to findings of the analysis contained in the dissertation. Given these exclusions, it is nevertheless hoped that the 'selective' approach chosen will create clarity and at the same time provide a substantial and meaningful content.

Finally, since the dissertation concerns Article 90(1) and privileged rights some clarification is needed with regard to the use of the term 'privileged rights'. Article 90(1) operates with the respective terms 'special' and 'exclusive' rights, but it is considered that for the purpose of this dissertation there is no need to distinguish the two types of rights from each other.[6] In general 'special and exclusive rights' will be referred to as 'privileged rights' and undertakings holding such rights will be referred to as 'privileged undertakings' (whether privately or publicly owned).

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[2] Although it is considered that the case law of the Court is dealt with rather elaborately. This is considered a natural consequence of the aim to examine the extent of the judicial control.

[3] Case 13/77 GB-Inno-BM v ATAB [1997] ECR 2115.

[4] See Aurelio Pappalardo *State Measures and Public Undertakings: Article 90 of the EEC Treaty Revisited* [1991] ECLR 29.

[5] See chapter 4 below.

[6] See Temple Lang *Community Antitrust Law and Government Measures relating to Public and Privileged Enterprises: Article 90 EEC Treaty* [1984] Fordham Corporate Law Institute 543 (at 553 to 555) for a definition of respectively 'special' and exclusive 'rights'. A defined meaning of 'special rights' remains uncertain under Community law, but is due to be clarified in the Article 90 directive extending the Terminals and Services directives (see chapter 4 below) to the satellite sector. See also the Commission's Green Paper of April 1994 on a common approach in the field of mobile and personal communications in the European Union.

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Chapter 2

A general introduction to Article 90

The role of Article 90

The role of Article 90 has courted much legal debate but it is beyond the scope of this dissertation to engage in an advanced analysis hereof. It seems generally accepted that the Article seeks to reconcile the pursuit of free trade and fair competition with the protection of public services performed by legal monopolies.

Some commentators take the view that in relation to the creation and maintenance of legal monopolies, the Treaty sets out two principles of particular importance; namely the principle of free competition as enshrined in Article 3(g) and the principle in Article 222 that the Treaty shall in no way prejudice the rules in Member States governing the system of property ownership. It is argued that there is a clear tension between these principles and that Article 90 seeks to provide a balance.[7]

Another commentator points out that the role of Article 90 has changed over the years. The Article once represented a neutral approach towards public and privileged undertakings based on the presumption that public monopolies and privileged undertakings are legal unless they in specific circumstances fall foul of the rules enshrined in the Treaty. This approach is reflected in the text of the Treaty as a whole. Reference is made to Articles 3(g), 5, 37 and 222. These Articles indicate that the framers of the Treaty wished to adopt a neutral position in the debate between state planning and free competition and that they preferred to leave to the Member States the liberty, within certain limits, to choose the appropriate model of economic organisation. However, following the mid-1980s a dramatic shift in the debate between state planning and free competition has taken place. This shift may be seen in the text of Article 3a of the Maastricht Treaty: "the activities of the Member States shall include .... the adoption of an

[7] See David Edward and Mark Hoskins, chapter 9.

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economic policy .... conducted in accordance with the principle of an open market economy with free competition". In other words, the neutrality towards legal monopolies and privileged enterprises in the text of the Rome Treaty has now been supplanted by a presumption of illegality.[8]

The application of Article 90

Article 90(1) imposes the duty on Member States neither to enact nor to maintain measures contrary to the Treaty, and Articles 7 and 85 to 94 in particular (the non-discrimination[9] and competition rules), in their dealings with public undertakings and undertakings to which Member States grant special or exclusive rights ('privileged undertakings'). Like the Article 5 duty to abstain from any measure which could jeopardise the attainment of the objectives of the Treaty, Article 90(1) is a reference provision and is infringed only when it can be shown that other rules of the Treaty are also being infringed. One of the main issues which the legal debate on the scope of Article 90(1) has revolved around is the question of which Member State 'measures' are subject to Article 90(1). It has always been accepted that measures affecting the *exercise* of special and exclusive rights are covered by Article 90(1). These could include measures encouraging, obliging or authorising public or privileged undertaking to infringe the competition rules or measures infringing other Treaty rules. In the past it has not, however, been generally accepted that the grant and maintenance, that is, the very existence, of such rights could infringe Article 90(1).[10]

Article 90(2) limits the application of the Treaty rules, and the competition rules in particular, where they threaten to obstruct the performance of public service duties by undertakings entrusted with such duties. While such undertakings usually have corresponding rights to enable them to carry out their public services task, and are therefore privileged undertakings (within the meaning of Article 90(1)), an undertaking may be entrusted with a public service within the meaning of Article 90(2) without having special or exclusive rights or being

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[8] See Anthony Gardner *The Velvet Revolution: Article 90 and the Triumph of the Free Market in Europe's Regulated Sectors* [1995] ECLR 78-86.
[9] Which now is placed in Article 6 of the Treaty.
[10] See chapter 9 for the viewpoints in 'early' literature.

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publicly owned. Conversely, it is not always the case that Article 90(1) undertakings are entrusted with a public service task within the meaning of Article 90(2). In principle, Article 90(1) and (2) do not have the same addressees. The latter is aimed at undertakings entrusted with specific tasks whereas the former is aimed at Member States. Nevertheless, the case law of the Court, which will be reviewed in this dissertation, shows that Article 90(2) is both a defence to an action brought against privileged undertakings under the competition rules (Article 86 in particular) and a derogation to the Article 90(1) duty on Member States. That being said, the requirements of Article 90(2) are difficult to establish.[11]

Article 90(3) adds a special enforcement procedure whereby the Commission can ensure compliance with Article 90(1) and (2) by addressing directives or decisions where necessary. With regard to the adoption of decisions, Article 90(3) provides the Commission with a more flexible and speedy tool than the procedure generally used by the Commission to enforce Treaty obligations under Article 169 (which requires the Commission to issue a 'reasoned opinion' and, if necessary, bring the offending Member State before the Court).[12] In contrast to the general procedure for the adoption of directives (for example Article 100A), Article 90(3) enables the Commission to address directives to Member States without involving the Parliament or the Council and is therefore less democratic and more politically controversial. It is usually suggested, however, that the Article 90(3) duty, like that of Article 169, is imposed on the Commission pursuant to its role of supervising and enforcing the Treaty and is more declacatory than normative in nature. One of the crucial differences between Article 100A directives and Article 90(3) directives is that the former harmonise previously legitimate national trade rules and thus create obligations, whereas the latter specify obligations which already exist under Article 90(1).

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[11] In Case 41/83 *Italy v Commission* [1985] ECR 873, the Court approved the Commission's decision under Article 86 to condemn certain British Telecommunications (BT) regulations which restricted the freedom of the company Sprint to provide message-forwarding services in the United Kingdom and rejected the Article 90(2) defence. It was held that while Sprint's activities entailed some loss of revenue for BT, it was not established that the Commission's condemnation of the BT regulations would, 'from an economic viewpoint, prejudice the accomplishment of the tasks assigned to BT'.

[12] As to the discretion of the Commission to bring action under Article 90(3) in a specific case, see, for one of the most recent rulings of the Court, Case C-107/95 *Bundesverband der Bilanzbuchhalter v Commission* Judgment of 20 February 1997, not yet reported.

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The effect of Article 90(3) directives may however be normative by outlawing, from the date specified in the directive, a particular Member State measure when it had previously been unclear that such measure infringed Article 90. The Commission may also use the Article 90(3) power to lay down certain rules in order to facilitate the task of enforcing Article 90(1), as in the case of the Commission Directive on the transparency of financial relations between Member States.[13]

Exercise v existence

Given that the distinction between the *exercise* and the *existence* of privileged rights is an inherent part of the issues addressed in this dissertation, it is found useful to submit some remarks on the distinction. The following remarks should not be read as a complete analysis hereof but merely as an attempt to indicate the nature of the issue.

When speaking of the difference between the application of Article 90(1) to respectively the *exercise* and *existence* of privileged rights it is essential to regard such rights, as a point of departure, as 'neutral' in the context of Community law. The term 'neutral' must be understood as meaning that the existence of a privileged right can not in itself constitute a breach of a Treaty rule. Only when the right is exercised can a breach occur.

Although it will be the undertaking holding the right which also in practice will exercise it, it is important to differ between an exercise which is initiated on the privileged undertaking's own initiative and an exercise which is initiated by the Member State that has granted the right. Article 90(1) deals only with the latter situation. The Member State may induce or, even more so, instruct the privileged undertaking to behave in a way which would be contrary to a Treaty rule had the undertaking behaved so on its own initiative or had the Member State behaved so itself. As an example of the first situation, the Member State may instruct the undertaking to charge unfair prices for the provision of services which come within the privileged right (infringement of Article 86). As to the second situation, the Member State may instruct the undertaking only to obtain

[13] Commission Directive 80/723/EEC, OJ 1980 L195/35. See chapter 3 below.

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services provided by nationals of the State (infringement of Article 59). Had the Member State not enacted these 'measures', no Treaty Articles would have been breached since the undertaking would have been in a position where it could have abstained from the unlawful behaviour. Thus, in this context the privileged right held by the undertaking is 'neutral' because it is not the *existence* of the right that has lead to the unlawful conduct but State measures concerning the *exercise* of the right.

However, as mentioned above, the 'neutrality' of privileged rights should only be regarded as a point of departure. It will often be difficult, if not impossible, to dissociate the exercise of privileged rights from their existence. For example, if an undertaking is granted privileged rights which cover the provision of all types of services in a given sector, i.e. the sector for postal services, and the undertaking is unable to provide every type of services which that sector calls for, such an action, or rather omission, could be regarded as a breach of the competition rules. In this case it is difficult to determine whether the responsibility for infringement should be referred to the privileged undertaking only (and thus concern the exercise of its rights) or whether the infringement is inherent in the grant (existence) of the rights for which the State is responsible.

It is even more difficult to maintain the notion of 'neutrality' of privileged rights when focus is turned to how the free movement and competition rules in general are applied. For example under Article 30, a national measure which imply restrictions on trade is considered an infringement unless the measures is justified according to certain requirements. If the enactment of a privileged right necessarily leads to such restrictions (even though that was not the intention) the grant and maintenance of the right can hardly be considered 'neutral' in the sense of Community law. Likewise, it may be argued that the grant of privileged rights necessarily leads to restrictions of competition in the industry sectors covered by the rights because private competitors are forced to abstain from competing with the privileged undertakings. Given the fundamental principle in Article 3(g) that competition must not be distorted, the notion of 'neutrality' is difficult to uphold.

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Nevertheless, the distinction between the *exercise* and the *existence* of privileged rights has from the viewpoint of most Member States and some commentators[14] been essential in the determination of the limits Member States must observe in light of Article 90 when they grant privileged rights. In the context of Article 90(1) this implies that if it is only the exercise which may be attacked, the grant and maintenance of privileged rights can not constitute 'measures' within the meaning of that Article.

Chapter 3

The Transparency Directive

Although the Transparency Directive[15], enacted by the Commission in 1980, does not explicitly deal with the question of the creation and maintenance of privileged rights, some remarks on the directive may show helpful when illustrating the nature and scope of the Commission's legislative powers under Article 90(3). Thus, the directive and the challenge against before the Court is a helpful (historical) tool to review the telecommunications directives which the Commission later adopted and also to get an idea of the latitude which the Court was ready to grant the Commission in this context. Furthermore, the directive did in one sense mark the beginning of the era when the application of Article 90 became substantial and life was given to the Article.

The Transparency directive may be seen as the Commission's first, but important, step to test its powers under paragraph 3 of Article 90. In the preamble of the directive, the Commission emphasises that transparency, when it comes to financial relations between Member States and public undertakings, is a precondition for the equal treatment of private and public undertakings. Thus, the purpose of the directive was basically to disclose these financial relations, especially in order to prevent disguised state aid. Probably in an attempt to safe-

[14] See chapter 9 below.
[15] Directive of 25 June 1980 "on transparency of financial relations between Member States and public undertakings", OJ 1980 L 195/35.

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guard itself against the reactions of the Member States, the Commission reminds in the same paragraph of the preamble that "the Treaty in no way prejudices the system of property ownership in Member States". Despite this, the scope of the directive crossed the border into what the Member States (at that point of time) considered as "sacred land" and their reaction was to bring prompt action for annulment.

France, Italy and the United Kingdom challenged the validity of the directive.[16] The submissions of the three states ranged from lack of competence on the part of the Commission to discrimination against public undertakings (since only public and not private undertakings were obliged to disclose financial information about themselves). The Court rejected all the arguments of the Member States. In paragraph 36 of the judgement it simply stated "(t)hat the applications made by the three governments have not revealed any factors capable of justifying a declaration that the contested directive is void, even in part".

Besides the complete rejection of the submissions of the Member States, some of the statements made by the Court in the judgment are of particular interest. One that attracts most interest is paragraph 6 which deals with the question of the Commission's legislative powers according to Article 90(3). In the final sentence of the paragraph, the Court stipulated the following:

> "....*(t)he limits of the powers conferred on the Commission by a specific provision of the Treaty are to be inferred not from a general principle, but from an interpretation of the particular wording of the provision in question, in this case Article 90, analysed in the light of its purpose and its place in the scheme of the Treaty.*"

At first sight this statement may appear to be no more than a normal standard of interpretation. However, what makes the statement significant is that the Court did not make any effort to differ between the power of the Commission to address a decision to a Member State in a specific case and the power to issue directives which are of a much more general nature and directed at all Member

[16] Joined cases 188-190/80 *France, Italy and United Kingdom v Commission* [1982] ECR 2545.

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States. Thus, the Court did not use the opportunity to clarify the division between the legislative and executive powers given to the Commission under Article 90(3). By avoiding dealing directly with this issue, the Court seems to have ensured that the collective powers of the Commission under Article 90(3) were not limited in any formalistic or rigid way.[17]

Another issue of relevance when reviewing the Transparency Directive is the lack of references to other Treaty Articles in the directive. As known, Article 90 can only be applied to a given situation when the measure in question is contrary to one of the other Treaty Articles. Yet there are no references to any other Treaty provisions in the directive.[18] Even though this would seem to be a rather obvious issue to raise, the question was left untouched not only by the Court but - surprisingly - also by the Member States. It is difficult to say whether the Court's omission was accidental or intentional in the sense that the Court wished to grant the Commission further scope when applying Article 90(3). In favour of the latter possibility speaks that it is not without doubt whether the lack of transparency in financial relations can be regarded as a 'measure' in the sense of Article 90(1), keeping in mind that the 'measure' has to be contrary to another Treaty Article.[19]

The latitude which the Court was ready to grant the Commission in the context of its powers under Article 90(3) should also be reviewed in light of an action the Commission in 1985 brought against Italy, claiming that the Member State had failed to comply with the Transparency Directive.[20] The Italian Government responded by saying that the authority/undertaking in question could not be characterised as a public undertaking in the sense of the Directive since it had

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[17] This kind of case law gives even more impetus to the debate about the democratic deficit in the European Union, including the constitutional issue of separation of legislative and executive powers. However, it goes beyond the aims of this dissertation to explore the conclusions that might be reached in this connection. In his article *The Court of Justice on Article 90 of the EEC Treaty*, Michael Brothwood argues in favour of the conclusion that the general rule of the separation of powers contained in the Treaty has not been altered by the judgment. CMLR [1983] 335-346.

[18] The relevant Articles, when dealing with the Transparency Directive, are most likely Articles 92-94 concerning state aid, but they are not mentioned explicitly in the directive.

[19] See Aurelio Pappalardo, footnote 4.

[20] Case 118/85 *Commission v Italy* [1987] ECR 2599.

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no legal personality which was separate from the State. The Court did not recognise the Italian argument and stated in paragraph 11 of the judgment:

> *"....(t)he Court has frequently emphasized in its decisions, that having recourse to Member States' domestic law in order to limit the scope of provisions of Community law undermines the unity and effectiveness of that law and cannot, therefore, be accepted. Consequently, the fact that a body has or has not, under national law, legal personality separate from that of the State is irrelevant in deciding whether it may be regarded as a public undertaking within the meaning of the directive."*

Besides repeating a well-known Community principle, this paragraph may also be read as an indication from the Court that it was not willing to take account of individual structures that are likely to characterise the public authority/undertaking-sphere of the Member States.

Once again the Court was given the opportunity to set limitations on the scope of the powers the Commission was trying to create for itself under Article 90, but the Court let the chance pass. The judgement can thus be seen as confirmation of the "interpretation-policy" laid down in the case dealing with the validity of transparency directive. What is remarkable about the two cases[21] is not only that the Court avoided setting any specific limitations on the Commission's powers under Article 90, but, even more so, that it avoided defining these powers. The Court was given the opportunity twice but did not take it. It would seem natural to assume that the Court did not want to put any strings on the shoulders of Commission in its efforts to create a policy in the area of Article 90.[22] Moreover, it would also seem natural to assume that the Commission read these signals and felt encouraged to continue.

[21] Case 188-90/80 and Case 118/85.
[22] Not least given the successes the Commission had accomplished in respect to Articles 85 and 86.

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Chapter 4

Telecommunications

The developments that have taken place in the telecommunications sector have had a significant influence on the scope of Article 90. In this chapter the developments up and until the adoption of the so-called Terminals and Services directives are summarized as well as the main provisions of two directives. In the last part of the chapter, the recitals of the directives are analysed.

Developments in the telecommunications sector

Prior to the launching of its 1987 Green Paper on the Development of the Common Market for telecommunications Services and Equipment,[23] the Commission had initiated various efforts for an examination of the structure of telecommunications at Community level.[24] The publication, however, in June 1985 of the White Paper proposing legislative action for the completion of the internal market by 1992[25] added new momentum to the Commission's efforts. The White Paper stressed that the telecommunications market should be "free of obstacles at Community level". Following the Council's approval of the text of the Single European Act and the subsequent ratification by all the Member States, the Commission was, thus, able to incorporate a telecommunications plan of action into the 1992 programme. The initial step of this plan was the publication of the Green Paper.

At the time of publication, there was a global trend towards liberalisation, privatisation and competition in telecommunications. On the basis of this trend, the Green Paper described the state of telecommunications in the EC which varied from Member State to Member State. Some sort of liberalisation or privatisation was commenced on a national level in almost all Member States, but the

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[23] "Towards a Dynamic European Economy: Green Paper on the Development of the Common Market for Telecommunications services and Equipment", COM(87) 290, 30 June 1987.
[24] Readers are referred to Colin Overbury's and Piero Ravaioli's article in [1989] Fordham Corporate Law Institute 313 - 331 for an overview of these efforts.
[25] White Paper concerning the completion of the Internal Market, COM(85)310.

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process was uneven. The most far-reaching step was taken in the United Kingdom in 1981 with the privatisation of telecommunications and the creation of British Telecom. In most of the other States, liberalisation/privatisation was still on the initial step of being discussed and planned.[26] Despite these efforts, telecommunications in all the Member States were still characterised by being vested in legal monopolies in the form of privileged rights. In the Green Paper the Commission concluded (among other issues) that the privileged position of the various national telecommunication bodies in the Member States was unnecessarily restrictive and that the position enjoyed by them should be liberalised to allow for greater competition.

By early 1988, the Commission considered that the reaction to the Green Paper had been sufficiently wide and positive to permit it to set out a programme of action to implement the Green Paper both as regards measures to be undertaken by itself under the competition rules and its general mandate as regards proposals to the Council.[27] Although most of the measures under the programme had to be adopted by the Council after a proposal from the Commission, the two measures which touched most directly on competition issues were adopted by the Commission in exercise of its legislative powers under Article 90(3), namely the directive on competition in the market for terminal equipment of May 1988 and the directive on competition in the market for telecommunications services of June 1989. With these two directives the Commission sought to liberalise (part of) the telecommunications sector by drawing the line between markets which could legitimately be subject to (continued) monopoly rights and those markets which must be opened to competition.[28]

As to the propriety of using Article 90 directives as the legal basis for liberalisation instead of Council legislation directed at harmonising national laws, Sir Leon Britton, at that time Vice-President of the Commission and Commissioner

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[26] See Overbury's and Ravaioli's article for a detailed summary of the process in each Member State, footnote 24.

[27] Communication from the Commission, COM(88) of 9 February 1988. This Communication should be viewed in connection with the Council's Resolution of June 30 1988; OJ 1988 C 257/1.

[28] The programme for the implementation of the Green Paper did not concern mobile telephony and paging services, and mass communication services such as radio or television.

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responsible for Competition policy, said the following on a conference in Amsterdam in April 1989:

"It has sometimes been argued that liberalisation should be based on harmonisation directives by the Council of Ministers of Member States rather than on directives by the Commission. Such arguments are based on the assumption that the Commission has a choice between the different procedures available. This is not so. The liberalisation of telecommunications markets implies in the first place the application of existing Community rules.

Article 90 of the Treaty of Rome obliges the Commission to monitor enterprises under State ownership or those in a privileged position because they have been granted a special or exclusive right. Member States may not enact or maintain, in respect of such enterprises, measures contrary to the rules of the Treaty.

After careful examination of the situation in the telecommunications sector, the Commission identified several infringements of the rules on competition, free circulation of goods and free provisions of services. It could have started individual actions against Member States. But that would have resulted in much duplication and delay. The fact was that we were facing a general problem and a global approach was obviously necessary. That is why it was appropriate to use Commission directives to open up the telecommunications markets to competition."[29]

[29] "Competition in Telecommunications", address by Sir Leon Brittan at the 2nd International Conference on Telecommunications, Amsterdam, 18 April 1989.

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The telecommunications directives

As mentioned, the Commission's aim by adopting the two aforesaid directives was to liberalise (a major part of) the telecommunications sector by drawing the line between markets which could legitimately be subject to (continued) monopoly rights and those markets which must be opened to competition.[30] In the case of terminal equipment, the line was drawn by defining terminal equipment as equipment connected to the termination point of the public telecommunications network (for example telephones or modems) and requiring a phased withdrawal (up to June 1990) of privileged rights over the importation, marketing, connection, bringing into service and maintenance of terminal equipment, while permitting the maintenance of national monopolies over the provision of network. In the case of services, the Commission required the withdrawal (by 1991) of privileged rights over the supply to the public of all telecommunications services save voice telephony (and certain packet or switched data services for a limited period of time). The Commission sought to justify these prohibitions in the preamble to each directive with an explanation of how the existing monopoly rights infringed Article 90 in conjunction with Articles 3, 5, 30, 37, 59 and 86. In the Services directive, Article 90(2) was invoked by the Commission to exempt voice telephony on the grounds that "the opening-up of voice telephony to competition could threaten the financial stability of telecommunications organisations" and thus put the provision of universal service at risk.[31]

Furthermore, of significance in both directives was the separation of regulatory and operational functions, both of which had traditionally been enjoyed by the telecommunications organisations to which the Member States had granted privileged rights. The directives required that Member States must entrust the tasks of drawing up specifications (for example equipment standards), granting type approval (market authorisation for terminal equipment) and operating licences (for service providers) and surveillance of usage conditions (use of the network) to a body independent of the aforementioned organisations. The sepa-

[30] Some of the markets in the telecommunications sector that according to the directives still could be subject to monopoly rights would later be reviewed by the Commission, for example the market for voice telephony.

[31] However, the Commission stated in the Services directive that the voice telephony exemption would be subject to review in 1992.

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ration of regulatory and operational functions was seen as necessary to avoid conflicts of interest. Finally, the Commission was in both directives of the opinion that the organisations holding privileged rights in the telecommunications sector had been able to impose long-term contracts on their customers and that these contracts would prevent the introduction of free competition from having a practical effect within a given period. For this reason the directives proscribed that the customers in question should be able to terminate their contracts with a certain notice.[32]

Analysis of the recitals of the directives

In light of the issues discussed and analysed in this dissertation, the two telecommunications directives are of particular importance because they constitute the first application, in practice, of Article 90 to the very existence of privileged rights. In the following the Commission's reasoning for requiring the abolition of privileged rights in the telecommunications sector will be analysed. The examination will be limited to the recitals of the directives since the Commission's reasoning is contained therein. Only those provisions which are considered of relevance for the context are analysed.

The directives do not use the expression 'privileged' rights but refer instead to 'special and exclusive' rights. As it will become apparent in the analysis of the challenge against the directives, the Court placed some emphasis on the distinction (or rather: lack of it) between a special and an exclusive right.[33] However, for the purpose of the analysis in this chapter this distinction is regarded of less importance and the term privileged rights will be used to cover both types of rights.

The Terminals directive

[32] Besides the liberalisation measures invoked by the Commission, the Council has enacted several harmonisation measures in the telecommunications sector, for example Council Directive 90/387/EEC on the establishment of the internal market for telecommunications services through the implementation of open network provision, OJ 1990 L192/1.
[33] Cf. chapter 5 below.

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In recital 1, the Commission stipulates that telecommunications are in all the Member States subject to legal monopolies granted in form of special or exclusive rights to one or more bodies responsible for providing and operating the network infrastructure and related services. The Commission then continues by stating that those rights, *however*, often go beyond the provision of network utilization services and extent to the supply of user terminal equipment for connection to the network.

Whereas the first statement is of factual character, the second statement seems to include more than just a factual observation by the Commission. Already by using the word "however" and then emphasising that privileged rights in the telecommunications sector go beyond the legal monopoly for the provision of a specific type of services (namely: network utilization services), there is an indication that the privileged rights in this sector have, in the eyes of the Commission, been stretched too far by the Member States. Keeping this indication in mind and since it is stressed that the privileged rights for telecommunications go beyond the provision of *network utilization services*, there seems to be basis for the conclusion that privileged rights for the provision of those specific services constitute an acceptable legal monopoly in the telecommunications sector whereas privileged rights constituting related but separate legal monopolies in that sector, such as a monopoly for terminal equipment, are not acceptable.[34]

In recital 2, the Commission acknowledges that several Member States had in response to the technical and economic developments in telecommunications sector already reviewed their grant of privileged rights, but there is an indication (although not explicitly stated) that these revisions had, in the eyes of the Commission, not been sufficient to allow consumers a free choice between the various types of equipment available. Thus, the statement seems to imply that

[34] Compare with the prohibition against the reservation, without any objective necessity, of an ancillary activity on a particular market by an undertaking holding a dominant position on a neighbouring but separate market, as stipulated by the Court in Case 311/84 *Telemarketing*, cf. chapter 5 below. By the time of the enactment of the Terminals directive, the Court had not rendered its ruling in Case C-18/88 *RTT v GB-Inno-BM* (judgment of 13 December 1991), cf. chapter 5 below.

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the Commission wished to underline that it had observed the principle of proportionality in the sense that it would have abstained from invoking a measure on Community level had the efforts on national levels been sufficient.[35]

The free movement provisions

Article 30 is invoked by the Commission in recital 3. It simply stated that the grant of privileged rights can, and often does, lead to restrictions on imports from other Member States. There are no further references to Article 30 in the directive and it is noticeable that the Commission does not in any way attempt to specify specific infringements of the Article due to privileged rights granted by Member States in the telecommunications sector, not least in the market for terminal equipment. Moreover, since no specific infringements are stipulated there is no examination of whether Article 36 can be applied or the mandatory requirements recognised in the case law of the Court.

Recitals 4, 5 and 6 all deal with Article 37. In recital 5 it is stipulated that the *exercise* by national telecommunications monopolies of their privileged rights relating to (importation and marketing of) terminal equipment is not compatible with Article 37. However according to recital 6, the Member States must remedy this infringement by the *abolition* of these rights and not simply by instructing the monopoly undertakings to exercise the rights in less restrictive way. [36]

Recital 7 deals with Article 59 and follows more or less the same track as recital 3 concerning Article 30. It is simply stated by the Commission that the maintenance of terminals is a service within the meaning of Article 60 and accordingly the service must be provided freely. There is no explicit mentioning as to a possible infringement of the Article due to privileged rights granted by Member

[35] Besides the principle of proportionality, it may also be said that the Commission is indicating that it has observed the subsidiarity principle. This principle was, however, not of the same magnitude in 1988 as it is today.

[36] In some respects this requirement is in accordance with the Court's prior case law on Article 37. See chapter 5 for elaboration on this case law. It is more surprising that the Commission connects the abolition of privileged rights concerning the importation and marketing of terminal equipment with the abolition of exclusive rights concerning the provision of installation and maintenance services. Article 37 concerns (at least in theory) goods, not services.

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States to telecommunications organisations. The only qualification is a statement that the service in question can not from a commercial point of view be dissociated from the marketing of terminals.

Article 90

Article 90 is dealt with in recitals 8, 9, 10 and 11. The first three recitals basically contain the Commission's reasoning of why an Article 90(3) directive is the appropriate instrument to achieve the purposes specified in the Terminal equipment directive. Of more particular relevance, in the light of the issues raised in this dissertation, is recital 11 which concerns Article 90(1) and (2).[37] In this recital, after concluding that telecommunications organisations are embraced by the concept of an undertaking according to Article 90(1), the Commission makes a statement of significant importance by stipulating the following:

"...(T)he grant and maintenance of special and exclusive rights for terminal equipment constitute measures within the meaning of that Article.[38] The conditions for applying the exception of Article 90(2) are not fulfilled. Even if the provision of a telecommunications network for the use of the general public is a service of general economic interest entrusted by the State to the telecommunications bodies, the abolition of their special or exclusive rights to import and market terminal equipment would not obstruct, in law or in fact, the performance of that service. ..."

The quotation may be interpreted as dealing not only with the question of whether Community law, Article 90 in particular, is able to prohibit the existence of privileged rights but, even more so, also with the question of to what extent Community law allows such rights at all. As to the first question, the answer seems to lie in the first sentence of the quotation where the Commission simply states that privileged rights for terminal equipment constitute *measures* within the meaning of Article 90(1). Keeping in mind that such measures are

[37] In recital 9 it is mentioned that the market in terminal equipment is still governed by a system which allows competition to be distorted and that this situation continues to produce infringements of the competition rules. The competition rules are applied in recitals 12 and 13.
[38] Article 90(1).

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prohibited if contrary to a Treaty rule, the conclusion must be that privileged rights can be prohibited as such. The concept of a "measure" is thus not limited to include only the exercise of such rights or even the conditions according to which the rights are set up but include also the very existence of the rights. If interpreted correctly, such a conclusion is in itself striking because the wording Article 90(1) seems to presuppose the existence of privileged rights.[39] What is, however, of even more interest is the possible answer to the second question. It is submitted that the quotation above leave room for two possible ways of answering the question posed.

The first way of answering runs as follows: Privileged rights are prohibited under Article 90(1) only if their existence in a specific case constitutes an infringement of another Treaty rule.[40] In case of an infringement, the undertaking holding the rights in question can claim the exemption provision in Article 90(2) and, if successful, avoid the abolition of its exclusive or special rights.[41] Thus, according to this way of answering the question posed, privileged rights are allowed unless prohibited due to the presence of specific circumstances. Since the existence of privileged rights, as a point of departure, is not considered prohibited *per se*, this way of reviewing the application of Article 90(1) seems to be (more or less)[42] in harmony with the above mentioned notion that Article 90(1) presupposes the existence of privileged rights. The qualification is only added that in some specific cases will the grant and maintenance of privileged rights be contrary to Community law. In other words, when considering whether the existence of a given privileged right is in accordance with Community, the point of departure is based on a presumption of legality.

The second way of answering the question posed is much more complex and in a sense reverse to the way suggested above. It may be deduced from the way the Commission has drafted recital 11. As the quotation above shows, Article

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[39] At least the conclusion was striking at the time when the directive was adopted.

[40] In some cases it may not be the very existence that constitute the infringement but merely the exercise of a privileged right.

[41] This does not, however, imply that the undertaking thereby obtains a general exemption from the application of the Treaty rules, the competition rules in particular, with regard to how the rights are exercised.

[42] Some commentators would probably not even accept this way of reviewing privileged rights, cf. chapter 9 below.

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90(1) and (2) are dealt with in the very same paragraph even though the two provisions do not have the same addressees. Immediately after the Commission has stated that privileged rights in themselves can constitute measures prohibited under Article 90(1), it engages directly into an analysis of whether the exemption provision in Article 90(2) can be applied without any application of Article 90(1) to the facts upon which the directive is based. There is thus an indication that it is the Commission's point of view that privileged rights are not allowed unless their existence is justified by Article 90(2). In other words, when reviewing whether the existence of a given privileged right is in accordance with Community law, the point of departure is a presumption of illegality. Should this interpretation be correct, it may be concluded that the role of Article 90(2) is essential since the provision is defining the conditions which allow Member States to grant or maintain privileged rights.

The quotation above of recital 11 seems to fit the interpretation as the following analysis will show. The first point that has to be determined is the type of legal monopolies in the telecommunications sector which are justified as such. In recital 11 it is stated that even if the provision of a network is a service of general economic interest entrusted by Member States to the telecommunications organisations (within the meaning of Article 90(2)), the abolition of their privileged rights with regard to terminal equipment would not obstruct the performance of that service. Since the directive deals with legal monopolies for terminal equipment there would be no need to refer to other, although related, legal monopolies (namely those concerning the provision of a network) if the former monopolies in themselves were justified according to Article 90(2). Thus, when reviewed out of context of each other it is only the monopolies concerning the provision of a network that are justified whereas monopolies with regard to terminal equipment are not. The second point to determine is if the latter monopolies nevertheless can obtain justification. The answer follows from the recital. Only if the operation of the former monopolies would be affected by the abolition of the latter monopolies could the latter obtain justification.[43]

The competition rules

[43] It must implicitly be understood that also this justification is based on Article 90(2).

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Recitals 12 and 13 deal specifically with the competition rules, Article 86 in particular. In recital 13 it is established that the telecommunications organisations each individually or jointly hold a dominant position on the relevant market(s) due to their privileged rights. The Commission then argues that the effect of these rights is a restrictive conduct prohibited by Article 86. It further argues that the privileged rights, *at all events*, give rise to a situation that is contrary to Article 3(g)[44] which requires competition not be distorted and *a fortiori* not to be eliminated. The Commission refers to the obligation under Article 5 which requires Member States to abstain from measures that result in such a situation. In the last paragraph of recital 13, the Commission concludes that *exclusive* rights (*special* rights are not mentioned) to import and market terminal equipment must be regarded as incompatible with Article 86 in conjunction with Article 3 and that the grant and maintenance of such rights by a Member State is prohibited under Article 90(1).

A number of considerations may be deduced from the Commission's reasoning. First of all, contrary to recitals 3 and 7 dealing with Articles 30 and 59 respectively, the Commission is much more specific by explicitly stating that the exclusive rights are incompatible with Article 86. Secondly, it is once more repeated that Article 90(1) can prohibit the very existence of such rights. Thirdly, there is an indication in the way the Commission argues, in particular by the use of the words "at all events", that the grant and maintenance of privileged right is prohibited almost *per se* since the existence of such rights automatically results in the elimination of competition on the relevant market(s) which is contrary to Article 3.[45]

The Services directive

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[44] When the directive was adopted: Article 3(f).

[45] This indication is not in full harmony with the provisions of recital 11 concerning the application of Article 90(2). However, the application of that Article is probably to be read into the Commission's application of the competition rules in conjunction with Article 90(1).

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Similar to recitals 1 and 2 of the Terminals directive recitals 1, 2, 3 and 4 constitute a sort of introduction to the directive. In recital 2 it is thus repeated that telecommunications are in all the Member States vested in organisations holding privileged rights. Recital 3 concludes that these organisations are undertakings within the meaning of Article 90(1) and in recital 4 the Commission acknowledges that several Member States have already revised the privileged rights held by the organisations although the process has been uneven in the sense that the privileged rights which are still in force do not cover the same type of telecommunications services.[46]

The free movement provisions

In recitals 5 to 12 the Commission applies Article 59. The way of application is much more extensive than the application of the various Treaty Articles, including Articles 30 and 59, in the Terminal directive. In recital 5 the Commission initial states that the granting of privileged rights *inevitably* restricts the provision of telecommunications services. The practical implications and effects of this restriction are stipulated in recital 6. The Commission then continues in recital 7 by examining whether the derogations to Article 59 (Articles 55 and 56 by reference from Article 66) can be invoked and reaches the conclusion that this is not the case. In recitals 8 and 9 the Commission examines whether the mandatory requirements recognised in the case law of the Court can be invoked in order to justify the restrictions on the free movement of telecommunications services caused by the privileged rights. In this respect the Commission is ready to recognise certain limited exemptions from the prohibition in Article 59; all dealing basically with the security of the network and data protection. Besides these exemptions the Commission is also ready to recognise that public service requirements can justify certain restrictions on the free movement of telecommunications services.[47] Finally, in recital 12 the Commission concludes that Article 59 requires the abolition of all other restrictions on the free movement of

[46] It is noticeable that the Commission remarks that the Member States have ensured the performance of public service tasks when these revisions took place.

[47] Cf. recital 10. Recital 11 deals specifically with the provision of packet or circuit switched data services. The Commission is ready to accept certain restrictions on the provision of these services until 1 January 1996.

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telecommunications services and that the maintenance or introduction of privileged rights which restrict the free movement of services beyond those exceptions already mentioned constitutes a breach of Article 90 in conjunction with Article 59.

The conclusion from the analysis of the Terminals directive that Article 90 can prohibit the existence of privileged rights is confirmed by the recitals dealing with Article 59. There is, however, no clarification as to whether the approach to this issue is based on a presumption of legality or illegality. In favour of an affirmation of the latter presumption speaks the statement in recital 5 that privileged rights *inevitably* restricts the provision of services. However, in favour of the former presumption speaks the thorough examination in recital 6 of the practical implications and effects of the specific restrictions that are caused by privileged rights for telecommunications services. In any event, it is of interest to note that, contrary to the recitals of the Terminals directive, the Commission has engaged into an extensive examination of the possibility of applying derogation provisions.[48]

The competition rules

The competition rules are applied by the Commission in recitals 13 to 17. To some extent these recitals represent a repetition of the findings in recitals 13 and 14 of the Terminals directive. There is, however, one amendment of interest. As in the Terminals directive it is established that the telecommunications organisations individually or collectively hold a dominant position on the relevant market(s) due to their privileged rights for the operation of the network. As a further addition to this finding, it is in recital 15 stated that this dominant position is strengthen by the extension of the rights to include the provision of *telecommunications services*. The Commission then move on to state that the privileged rights, *at all events*, give rise to a situation that is contrary to Article 3(g)[49] and furthermore refers to the duty on Member States enshrined in Article 5. Finally, in recital 17 the Commission concludes that *exclusive rights* to telecommunications services are incompatible with Article 90(1) in conjunction with Article 86.

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[48] Other than Article 90(2). Cf. below for the application of this provision.
[49] When the directive was adopted: Article 3(f).

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In general recitals 13 to 17 of the Services directive call for the same considerations as recitals 12 and 13 of the Terminals directive with the addition, however, of the statement in recital 15. This statement confuses the answer to the question of whether review of privileged rights shall be approached on the basis of a presumption of legality or illegality. The repetition from the Terminals directive that privileged rights *at all events* give rise to a situation contrary to Article 3 indicates an approach based on the presumption of illegality whereas the statement in recital 15 indicates the opposite. If it is the strengthening of a dominant position that causes the breach of the competition rules, this calls the conclusion that the privileged rights in question are prohibited on the basis that they in these specific circumstances constitute a breach of Community law.[50]

Article 90(2)

Recital 18 concerns the application of Article 90(2).[51] The wording of the recital is as follows:

"Article 90(2) of the Treaty allows derogations from the application of Articles 59 and 86 of the Treaty where such application would obstruct the performance, in law or in fact, of the particular task assigned to the telecommunications organizations. This task consists in the provision and exploitation of a universal network, ... (T)he financial resources for the development of the network still derive mainly from the operation of the telephone services. Consequently, the opening-up of voice telephony to competition could threaten the financial stability of the telecommunications organizations. ...."

In several ways, the quoted statement is of significance. First of all, the Commission does not, as in the Terminals directive, apply Article 90(1) and (2) in the very same paragraph. This indicates support for the conclusion that review of privileged rights should be approached on the basis of a presumption of legality. Secondly, by saying that Article 90(2) allows derogations from the appli-

[50] On the basis of a sort of *Telemarketing* abuse, see Case 311/84, chapter 5 below
[51] Recitals 19 and 20 concern also the application of Article 90(2) but in the context of the analysis conducted in this chapter these recitals are not considered of relevance.

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cation of Articles 59 and 86, the conclusion may be drawn that Article 90(2) provides an extra defence, besides mandatory requirements and Articles 55 and 56, to the application of Article 59.[52] Consequently, Article 90(2) must also provide an extra defence to the application of Article 30.[53] Thirdly, it is noticeable that the existence of privileged rights relating to voice telephony is justified on the ground that free competition for the provision of that service would threaten the financial stability of the telecommunications organizations. It must be implicit in that statement that such rights could not obtain justification on their own on the basis of Article 90(2). Only because they provide the necessary economic foundation with regard to the privileged rights which on their own are justified, namely those rights relating to the provision and exploitation of a universal network, are the rights relating to voice telephony justified.

Chapter 5

The case law

This chapter is divided into two parts. The first part contains an analysis of the 'early' case law of the Court on Article 90 and developments which took place in related areas of Community law. The second part contains a summary of the case law beginning with the so-called *Terminals* case and ending with *Corbeau*.

The cases in the second part are dealt with in a chronological order because it is considered that such an order in itself is a helpful mean to assess the judgments. These cases are not analysed in the present chapter but in separate chapters below. The reason for this is that most of the cases both concern the application of Article 90 in conjunction with the competition rules and in conjunction with the free movement provisions and it is believed to be helpful that the two 'sets' of rules are analysed in separate chapters. It is hoped, however, that this approach will not be to tiresome for the reader. Judgments rendered subsequent to *Corbeau* are reviewed in the aforementioned 'analytical' chapters.

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[52] In contrast, Article 90(2) provides the only defence to the application of Article 86.
[53] Besides mandatory requirements and Article 36.

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Part I: The 'early' case law and related developments

It was not until the early 1990s that the case law with regard to privileged rights was thoroughly developed. Prior to this development, the Court's case law concerning the compliance of privileged rights with Community law was of sporadic nature. However, during the 1970s and 1980s significant developments in the case law of the Court took place in related areas of Community law, especially concerning the free movement provisions and Article 86, and it is submitted that these developments influenced the Court's later view on the application of Article 90 with regard to privileged rights. In the following some of these developments will be analysed, although only for the parts which are considered of relevance for the context. Initially, the Court's ruling in the case known as *Sacchi*[54] will analysed since this case represents the first judgment concerning the application of Article 90 in the context of privileged rights.

Sacchi

One of the main issues of the case concerned the application of Article 90 in conjunction with Article 86 to the fact that privileged rights creates a monopoly and thereby, it can be argued, places the holder of the rights in a dominant position.[55] The attention devoted to this issue should be seen in light of a judgment the Court had rendered approximately one year before its ruling in the Sacchi case. In the *Continental Can*[56] case the Court had applied Article 86 to prohibit the acquisition by a dominant firm of most of the shares in a potential competitor on the ground that the acquisition would substantially reduce competition.[57]

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[54] Case 155/73 [1974] ECR 409.

[55] This was later confirmed in the Court's ruling in *Telemarketing*, cf. below.

[56] Case 6/72 *Continental Can v Commission* [1973] ECR 215.

[57] The case came before the Court as a challenge to a Commission decision to that effect. The Court annulled the Commission's decision on the grounds that the Commission had failed to supply a sufficient sophisticated economic analysis. However, on the point of principle the Court confirmed the Commission's view that a merger may, due to its impact on competition, constitute an abuse under Article 86.

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Drawing on Article 3(g)[58] the Court held that, in the view of the distortion consequent on a merger, such an action (agreement) falls foul of Community law where a dominant firm extends its power through merger in a manner that *substantially fetters competition*. Thus, it could be argued that based on *Continental Can* any action that has the effect of reducing competition to a substantial extent (in the relevant market/sector) will be contrary to Article 86 even though no specific abuse results from that action.

Sacchi came before the Court as a preliminary ruling requested by an Italian court. Under Italian law Radio Audizione Italiana (RAI) held a legal monopoly for television transmission and at the same time it was prohibited for any other undertaking to receive, for the purpose of retransmission, audio-visual signals transmitted either from the national territory or from foreign stations. Thus, RAI held an exclusive right and Mr Sacchi challenged that right by alleging that it did not conform with Community law insofar concerned cable television. The challenge was brought forward in criminal proceedings instituted against Sacchi for breaching the monopoly rights of RAI.

The Italian court raised no less than 11 questions for the Court of Justice to answer, including a number of questions concerning the provisions relating to the free movement of goods. However, the Court found that the transmission of television signals comes within the Treaty rules relating to services and consequently the Court did not assess the question whether the exclusive rights granted by the Italian State to RAI constituted a breach of the principle contained in the aforementioned provisions. It did, however, state that RAI's monopoly would contravene the principle of free movement of goods if the monopoly was used to discriminate against foreign providers of materials necessary for the transmission of television.[59] When reviewing this statement in hindsight of the Court's case law concerning the free movement of goods, it is of interest to note that the Court seems to have disregarded the fact that the existence of RAI's exclusive rights might, to some (indistinctly) extent, imply restrictions on trade within the Community. In this context it must be recalled, however, that at

[58] At the time of the judgment: Article 3(f).

[59] Unfortunately, the Court did use the opportunity to examine the compatibility of RAI's exclusive right in the light of the rules relating to services although it, as mentioned, had found that these were the Treaty provisions of relevance.

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the time of its judgment in *Sacchi* the Court had not yet delivered its judgment in the *Dasonville* case[60] which significantly expanded the application of the principle of free movement of goods (and later influenced also the principle of free movement of services).

The Court went on to assess whether "exclusive rights granted by a Member State to a limited company in relation to television broadcasts, and the exercise of such rights, are compatible with the competition rules". The answer was given in ground no. 14 of the judgment:

> *"Article 90(1) permits Member States inter alia to grant special or exclusive rights to undertakings.*
>
> *Nothing in the Treaty prevents Member States, for considerations of public interest, of a non-economic nature, from removing radio and television transmissions, including cable transmissions, from the field of competition by conferring on one or more establishments an exclusive right to conduct them.*
>
> *However, for the performance of their tasks these establishments remain subject to the prohibitions against discrimination and, to the extent that this performance comprises activities of an economic nature, fall under the provisions referred to in Article 90 relating to public undertakings and undertakings to which Member States grant special and exclusive rights.*
>
> *The interpretation of Articles 86 and 90 taken together leads to the conclusion that the fact that an undertaking to which a Member State grants exclusive rights has a monopoly is not as such incompatible with Article 86.*
>
> *It is therefor the same as regards an extension of exclusive rights following a new intervention by this State."* (Emphasis added).

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[60] Cf. below.

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If not read in the context of the facts of the case and the observations submitted by the parties, the link between the five paragraphs of the quotation does not appear altogether clear. Sacchi had argued that Article 90(1) is infringed when a measure enacted by a State (the grant of an exclusive right) "aim at allowing a public undertaking to achieve a result which undertakings are prohibited from obtaining". This line of argumentation must be understood as meaning that Article 90(1) prohibits Member States from placing privileged undertakings in a position which enables them to infringe the competition rules whether or not such an infringement has actually occurred. The mere fact that a measure enacted by a State has placed the privileged undertaking in such position constitutes a breach of Article 90(1). The infringement Sacchi had in mind was abuse of dominant position and it is implicit in the argumentation that the grant of exclusive rights to RAI necessarily implied the creation of a monopoly and therefore placed that undertaking in a dominant position which it would be able to abuse. Taken in a larger context, Sacchi's argumentation raises the question whether the grant of privileged rights can be prohibited under Article 90(1).

The Court's reply follows from the first paragraph of the quotation where it simply stated that "Article 90(1) permits Member States *inter alia* to grant special or exclusive rights", or in other words: the grant of privileged rights is not prohibited under Article 90(1) because that provision presupposes their existence. The Court was, however, not ready to allow Member States to grant such rights without any qualifications. It follows from the second and third paragraph of the quotation that privileged rights have to be justified on public interest grounds of non-economic nature[61] and that an undertaking holding such rights is, with regard to their exercise, not immune to the application of the Treaty rules. As to the latter, the same applies for Member States if they are responsible for the way an undertaking exercises its privileged rights.

[61] It should be recalled that the judgment was delivered in 1974 and thus almost five years before the *Cassis de Dijon* judgment, cf. below. Nevertheless, the qualification seems to resemble the "Cassis de Dijon" type of mandatory requirements which is applied on restrictions on the free movement of goods. There is, however, no mentioning of the principle of proportionality in the sense that the consequent restriction of competition, which the grant of privileged rights necessarily implies, must not exceed what is necessary in order to attain the public interest ground in question.

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The fourth paragraph of the quotation, dealing more specifically with Article 86, should also be read in light of Sacchi's argumentation. With reference to the Court's reasoning in Continental Can, Sacchi argued that Article 86 is aimed not only at practices which may cause damage to consumers directly, but also at those which are detrimental to an effective competition structure. Since the grant of an exclusive right implies the creation of a monopoly and since a monopoly "involves the elimination of competition, abuse of dominant position arises from the existence of the monopoly". Thus, Sacchi applied *Continental Can* to the grant by the Italian State of exclusive rights to RAI in the sense that since the monopoly conferred on RAI necessarily involved the elimination (or substantial restriction) of competition, Article 86 had been infringed and the Italian State was responsible for this infringement under Article 90(1). The Court rejected these arguments simply by stating that even though the grant of exclusive rights implies the creation of a monopoly this does not in itself lead to an infringement of Articles 86 and 90 taken together.

Although the line of Sacchi's argumentation invited the Court to address the question whether an undertaking which holds a privileged right in a "substantial part of the common market"[62] necessarily must be considered to be in a dominant position within the meaning of Article 86, the Court did not (explicitly) review this question. However, the wording of the fourth paragraph of the quotation seems to imply an affirmative answer, at least in respect of RAI's exclusive rights. Otherwise, it would have seem natural if the Court had rejected Sacchi's arguments simply by stating that RAI could not be considered to be in a dominant position within the meaning of Article 86.

The situation examined in paragraph five of the quotation concerning an extension of exclusive rights (and thereby the inherent monopoly) by a new intervention of the State must also be reviewed in light of the facts of the case. In the criminal proceedings instituted against Sacchi he was being charged for breaching RAI's monopoly in respect of cable television. From the facts, as they were presented to the Court, it was not altogether clear whether RAI's original monopoly rights had been extended to include not only transmission of television signals by air but also by cable. Sacchi argued that if this was the case an abuse

[62] As defined by the Court.

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of dominant position was, in any event, constituted by such an extension. Once again reference was made to *Continental Can* as Sacchi interpreted that judgment of imposing a sort of standstill obligation on undertakings already in a dominant position in the sense that they should be prohibited from strengthening this position to an extent which would impair an effective competition structure. Thus, Sacchi compared the extension of monopoly rights with the acquisition by a dominant firm of a competitor in that both situations lead to impairment of competition. Once again the Court rejected Sacchi's arguments. It replied by saying that if the creation of a monopoly through the grant of exclusive rights does not in itself lead to an infringement of Articles 86 and 90, the same holds true for an extension of those rights by a new State measure. It is of interest to note that the Court did not add any qualifications to this statement. It could be argued that the extension of exclusive rights by a Member State implies, in principle, the creation of new (but related) monopoly. Since the grant of exclusive rights in the first place has to be justified on grounds of public interest according to the Court, cf. above, why should the extension of such rights not be conditioned by the same qualification. The Court might have read the qualification into the context of ground no. 14 of the judgment and thus was of the opinion that a repetition was not needed but the wording does not provide an indication to that effect.

In ground no. 15 of the judgment the Court engaged into a brief analysis of the role of Article 90(2). It held that undertakings embraced by that provision are subject to the application of the Treaty rules with regard to their *behaviour* as long as it is not shown that the application of said rules are incompatible with the performance of the tasks of these undertakings in which case the exemption provision in Article 90(2) may be invoked. On the basis of this interpretation it may be deduced that the Court regarded Article 90(2) as dealing with the exercise rather than the existence of privileged rights. The Court did not read the provisions of Article 90(1) and (2) in context of each other in the sense that it could have linked the justification for the grant of privileged rights (reasons of public interest), introduced in the Court's interpretation of Article 90(1), with the provision of Article 90(2) that permits Member States to confer on undertakings privileged rights to which the Treaty rules can not be applied if certain conditions are fulfilled (the undertaking in question shall be entrusted with the

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operation of services of general economic interest etc.). It could of course be argued that if a Member State entrusts an undertaking with the operation of "services of general economic interest" such an entrustment is necessarily based on grounds of "public interest" but the lack reference by the Court to its interpretation of Article 90(1) when interpreting Article 90(2) does not facilitate that the Court had this link between the two provisions in mind.[63]

Developments in related areas of Community law

Article 30

It would appear from the Court's ruling in *Sacchi* that the existence of privileged rights is not in itself contrary to the free movement provisions, including those provisions relating to goods. However, since the existence of such rights implies the creation of monopolies, trade within the Community must to some extent be affected by the granting of the rights. Clearly, if the rights are granted with the purpose of being exercised in a discriminatory manner or the privileged undertaking on its own initiative exercises the rights in such a way, trade is restricted. However, even though this is not the case, the implications on trade due to the existence of the privileged rights might still be of restrictive nature, although limited to an indistinctly extent. Given the case law of the Court as we know it today with regard to the free movement provisions, it might seem strange that the Court did not touch upon this issue in its ruling in *Sacchi*. However, when the Court rendered its judgement the well-known Dasonville formula and Cassis de Dijon principles were not yet part of Community law due to the simple fact that the judgements concerned had not been delivered by the Court.[64]

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[63] Such a link would not contain a contradiction even though the Court had stated that the grounds of public interest have to be of *non-economic nature* whereas Article 90(2) concerns undertakings entrusted with the operation of services of *general economic* interest. An undertaking may be granted privileged rights for reasons of non-economic nature but that does not necessarily imply that some sort of economic activity is not involved.

[64] *Sacchi* was delivered on 30 April 1974 whereas the *Dasonville* judgement is of 11 July 1974 and the *Cassis* judgement was rendered on 20 February 1979.

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Although the Dasonville formula is a well-known part of Community law today some remarks should be devoted to the reasoning behind this formula in order to determine the role that the formula might have played in the context of developing a practice with regard to privileged rights.

Little more than two months subsequent to its ruling in Sacchi, the Court rendered its judgement in *Procureur du Roi v Dasonville*.[65] In this ruling the Court set out what has come to be regarded as its standard definition of the scope of free movement of goods, stating that provisions in this respect prohibit "all trading rules enacted by Member States which are capable of hindering, directly or indirectly, actually or potentially, intra-Community trade".[66] The litigation arose from Belgian legislation that required an importer of Scotch whisky to hold a certificate of authenticity by the British customs authorities. Whisky had reached Belgium from Scotland via France, where no such certificate was required, and consequently the consignment was not accompanied by the necessary documentation. As a result of the certification requirement, the Belgian market was effectively closed to the whisky importer. It was argued that the Belgian law contravened Article 30 and the matter was referred to the Court for a preliminary ruling. Although it was plain that only importers of whisky direct from Scotland could readily satisfy Belgian law and that this led to an obvious distortion in patterns of trade in Scotch whisky, the Court took the opportunity to lay down the formula. The striking feature of the Court's interpretation of the free movement provisions and the phrasing of the formula in *Dassonville* is that the Court concentrates on the *effect* of the national practice in question, not its form.

Given the sweeping scope of the Dassonville formula, it is well known that the Court in subsequent cases had to introduce qualifications to the formula.[67] In the case *Rewe-Zentrale v Bundesmonopolverwaltung für Branntwein*,[68] better known as the *Cassis de Dijon* case, the Court introduced the concept of *manda-*

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[65] Case 8/74 [1974] ECR 837.
[66] Paragraph 5 of the judgement.
[67] Although the Court in paragraph 6 of the *Dassonville* ruling had inserted some sort of "rule of reason" to the formula. In *Keck and Mithourd* the Court chose to "re-examine and clarify" the case law based originally on Dassonville, joined cases C-267 and C-268/91 [1993] ECR I-6097.
[68] Case 120/78 [1979] ECR 649.

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tory requirements. Given that the formula embraces not only national measures which have a distinctly effect on trade, i.e. by means of discrimination, but also measures which have an indistinctly effect in the sense that the measures were not intended to have restrictive effect but due to i.e. certain product requirements nevertheless distorts intra-Community trade, it became apparent that in some cases the national measures should be accepted. Thus, in *Cassis de Dijon* the Court declared that national measures necessary to satisfy mandatory requirements will be in compliance with Community law irrespective of their (indistinctly) restrictive effect on trade.[69] The Court emphasized that the principle of proportionality is a part of the concept of mandatory requirements.

Article 37/ Manghera

Article 37 requires Member States that posses state monopolies of a commercial character to adjust such monopolies in order to ensure that no discrimination based on nationality exists regarding the conditions under which goods are procured and marketed. The Article may be viewed as one of the elements in the Community's initiative against exclusivity conferred by the state. From this perspective it also represents a further example of the interrelation of provisions located in different parts of the Treaty that contributes to the complexity of the application of Community law to state intervention in the market.

The scope of Article 37 is, however, uncertain. In *Sacchi* the Court determined that Article 37's place in the Treaty demonstrates that it refers only to trade in goods, not the provision of services. The Court did, however, not address the issue of the notion of *adjustment* which has been the object of some debate.[70] From one point of view it has been argued that although Article 37 is part of a chapter in the Treaty on the *elimination* of restrictions, this term has not been utilised with regard to the monopolies addressed in the Article which means that these monopolies should only be adjusted in order to ensure that they do not operate in discriminatory manner. Others have argued that a logical reading of

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[69] Cf. paragraph 8 of the judgment. See chapter 17 in Weatherill and Beamont *EC Law* [1995] 2nd ed. for a more detailed summary of the case and the principles.
[70] See Pappalardo, footnote 4 above (note 24 in his article in particular).

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Article 37 in context of related treaty provisions, Article 30 in particular, leads logically to a requirement that the exclusive rights vested in state monopolies must be abolished.[71]

In one of the early and (still) few cases dealing with the Article, the Court clarified some of issues which dominated the debate, although the scope of the Article still is not certain. The case, *Pubblico Ministerio v Flavia Manghera*[72] or better known simply as *Manghera*, concerned an exclusive right of importation of manufactured tobacco enjoyed by an Italian state monopoly. The Court held that Article 37 (1) had direct effect and that an exclusive right to import would discriminate against exporters from other Member States and was accordingly unlawful. In its ruling the Court held that:

> *"(A)article 37(1) of the EEC Treaty must be interpreted as meaning that ..... every national monopoly of a commercial character must be adjusted so as to eliminate the exclusive right to import from other Member States."*[73]

The quoted paragraph seems to have a direct impact on the interpretation of Article 90(1) in that it follows from the statement that Member States are prevented from granting exclusive rights for the import of goods from other Member States. However, it also seems to follow that a state monopoly limited to domestic products is unaffected by Article 37.

Some writers, thus, read the judgement as part of the Court's intention to place Article 37 alongside Article 30 as a means of securing the free movement of goods and that Article 37 has little (if any) vigour independent of Article 30.[74] Others give Article 37 a much more independent scope based on a interpretation of *Manghera*.[75] Although the judgement does not state that Article 37 requires the abolition of the exclusive rights vested in the monopolies concerned and

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[71] See Pappalardo ibid. for a more detailed summery of the different views on Article 37.
[72] Case 59/75 [1976] ECR 91. The judgement was delivered by the Court on 3 February 1976.
[73] Paragraph 13 of the judgment.
[74] Cf. Weatherill and Beamont (footnote 69) at page 873.
[75] See Pappalardo footnote 4 above and Panel Discussion *Legal Monopolies under the EEC Treaty* [1991] Fordham Corporate Law Institute 273-285.

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thereby, ultimately, the abolition of said monopolies, it is maintained by these commentators that the essence of the ruling must lead to that effect. The argument is that even though a state enterprise remains in business after the adjustment required by *Manghera* has been completed such a state undertaking will still maintain other exclusive rights. However, the argument runs, the elimination of an exclusive import right (in intra-Community trade) must necessarily imply the abolition of the 'whole' monopoly.

Competition law: Telemarketing

In *Telemarketing*,[76] the Court gave a preliminary ruling concerning the concepts of dominant position and abuse of such position. The facts of the case were that the Belgium company CBEM operated in the market for telemarketing in the sense that potential advertisers could hire CBEM to conduct such operations on their behalf. In this capacity CBEM placed orders for television advertisements to be shown on the television station RTL which had been granted a privileged right to broadcast. The orders were placed with the company IPB which acted as exclusive agent for RTL with regard to televised advertising aimed at the Benelux counties. Thus, IPB and RTL belonged to the same group and in 1983 CBEM concluded an agreement with IPB 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 the viewers was that of CBEM which made its telephone lines and team of telephonists available to advertisers. When the agreement expired, IPB notified advertisers that RTL would no longer accept advertising spots for telemarketing unless the number used in Belgium was that of IPB. In actions before the national court against IPB and RTL, CBEM claimed that the notice constituted an abuse of dominant position according to Article 86.

The national court posed two question to the Court of Justice. The first question dealt with the issue of applying the competition rules, Article 86 in particular, to a privileged undertaking. This issue had already been reviewed by the Court in *Sacchi* and the Court confirmed the finding of the judgment that privileged undertakings are subject to the competition rules. Thus, the Court stated

[76] Case 311/84 [1985] ECR 3261.

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that "Article 86 of the EC 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 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". By this statement the Court also seems to have confirmed what was not explicitly said in *Sacchi*, namely that an undertaking which holds a privileged right (in a substantial part of the common market) can be considered to be in a dominant position within the meaning of Article 86.

The second question regarded the issue of whether IPB and RTL had abused their dominant position. Based on an examination of CBEM's agreement with IPB and the conduct of the parties in the main action, the national court had concluded that CBEM was engaged in an activity ancillary to (television) advertising and was, for this activity (telemarketing), operating on behalf of advertisers rather than on behalf of the broadcaster (IPB and RTL). Thus, telemarketing constituted a neighbouring but separate market from that of television advertising and given that RTL and IPB occupied a dominant position on the market for the latter type of activity, the question arose whether they had abused that position by reserving to themselves, to the exclusion of any other undertaking, the ancillary activity comprised of telemarketing. The Court gave an affirmative answer stating that an abuse was committed within the meaning of Article 86 when the reservation of the ancillary activity could not be justified by objective needs.

As it may be recalled, in *Sacchi* the Court had ruled that an extension of a privileged right by a new intervention of the State does not constitute an infringement of Articles 86 in conjunction with Article 90. The Court did, however, not explicitly address the issue whether the extension have to be justified on grounds of public interest in the same way as the original grant of the right. The Court's judgment in *Telemarketing* facilitates an indication as to the clarification of this issue. If a privileged undertaking commits an abuse when it, without any objective necessity, extends its privileged right to include an ancillary activity, it may argued that an extension of the right by intervention of the State (also) constitutes an infringement of Article 86 in conjunction with Article 90 if

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the extension by the State is not justified by objective needs (grounds of public interest, cf. Sacchi).

Part II: Case law on Article 90

The Terminals case - France v Commission[77]

The content of the two telecommunications directives has already been the object of analysis. In July 1988, France brought an action for annulment of Articles 2, 6, 7 and 9 of the Terminals directive (which concerned telecommunications terminal equipment).

As previously mentioned, the directive was adopted by the Commission in May 1988 under Article 90(3) and provided in Article 2 that Member States which had granted special or exclusive rights for the importation, marketing, connection, bringing into service of telecommunications terminal equipment and/or maintenance of such equipment, were to ensure that those rights were withdrawn. As it may be recalled, the Commission had invoked Treaty Articles 30,37,59 and 86 together with Article 90 as the legal basis for its reasoning.

The main objection against the adoption of the directive was the Commission's power to act on the basis of Article 90(3). This power was challenged from different angles. First it was asserted that the Commission had acted *ultra vires* under Article 90(1) by requiring the elimination of special and exclusive rights. According to the French Government this provision presupposed the legality of such rights. Thus, this provision should prelude the Commission from holding that the granting of special and exclusive rights in itself amounts to an adoption of measures incompatible with the Treaty. A second argument related to the violation of the principle of proportionality. A third argument was that, even if the Commission had not violated Article 90(1), it had violated Article 90(3) because that provision could not allow for the use of a directive to rectify infringements instead of the procedure of Article 169. A fourth argument reproached the Commission for incorrect application of Articles 30,37,59 and 86

[77] Case C-202/88 [1991] ECR I-1223.

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of the Treaty. Finally, the Commission's powers were challenged as *ultra wires* in the sense that the Commission had in fact adopted a normative act regulating a specific sector of industry. It was argued that such an act is beyond the scope of Article 90(3) and should have been adopted on the basis of Article 100A.

The Commission denied the thesis that Article 90(1) should presuppose the maintenance of all special and exclusive rights. It argued that there are situations where the very existence of such rights cannot be separated from their exercise. Consequently, the only way to eliminate an illegal exercise is by elimination of the rights as such. The Commission rejected both the argument that it was not empowered to adopt the directive because it was a general normative act and the argument that the act should have been enacted on the basis of Article 100A.

Judgment of the Court

In its judgement, the Court made some preliminary remarks on the interpretation of Article 90. In paragraph 12, it noted that the purpose of the Article is to conciliate the interest of the Member States in using public enterprises as instruments of economic or taxation policy with the Community interest of respecting the competition rules and preserving the unity of the common market. It went on to note that in the preamble to the directive, the Commission had stated that the conditions for applying Article 90(2) were not satisfied. Neither the French Government nor the other intervening States[78] had contested that statement. Consequently, the Court stated that dispute (merely) concerned Article 90(1) and (3).

With regard to Article 90(3) the Court noted that the Article gives the Commission a general power to lay down, in directives, detailed provisions concerning the Member States' obligations under Article 90(1). According to the Court, the Commission may put that power into practice when, without taking account of the particular situation existing in the various Member States, it makes detailed rules concerning their obligations under the Treaty. Of its very nature

[78] Italy, Belgium Germany and Greece had intervened in the proceedings.

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such a power could not be used to obtain a declaration that a Member State had failed to fulfil its obligations under the Treaty. Since the Commission merely laid down general obligations to which the Member States are subject under the Treaty, the directive could not be interpreted as containing a finding of specific Treaty infringements by specific Member States and the French Government's submission in this respect was therefore rejected as unfounded.

Likewise, the Court did not accept the submission that by adopting a directive providing purely and simply for the withdrawal of special or exclusive rights for the importation, marketing, connection, bringing into service of terminal equipment and/or maintenance of such equipment, the Commission had exceeded the supervisory power conferred on it by Article 90(3). The Court pointed out that the Commission's supervisory power included the possibility of defining, under Article 90(3), the obligations flowing from the Treaty. Consequently, the extent of that power depended on the scope of the rules to be enforced.

As to the allegation that Article 90 presupposes the legality of special or exclusive rights, the Court stated:

> *".. (e)ven though that article presupposes the existence of undertakings which have special or exclusive rights, it does not follow that all the special and exclusive rights are necessarily compatible with the Treaty. That depends on the different rules, to which Article 90(1) refers."* [79]

With regard to the complaint that the Commission had sought to exercise powers attributed to the Council by Articles 87 and 100A, the Court noted that the purpose of the powers conferred on the Commission by Article 90(3) was different and more specific than the powers conferred on the Council under the aforementioned articles.

As mentioned above, the French Government had also claimed that Article 2 (as well as Articles 6,7 and 9) of the directive was unlawful on the ground that the Commission incorrectly applied Articles 30,37,59 and 86 of the Treaty.

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[79] Cf. paragraph 22 of the judgement.

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The Court considered, with regard to Article 2, that the Commission had been entitled to require the withdrawal of *exclusive* importation and marketing rights with regard to telecommunications terminal equipment. In reaching that conclusion the Court applied Article 30 of the Treaty on the basis that these rights infringe said Article as they are clearly capable of restricting intra-Community trade (within the meaning of *Dassonville*[80]).[81]

The Court went on to discuss possible justifications for the exclusive rights by referring to Article 3 of the directive. In that provision the Commission had specified the extent and the limits of the obligation to abolish the special and exclusive rights.[82] The French Government had not challenged Article 3, therefore no justification could be claimed.[83]

With regard to exclusive rights to the connection, bringing into service and maintenance of terminal equipment, the Court held that these rights were also caught by Article 30 as an exclusive rightsholder would have no incentive to provide the services to all the types of terminal equipment made available on the market when the exclusive rights over the import and export of terminal equipment were withdrawn.

With regard to *special* rights, the Court considered that neither the provisions of the directive nor the recitals in the preamble thereto, provided any details as to the precise rights referred to or in what way the existence of those rights was contrary to the various provisions of the Treaty. It followed that the Commission had not provided a justification for the obligation to withdraw the *special* rights with regard to terminal equipment and/or maintenance of such equipment. Consequently, the Court declared Article 2 void in so far as it referred to those rights.[84]

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[80] Case C-8/74 [1974] ECR 837.
[81] Cf. paragraphs 33 and 34 of the judgement.
[82] In this provision the Commission had referred to the essential requirements laid down in Article 2(17) of Council Directive 86/361, see paragraph 37 of the judgment.
[83]. The Court made no explicit reference to neither the Cassis de Dijon principles nor Article 36 of the Treaty and since Article 90(2) was not object of any material discussion by the Court the judgment does unfortunately not contain any comments on the interaction of these principles and Treaty provisions.
[84] It is of interest to note that the Court did not explicitly consider Articles 37, 59 and 86 of the Treaty when reviewing Article 2 of the directive (with regard to *exclusive* as well as *spe-*

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Höfner[85]

The case concerned a preliminary requested by a German Court. The dispute in the main proceedings was between Höfner and Elser, two German nationals who were recruitment consultants, and Macrotron GmbH, a German Company. The two parties had concluded a contract under which Höfner and Elser would seek and select candidates for a post of sales manager with Macrotron. On completion of their task, a candidate presented to Macrotron. However, Macrotron decided not to recruit that candidate and refused to pay the recruitment consultants' fees. Höfner and Elser then commenced proceedings against Macrotron before the Landgericht München (Local Court, Munich) in order to recover the agreed fees.

Under German law, however, the Bundesanstalt für Arbeit (Federal Employment Office) had been given the exclusive right to undertake the activity of placing persons seeking work in contact with employers. Notwithstanding that exclusive right, a specific recruitment and placement business had developed for business executives. It was carried on by recruitment consultants and to some extent tolerated by the Federal Employment Office. The fact nevertheless remained that any measure which would contravene a legal prohibition (monopoly) would be void by virtue of Article 134 of the German Civil Code. According to prior rulings of the German courts such measures included contracts concerning recruitment activities similar to the one between the two parties.

On the basis, the Landgericht rejected the claim of Höfner and Elser and they appealed to the *Oberlandesgericht München*. The latter court took the view that the contract at issue was void, by virtue of Article 134 of the German Civil

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cial rights). Likewise, in two judgments, rendered two days after the telecom judgment, concerning pharmacists' legal monopoly to sell certain products, the Court did not either take, especially, Article 86 (together with Article 90(1)) into consideration when reviewing the monopolies. In these cases, however, the parties had not made reference to Article 86. See case C-369/88 *Jean-Marie Delattre* [1991] ECR I-1487 and case C-60/89 *Jean Monteil and Daniel Samanni* [1991] ECR I-1547.

[85] Case C-41/90 Höfner and Elser v Macroton [1991] ECR I-1979.

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Code, in so far as it infringed the exclusive right of the Federal Employment Office. In its view, the case ought to be dismissed, in so far as it was based on national law. However, the same would not necessarily apply with respect to Community law. Accordingly, the Oberlandesgericht stayed the proceedings and requested a preliminary ruling on the interpretation of Articles 7, 55, 56, 59, 60, 66, 86 and 90.

In its ruling, the Court first turned to the interpretation of the Articles 86 and 90. It stated that, in the context of competition law, the concept of undertaking included any entity which exercised an economic activity regardless of its legal status and basis of financing, and also that placement of staff was an economic activity, the nature of which was not affected by the fact that it was entrusted normally to public offices. It followed that a body such as a public employment office engaging in placement activities, could be classified as an undertaking for the purpose of applying Community competition rules and that it remained subject to those rules until such time as it was shown that their application was incompatible with the discharge of its duties.

The Court went on to say that a public employment office which manifestly does not satisfy the demand is not excluded from the application of Article 86 and that even though Article 86 applied within the limits of Article 90(2) is addressed to public enterprises, the Treaty imposes an obligation on Member States not to take or maintain measures which eliminate the effect of Article 86. Consequently, any measure adopted by a Member State that maintained in force a legal provision which created a situation in which a public employment office was compelled to infringe the terms of Article 86, was incompatible with the provisions of the Treaty.

An enterprise holding a statutory monopoly may be considered to occupy a dominant position[86] and the territory of a Member State over which such monopoly extends may constitute a substantial part of the Common market.[87] The mere fact of creating a dominant position is not, according to the Court,[88] as

[86] Case 311/84 *Telemarketing* [1985] ECR 3261.
[87] Case 322/81 *Michelin* [1983] ECR 3461.
[88] Cf. paragraph 29 of the judgement.

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such, incompatible with Article 86.[89] A Member State infringes the Articles 86 and 90(1) only when the enterprise will, by the mere exercise of the exclusive right, be led to exploit its dominant position in an abusive manner. Referring to Article 86 second sentence under b), the Court said:

> *"A Member State creates a situation in which the provision of a service is limited when the undertaking to which it grants an exclusive right extending to recruitment activities is manifestly not in a position to satisfy the demand prevailing on the market for activities of that kind and when the effective pursuit of such activities by private companies is rendered impossible by the maintenance in force of a statutory provision under which such activities are prohibited and non-observance of that prohibition renders the contracts concerned void.."*[90]

The Court went on to discuss the effect on trade between the Member States and stated that a potential effect exists when employment activities undertaken by private enterprises may include nationals of other Member States or may be conducted on their territory.

Turning to the interpretation of Article 59, the Court found that the factual situation of the case did not present any point envisaged by Community law since the activities concerned were confined within a single Member State.

ERT[91]

This case, which came before the Court as a request for a preliminary ruling, concerned the exclusive right for ERT, a Greek state radio and television company. Under Greek law, ERT had been granted exclusive rights for all activities concerning the transmission of radio sound and television images by all possible

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[89] Case 311/84, *Telemarketing*.
[90] Cf. paragraph 31 of the judgment.
[91] Case C-260/89 *Elliniki Radiophonia Tileorassi v Dimotiki* [1991] ECR I-2925.

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means, including cable television. The statute prohibited persons from undertaking activities for which ERT held the exclusive right without authorization by ERT. Actions were brought against a municipal information company of the Greek city Thessaloniki and the Mayor of that city by ERT for starting a local television station. As part of the proceedings before the tribunal of Thessaloniki, the municipal information company invoked provisions of Community law (and the European Convention on Human Rights). As a result, a number of questions were put to the European Court of Justice, including questions concerning the compatibility of a television monopoly with Community law.

The Court reiterated its position in *Sacchi*[92] that nothing in the Treaty denies Member States the power to grant an exclusive right to radio and television for reason of public interest of a non-economic nature. The Court the continued by stating that nevertheless the methods of organization and the exercise of such a monopoly should be in accordance with Article 90(1) and (2) and not be contrary to the Treaty rules concerning the free movement of goods as well as the competition rules.

With regard to the compatibility of a television monopoly with Articles 30 and 36, the Court stated that a television monopoly being a service monopoly is not as such incompatible with the free movement of goods. Nevertheless the movement of all material connected with that service is subject to the rules concerning the free movement of goods. Thus, if discrimination between national and imported products were to result from the exclusive television rights, Article 30 would be contravened.

In discussing the compatibility of the television monopoly with Article 59, the Court once more reiterated the view that such a monopoly is not as such incompatible with the free movement rules, but becomes so when the exclusive right lead to discrimination. The Greek monopoly comprised both normal transmission and retransmissions of programmes from other Member States. As the Commission had observed, such *cumulation of monopoly rights* created the possibility of ERT's favouring of its own programmes. Therefore, the Court of Justice invited the national court to establish whether such discrimination had

[92] Case 155/73 [1974] ECR 409.

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occurred. The Court pointed out, however, that the national legislation may be justified by Article 56.

The Court then turned to the question of compatibility of the monopoly with the competition rules. It started with a discussion of the monopoly under Article 86. Literally repeating from the *Höfner* judgment,[93] it stated that an undertaking occupying a legal monopoly has a dominant position in the sense of Article 86. Similarly, it repeated its position that a monopoly extending over the entire territory of a Member State may be considered to cover a substantial part of the common market. It is for the national court to establish whether the practices of the monopoly are compatible with Article 86 and to verify whether, if such practices are incompatible, they may nevertheless be justified by performance of the particular task assigned to the monopoly according to Article 90(2).

In discussing the compatibility of national measures granting the monopoly, the Court started by referring to the proposition that Member States have a duty not to eliminate the effect of the Articles 85 and 86. It then went on to note that Article 90(1) prohibits the granting of an exclusive right to transmit and the exclusive right to retransmit television broadcasts to a single undertaking where those right are liable to create a situation in which the privileged undertaking is led to infringe Article 86 by virtue of discriminatory policies of favouring its own programmes, unless the application of Article 86 would obstruct the performance of the particular tasks entrusted to the undertaking.

The Mediawet cases[94]

Although the main Article of issue in these two cases was not Article 90[95] but Article 59, which concerns the free movement of services, the judgments are of interest since they, to some extent, portray how the free movement provisions and Article 90 complement each other. Furthermore, the rulings may be seen to

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[93] See paragraph 28 of *Höfner*.

[94] Case C-288/89 *Stichting Collective Antennevoorziening Gouda and Others v. Commissariaat voor de Media* [1991] ECR I-4007; Case C-353/89 *Commission v Kingdom of the Netherlands* [1991] ECR I-4069.

[95] Article 90 was invoked by the Dutch government in case C-353/89.

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indicate that exclusive rights which constitute obstacles to the freedom to provide services are prohibited except where they are justified - as in the case of goods - by imperative reasons.

In case C-288/89, which was preliminary ruling, several Dutch cable network operators had disputed fines which had been imposed by the *Commissariaat voor de Media* (a governmental supervisory institution) for relaying foreign television programmes broadcast by commercial stations such as Super Channel and Cable One which contained advertisements in the Dutch language. According to the *Commissariaat*, the cable network operators had infringed certain provisions of the Netherlands Media Act ("Mediawet").[96] Among other restrictions the Act provided that programmes emanating from abroad which contained advertisements aimed at the Netherlands audience could be relayed through cable networks only under the condition that certain requirements as to the commercial programmes in question, the structure of the foreign broadcasting companies and the contents of the advertisements were fulfilled. The cable network operators argued that the requirements infringed Article 59.

Parallel to this case, the Commission had instituted an infringement procedure against the Netherlands before the Court under Article 169. The Commission supported the argument that the provisions of the Media Act at issue violated the Treaty provisions on the free movement of services. Furthermore, the Commission focused on another article of the Media Act[97] which obliged the Netherlands broadcasting companies to obtain all or a large share of their requirements for programme production from a state-owned company, in the case referred to as NOPB. According to the Commission, this provision infringed the freedom to provide services.

The two judgments are more or less similar in so far as the requirements for foreign programmes are concerned. In the following review of the cases, reference will primarily be made to the judgment in the infringement case.

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[96] Article 66 of the Act.
[97] Article 61 of the Act.

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The Court recalled extensively its case law concerning the freedom to provide services and stated the well-known rule that discriminatory treatment is prohibited. It then went on to say that national provisions which restrict the free movement of services *without* distinction as to nationality do not infringe Article 59 *provided* that such restrictions are justified on grounds relating to the public interest. The Court enumerated the various grounds which have been recognized in this regard.

The Court held that the preferential treatment of NOPB for the provision of programme production services to the public broadcasting institutions in the Netherlands violated Article 59. Such preferential treatment prevented these institutions from obtaining the services from abroad and protected a domestic company. Article 59 was infringed even if other similar companies established within the Netherlands were excluded as well.

The preferential treatment of NOPB could not be justified on grounds relating to national cultural policy. The cultural obligations of NOPB were fully financed by the state and could be separated from the obligation of the broadcasting companies to obtain their facilities from NOPB.

The Dutch government had, with regard to the exclusive right of NOPB, among its arguments referred to Article 90. Although it is not altogether clear from the judgment, whether the reference was made to Article (1) or (2), the Court did, in any event, reject the argument. It did so by stating that pursuant to its judgment in the *Terminals* case,[98] the assignment of special or exclusive rights must be assessed in light of the different rules in the Treaty to which Article 90(1) refers. Thus, if a given exclusive right imply the restriction of the provision of certain services, the justification of the exclusive right requires a justification on grounds relating to the public interest.[99] These grounds had already been rejected by the Court when examining the applicability of Article 59.

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[98] Case C-202/88, France v. Commission, [1991] ECR I-1223.

[99] In light of this statement it must be clear that the Court had Article 90(1) in mind when reviewing the argument of the Dutch government. There is no explicit examination of Article 90(2) in the judgment. On this basis it might be concluded that only if the justification grounds in respect to Article 59 are present, can the restrictions in question be justified given that in this case the Treaty rule to which Article 90(1) refers is Article 59. See paragraphs 33 - 36 of case C-353/89.

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As to the provisions of the Media Act concerning the various requirements to be fulfilled with regard to the commercial programmes in question, the structure of the foreign broadcasting companies and the contents of the advertisements, the Dutch Government argued that the requirements were justified for mandatory reasons relating to national cultural policy and protection of consumers against too much commercial television and at the same time maintaining a certain quality of the programmes. The Court concluded that requirements such as the ones provided in the Media Act could not be justified and, thus, breached Article 59.

Merci[100]

The case, also known as *Porto di Genova,* concerned the Italian private undertaking Merci Convenzionali Porto di Genova SpA which (as well as other port companies) enjoyed an exclusive concession for the handling of loading operations in the harbour of Genoa. Due to a strike at Merci, the unloading of goods imported from Germany by the Italian company Siderurgica Gabrielli SpA had been delayed. The latter brought actions against Merci before the Tribunale di Genova in order to recover the sums it had paid for the (ineffective) service, as well as damages caused by the delay.

While the proceedings were pending, questions arose as to compatibility of Merci's exclusive rights in regard to Community law and a request for a preliminary ruling was made to the Court of Justice. The preliminary questions essentially aimed at assessing the facts at hand in light of Article 90 (1) read in combination with Articles 30 and 86. They also concerned the scope of application of Article 90 (2).

The Court found that Merci had been granted exclusive rights within the meaning of Article 90 (1) and was in a dominant position within the meaning of Article 86. The Court then stated that a Member State, which has granted such privileged rights, contravenes Article 90(1) in conjunction with Article 86 if:

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[100] Case C-192/90 *Merci Convenzionali Porto di Genova SpA* v *Siderurgica Cabrielli SpA* [1991] ECR I-5889.

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> *"the undertaking in question, merely by exercising the exclusive rights granted to it, cannot avoid abusing its dominant position (citing Höfner) or when such rights are liable to create a situation in which that undertaking is induced to commit such abuses (citing ERT)".*[101]

On the basis of the facts provided by the national court, the Court identified a number of Article 86 abuses that Merci was led to commit by reason of its exclusive rights; such as demanding payment for unwanted services, charging disproportionate or discriminatory prices and refusing to use modern technology, and found that these abuses were likely to affect trade between Member States. The Court concluded that Article 90, in conjunction with Article 86 prohibited the grant of exclusive rights of the type in question.

The Court was more brief on the free movement provisions. It stated that a national measure which facilitates the abuse of a dominant position is usually incompatible with Article 30 insofar as it restricts the importation of goods from other Member States. The Court considered that certain supplementary costs necessitated by recourse to Merci (and other port companies) were likely to influence imports. The Court also indicated that a requirement by the Italian government that the privileged port companies should comprise only national workers was in breach of Article 48.

Finally, the Court also held that Article 90 (2) of the Treaty must be interpreted as meaning that an undertaking in a position, as described in the questions put to the Court, may not be regarded as being responsible for the management of services of general economic interest within the meaning of that provision.

RTT[102]

The preliminary ruling in this case concerned the Belgian public company RTT which held exclusive rights for the operation of the public telephone network as

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[101] See paragraph 17 of the judgment.
[102] Case C-18/88 *Régie des Télégraphes et des Téléphones v SA GB-Inno-BM* [1991] ECR 5941.

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well as for the approval of equipment - to be connected to the network - which it had not supplied itself. In respect of the latter exclusive right, there was no appeal procedure available against the decisions taken by RTT. The company *GB-Inno-BM* had sold telephone equipment manufactured in the far East without informing its customers that this equipment had not been approved by RTT. The latter claimed that such sales incited customers to connect the equipment themselves to the network. Thus, RTT requested the *Tribunal de Commerce* in Brussels to issue an injunction against *GB-Inno-BM*.

The Belgian Court stayed the proceedings and referred a number of questions to the Court of Justice. As in the other cases already dealt with in this chapter, the questions put to the Court essentially aimed at assessing Article 90 (1) read in combination with Articles 30 and 86 in light of the exclusive rights in question. Although no explicit reference was made to Article 90(2) in the preliminary questions, the Court included remarks on this Treaty provision in its ruling.[103]

In its judgment, the Court applied the principle established in *Telemarketing* to deduce that it is an abuse within the meaning of Article 86 for an undertaking, holding the monopoly on a particular market (the establishment and operation of the telecommunications network), to reserve for itself, without any objective necessity, an ancillary activity on a neighbouring but separate market (the importation, marketing and maintenance of equipment for connection to the network). Thereby, all competition from other undertakings on that neighbouring market would be eliminated.

In relation to national measures, the Court stated that Article 90(1) prohibits Member States from placing privileged undertakings 'in a position which those undertakings could not themselves attain by their own conduct without infringing Article 86'.[104] The Court rejected an argument that Article 90(1) could only be infringed if the Member State had favoured an abuse that RTT had in fact committed. The Court merely stated that it was 'the extension of the monopoly to the telephone market without any objective justification' which infringed Ar-

[103] The referral was made prior to the implementation of the Terminals directive (which required the separation of operational and regulatory functions) and at a time when the *Terminals* case was pending before the Court.
[104] Cf. paragraph 20 of the judgment.

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ticle 90(1) in conjunction with Article 86 where the extension results from a measure adopted by a state.

According to the Court, the restriction of competition due to the exclusive rights of RTT could not be justified for reasons of user safety and network security and, accordingly, the Court refused to apply of Article 90(2). According to the Court the aforementioned essential requirements could be otherwise protected by introducing appropriate rules and an authorisation procedure. The Court stressed that the system of undistorted competition laid down by the Treaty could only by guaranteed if equality of opportunity is secured between various economic operators and that conferring on RTT the right to draw up specifications and grant type approval gave it an obvious advantage over its competitors (reference was made to the *Terminals* case).

In relation hereto the Court found, when applying Article 30 to the case, that the Belgian requirement that telephones had to be approved by RTT before being placed on the market made it more difficult for foreign telephones to be sold. While, as the Court acknowledged, the need to satisfy essential requirements justifies type approval procedures, the implied restrictions on the free movement of goods must be proportional to the aim. The Court found that the lack of appeals procedure could allow RTT to adopt an unfavourable attitude towards imported products and that the grant of power to approve terminal equipment in such circumstances infringed Article 30.

The Services case[105]

As it may be recalled, the provisions of the Commission's Services directive[106] required the withdrawal (by 1991) of privileged rights over the supply to the public of all telecommunications services save voice telephony. As in the case of the Terminals directive, the Commission sought in the preamble to the directive

[105] Joined Cases C-271/90, C-281/90 and C-289/90 *Spain and others v Commission* [1992] ECR I-5833.
[106] Directive 90/388 EEC.

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to justify the requirement with an explanation of how the existing monopoly rights infringed Article 90 in conjunction with Articles 3, 5, 30, 37, 59 and 86.

The directive was adopted by the Commission in June 1990 under Article 90(3). Subsequently, Spain,[107] Belgium and Italy brought action against the Commission for annulment of the directive. The key issue was - as in the *Terminals* case - the scope of the Commission's powers under Article 90 (3).[108] Thus, many of the arguments invoked by the Member States challenging the validity of the directive resemble those put forward before the Court in the *Terminals* case and it seems needless to summarize these arguments once more.

The Court's general response was predictably similar to its ruling in the *Terminals* case. It reaffirmed the Commission's power to issue directives to specify Member States' obligations in relation to their public undertakings or undertakings enjoying 'special' or 'exclusive' rights and the Commission's competence to require the withdrawal of special and exclusive rights was thus confirmed.

However, whereas the Court in the *Terminals* case had based its reasoning for the abolition of exclusive rights on the free movement provisions (Article 30), in the *Services* case the Court favoured the combination of Article 86 and Article 90.[109]

The Court stated that the simple fact of creating a dominant position by granting exclusive rights under Article 90(1) is not in itself incompatible with Article 86, but the 'extension of the network monopoly' to the market for services is prohibited by Article 90(1) in conjunction with Article 86, when this extension is result of a state measure.[110] According to the court such a state measure is

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[107] France intervened in support of Spain.
[108] The cases came before the Court before the judgment in the *Terminals* case was rendered.
[109] The relevant Article of the free movement provisions (Article 59 for obvious reasons) was invoked by the Court. The Court pointed out that Article 59, like Article 30, created directly effective and binding obligations on Member States and confirmed that the Commission could therefore specify the obligations arising from Article 59 without the need for the Council to adopt legislation on the subject.
[110] If the extension takes place on the privileged undertaking's own initiative this is in itself a breach of Article 86.

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tending to eliminate competition and the Commission was therefore right to require the abolition of exclusive rights to telecommunications services.

As in the *Terminal* case, the Court annulled the directive with regard to those provisions requiring the withdrawal of special rights on the grounds that the Commission had not provided adequate reasons for abolition of such rights. Although the Services Directive provided a definition of 'special and exclusive rights' and explained the reasons for their abolition, it failed to differentiate between 'exclusive' and 'special'.

Corbeau[111]

Corbeau concerned the legality of exclusive rights over postal services.[112] The judgment was awaited with much attention since the Commission in June 1992 had published a Green Paper on the Development of the Single Market for Postal Services recommending partial liberalization of the Community postal sector.[113] In the Green Paper the Commission had proposed that a Community definition of *universal service* should be drawn up to cover certain basic postal services which should be reserved to national postal monopolies. No such definition had been agreed upon, and it was believed that a ruling from the Court of Justice could have important consequences for where the dividing line between the 'reserved' and 'liberalized' services might ultimately be drawn.[114]

However, the significance of *Corbeau* extends beyond the postal services sector. The case may be considered the first time when the Court engaged into a

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[111] Case C-320/91 *Paul Corbeau* [1993] ECR I-2533.

[112] The case offered the Court a renewed chance to rule on the legality of monopoly rights over postal services. In Joined Cases C-48 & 66/90 *The Netherlands and the Royal Dutch PTT* v *Commission* [1992] ECR I-627, the Court declared Commission Decision 90/16 (OJ 1990, L 10/47) concerning courier and express services in the Netherlands void on procedural grounds only.

[113] Com (91) 476 final.

[114] This is probably the main reason for the interventions from the Spanish, British and Irish governments in the case. There was considerable discussion over which type of services should fall within the "reserved area" and which could be liberalized without threatening "the economic and financial balance needed for the provision of the universal services".

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thorough analysis of defining the scope of the "public service" exemption as provided in Article 90(2). Moreover, the case may also be regarded as providing a test as to when the existence of privileged rights are justified under Community law.

Factual background

Paul Corbeau had established his own postal service in the Belgian town of Liége and its environs. This service comprised personal collection from the sender's place of residence and delivery before noon of the following day to addresses within and around Liége. For deliveries outside this area, Corbeau collected mail but dispatched it via the normal postal services.

Corbeau was prosecuted for contravening Belgian legislation of December 1956 and July 1971 which created the Belgian *Regie des Postes* and conferred upon it an exclusive right to collect, transport and deliver throughout Belgium various forms of correspondence, and imposed criminal sanctions for infringement of this exclusive right. As part of the proceedings the court of Liége referred four questions to the Court of Justice concerning the compatibility of the Belgian postal monopoly with Community law. Basically, the questions dealt with the compatibility of the monopoly as constituted by the legislation of 1956 with Articles 90, 85 and 86, including the issue whether the privileged enterprise in question enjoyed a dominant position, in law or in fact, on a substantial part of the common market within the meaning of Article 86. Furthermore, the duty on Member States as a consequence of Article 90(1) to restructure a monopoly such as the one in question in order to conform with their Community obligations and the extent to which an enterprise such as a postal service by virtue of Article 90(2) still remained subject to the application of the Treaty rules, in particular Articles 7, 85 and 90, were also issues raised in the preliminary questions.

The judgment of the Court

The Court reformulated the four questions posed by the national court into a single question: "whether Article 90 of the Treaty must be interpreted as mean-

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ing that it is contrary to that article for the legislation of a Member State which confers on a body such as the Regie des Postes the exclusive right to collect, carry and distribute mail to prohibit an economic operator established in that State from offering, under the threat of criminal penalties, certain specific services on that market.[115]

The Court first confirmed that the Belgian postal authority was an undertaking which enjoyed exclusive rights within the meaning of Article 90(1). It then recalled its earlier jurisprudence to the effect that an enterprise invested with a statutory monopoly must be considered to enjoy a dominant position in the sense of Article 86. This Article is directed at anti-competitive behaviour of undertakings engage into on their own initiative, and the Court referred to its ruling in ERT[116] to restate the proposition that the mere fact that a Member State creates a dominant position by the grant of exclusive rights is not in itself incompatible with Article 86. Nevertheless, as the Court emphazised, the Treaty requires the Member States not to take or maintain in force measures capable of eliminating the effectiveness (*effet utile*) of this provision. With regard to privileged undertakings, Article 90(1) reaffirms this.

Without any analysis of the application of Article 90(1) to the facts, the Court then stated that Article 90(1) must be read in combination with Article 90(2) and went on to consider the application of Article 90(2). According to the Court the latter provision applies to undertakings but also Member States.[117] The Court stated that the provision allows Member States, in respect of enterprises which they have entrusted with the management of services in the general economic interest, to confer exclusive rights which obstruct the application of the Treaty competition rules, but only to the extent that a restriction of competition from other economic operators is necessary to guarantee the fulfilment of the tasks so entrusted.

The Belgian postal authority was undoubtedly entrusted with general public interest duties, namely the obligation to quarantee the collection and delivery of

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[115] See paragraph 7 of the judgment.
[116] [1991] ECR I-2951.
[117] Such a statement is not explicitly made in the judgment but a reading of paragraphs 13 and 14 leads logically to this conclusion.

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mail at uniform rates and on equal conditions, irrespective of the profitability of any single operation. It was therefore necessary to examine to what extent a restriction on competition was necessary to allow the authority to realize the duties conferred upon it, in particular when taken into account that the authority should be able to operate under economically acceptable conditions.[118]

The Court stated that if the conferred duties are to be accomplished under conditions of economic equilibrium, the privileged undertaking in question must be able to offset profits from more lucrative operations against losses in others. Thus, a restriction on competition from private firms in the profitable areas can be justified since private operators otherwise would concentrate on the more profitable operations and offer more competitive rates, given that they would not be obliged to absorb less attractive or loss-making activities.

The Court emphazised, however, that this did not necessarily imply that competition could be entirely excluded. It took the view that it was not 'justified' to exclude competition for specific supplementary services which respond to the demands of the market and which were not offered traditionally by the postal authority and separable from the service of general economic interest provided by that authority, unless competition for the supplementary services would threaten the economic equilibrium of the service of general economic interest.[119] The Court concluded that it was for the national court to decide whether the services at issue fell within these criteria.[120]

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[118] Cf. paragraph 16 of the judgment.

[119] In the above mentioned Commission Decision 90/16 (footnote 112), the Commission had held that a Dutch law from 1988 extending the Dutch postal authority's monopoly to most express courier services was in breach of Article 86 in conjunction with Article 90. The Commission had rejected an argument based on Article 90(2), pointing out that the authority had managed to achieve high profits prior to the 1988 law and that given the high turnover on the market and the authority's ability to benefit from economies of scale and use them to compete on price, the extension of the monopoly was not necessary to ensure sufficient revenue to support the less profitable areas of the postal service. In its decision of 1 August 1990 (OJ 1990 L233/19), the Commission held that the Spanish monopoly over express courier services infringed Articles 86 and 90 and was not justified by Article 90(2). Similar proceedings against the Danish, German, French and Italian postal monopolies ended in the same result without the need for formal decisions (XXIst Report on Competition Policy, 1991).

[120] There was argument before the Court as to whether the services of Corbeau constituted a true, rapid courier service, not offered by Regie des Postes, or whether he was merely providing normal postal services at a rate below official tariffs. From the facts it was not entirely clear whether Corbeau was in fact providing a rapid courier service or was engaged in a form

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Chapter 6

Analysis of the case law on Article 90 and the competition rules

The case law reviewed

Although the Commission had made reference to Article 86 in recitals to the Terminals directive, in its review of the directive the Court focused on Article 30. *Höfner* thus was the first case in which the Court applied Article 90 in conjunction with the competition rules (Article 86) to the existence of monopoly rights.

As it may be recalled from the previous chapter, in *Höfner* the Court ruled that a Member State is in breach of Article 90(1) in conjunction with Article 86 if a privileged undertaking 'is led, by the mere exercise of the exclusive rights granted to it, to abuse its dominant position'. In *ERT* an exclusive right to re-transmit television programmes together with the exclusive right to broadcast programmes was deemed prohibited by Article 90(1) if such rights are 'liable to create a situation in which that (the privileged) undertaking is led to infringe' Article 86 by virtue of a discriminatory policy in favour of national programmes. These two rulings more or less repeated and combined by the Court in *Merci* where the Court stated that a Member State contravenes Articles 90(1) and 86 in conjunction when the privileged undertaking is led, by the mere exercise of its exclusive rights, to exploit its dominant position in an abusive way or when the rights are liable to create a situation in which the undertaking is led to commit such an abuse.

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of "city-mailing" which could be described as "cream-skimming". Advocate General Tesauro concluded that given that there was as yet no Community definition of the concept of a rapid courier service, and given the fact that Corbeau provided a value added service in comparison to that provided by the Belgian postal authorities, then his services should be qualified as rapid courier services.

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The judgments of the Court in *Höfner, ERT* and *Merci* seem to apply a rule, already known in previous case law concerning Articles 5 and 90,[121] prohibiting a Member State measure which facilitates or requires the abuse of a dominant position. However, only in *Höfner* was the abuse identified as an inevitable consequence of the monopoly. In *ERT*, the structure of the monopoly was such that the undertaking was liable (that is, likely) but not obliged by its exclusive rights to commit an abuse of discriminating in favour of its own programmes. In *Merci*, the abuses at issue were facilitated by the monopoly rights (Merci could not have charged disproportionate prices etc., if the company had not been insulated from competition), but were not inevitable. The distinction may therefore be drawn that the monopoly undertakings in *ERT* and *Merci* could/should be held responsible for their (possible) abuses, whereas in *Höfner* the federal employment agency was blameless. It is thus arguable that in *ERT* and *Merci* type situations the remedy might have been merely to enforce Article 86 vis-à-vis the privileged undertakings rather than to invoke Article 90(1) vis-à-vis the grant of the of the privileged rights. However, the Court's conclusions indicate that in all three cases Article 90 requires the removal of privileged rights and it would indeed be difficult in practice to draw the distinction that legal monopolies which are liable to result in an abuse are permitted, whereas those which lead inevitably to an abuse are prohibited.[122] Nevertheless, further guidance from the Court as to the application of the competition rules would be helpful with regard to similar situations.

In the *RTT* case (and the *Services* case), the Court seemed to take a related but still different approach. The rationale of this ruling seems to be that the 'effet utile' of Article 86 is undermined and Article 90 is infringed where the extension of the monopoly by a Member State measure achieves the same result as a *Telemarketing*[123] type abuse. In such a situation, the Court indicated in *RTT* that it was not necessary to establish that an abuse had actually been committed by the privileged undertaking. However, it may be argued that the facts of the *RTT* case did not quite fit the Court's *Telemarketing* formula in the sense that the granting of exclusive rights to the national telecommunications body (RTT)

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[121] See Case 321/83 *Cullet v Leclerc* [1985] ECR 305, Case 30/87 *Bodson v Pompes Funèbres* [1988] ECR 2479.
[122] See Gyselen *Case Law* [1992] CMLR 1229, at 1238 to 1240.
[123] Case C-311/84 [1985] ECR 3261.

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equals the abuse of using dominance in one market to leverage on to a neighbouring market. The monopoly of RTT over network provision was not *extended* to the terminal equipment market by the Belgian law in question, which merely conferred regulatory functions on RTT. Furthermore, RTT could not have attained the same position by abusing its dominant position as regulatory powers are by definition conferred by the state. On the other hand, it must be recognised that the effect of the privileged rights in question was that the existence of these rights were liable to create, or in fact created, a situation similar to the *Telemarketing* type of abuse. An alternative rationale for *RTT* may be that the delegation of regulatory functions created a conflict of interest which was liable to lead to an abuse (as in *ERT*) and infringed the principle of equality of opportunity between competitors without justification (as in the *Terminals* case).

In the *Services* case, the Court took the same approach as in *RTT*. Even in this case, however, where the maintenance of the monopolies of the national telecommunications organisations over telecommunications services was at issue, it could be argued that no extension was involved, at least not on the part of the privileged undertakings. The *Telemarketing* type abuse, of using dominance in one market to leverage on to a neighbouring market, can not be transposed directly to a state measure situation because if an undertaking is entrusted with a monopoly over two neighbouring markets, there is no need for any leveraging. However, as in the case of *RTT*, it must be recognised that the effect of the privileged rights in question in fact created a situation similar to the *Telemarketing* type of abuse and this effect was a result of the very existence of these rights.

When reviewing the related but still, to some extent, different approaches of the Court in the five cases,[124] it could be argued that the Court faced the same overall issue which can, in simple terms, be summarized as follows.[125] Does a Member State infringe Article 90(1) in combination with Article 86 if the privileged undertaking in question does not abuse its dominant position - in other

[124] *Höfner*, *ERT*, *Merci*, *RTT* and the *Services* case.
[125] See Gyselen, footnote 122 above, at 1230.

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words, if it does not formally infringe Article 86.[126] The Court's answer is not all together clear. The rulings in *RTT* and the *Services* case support the view that the granting of exclusive rights may *in itself* constitute a measure contrary to Article 86 even if no formal abuse was committed. It is sufficient that the monopoly rights are extended beyond the core monopoly without any objective justification.[127] The ruling in *Merci*, which combined the rulings in *Höfner* and *ERT*, seems to suggest that, in order to trigger the combined application of Articles 90 (1) and 86 with regard to the existence of privileged rights, an abuse either has to be committed, although not intentionally by the privileged undertaking,[128] or, there must be a risk (possibility), created by the privileged rights, that an abuse will take place.[129]

It could be argued that at the end of day the Court's way of answering the question posed ultimately is the same since in each of the cases the concern of the Court is whether the privileged rights create a situation in which the privileged undertaking is placed in a position which would eventually lead to an abuse. In other words, ultimately the Court emphasizes the 'effet utile' of Article 86. However, if the approaches of the Court are transposed into a situation where no state measure was involved, there appears to be a difference. The rationale of *Merci*, or in particular *ERT*, could not easily be transposed since it would not in itself be prohibited under Article 86 for a non-privileged enterprise to be in a dominant position within the meaning of that Article, although there would be the risk that the enterprise at some point would engage in abuse behaviour.[130] This holds true at least if the entity in question had obtained that

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[126] When raising the question of an infringement by a Member State in this respect, it is implicit in the question that the privileged undertaking does not on its own initiative engage in abusive behaviour. The question relates to the granting of the privileged right in itself. Merci had however - as the facts were presented - engaged in abusive behaviour on the company's own initiative. The Court did nevertheless seem to disregard the actual behaviour of Merci and instead focus on the structure of the exclusive rights granted to the Italian company.

[127] The Court did not repeat the words from the other three judgments that the simple fact of creating a dominant position by the granting of privileged rights is not as such incompatible with Article 86.

[128] The privileged undertaking is led, by the mere exercise of its exclusive rights, to exploit its dominant position in an abusive way (*Höfner*).

[129] The privileged rights are liable to create a situation in which the privileged undertaking is led to commit an abuse (*ERT*).

[130] The *Höfner* situation is difficult to imagine in a non-state measure situation, unless the case of intellectual property rights is included. However, such are rights are in a sense "state

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position by growing from within.[131] The rationale of *RTT* and the *Services* case is more easily transposed into a non-state measure situation since it would in itself constitute an abuse by a non-privileged enterprise to use its dominance in one market to leverage on to a neighbouring market. However, the qualifications mentioned above with regard to such a transposition still apply.

In *Corbeau*[132] the Court seems to have developed the two approaches and overcomed the differences between them by taking due account of the fact that a privileged undertaking has not obtained its dominant position by its own efforts but indeed through the rights granted to it.

As it may be recalled from previous, the Court stated that Article 90(1) must be read in combination with Article 90(2) and went on to consider the application of Article 90(2) without any prior analysis of the application of Article 90(1) to the facts. Thus, without applying any of the approaches set out in the cases mentioned above for establishing an infringement of Article 90(1), the Court appears to have concluded that the use of the Régie des Postes' exclusive rights to prevent private courier services threatened the 'effet utile' of Article 86 and thus fell to be considered under Article 90(2). However, a close look at the Court's analysis reveals the influence of Article 90(1) considerations.

The Court seems to have applied the cumulative formula that excluding competition is not 'justified' where first, the services are supplementary to and separable from the public service and in demand and second, they do not threaten the financial equilibrium of the public service. The implication of the first limb can regarded as an examination of whether the service at issue falls within the type of services mentioned in Article 90(2) ("the public services"). If not, the implication of the second limp seems to be that it is only 'justified' to exclude the provision of the service from competition if said service constitutes a necessary financial foundation for the provision of a (related or ancillary) public

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measures", although of another kind than Article 90 privileged rights. Reference is made to the Courts ruling in Joined Cases C-241 and C-242/91 *Magill* [1995] ECR I-743.

[131] In case of obtaining a dominant position through merger, prior approval would be necessary according to the Merger Regulation (4064/89). Before the adoption of this regulation, the merger could probably have been prohibited under Article 86, see above regarding the Courts judgment in the *Continental Can* case.

[132] Case C-320/91 *Paul Corbeau* [1993] ECR I-2533.

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service. In other words, the public services embraced by Article 90(2) constitute what should be considered core monopolies and if there exits a demand for related or ancillary services, these services may not be monopolised unless their inclusion in the monopoly is necessary from a financial point of view in order for the monopoly undertaking to perform the public services.[133]

If this interpretation of *Corbeau* is correct, the Court applied Articles 90(1) and 90(2) in combination although the paragraphs usually are considered to have different addressees. This is harmony with the Court's statement in the judgment that *Article 90(2) permits Member States* to grant exclusive rights, which could hinder the application of the competition rules, to undertakings entrusted with a public service task where such restrictions are necessary to ensure the performance of that task.[134] The statement does, however, call for further consideration as to the scope of Article 90(2). If a given privileged rights falls within the public services embraced by Article 90 (2) and the *existence* of the right thus is 'justified', can the exemption provision of that Article be used once again to exempt an otherwise illegal *exercise* of the right?

Further clues to understanding the Court's judgment and, in particular, its assessment of whether the monopoly was 'justified' are to be found in Advocate General Tesauro's opinion. Tesauro pointed out that the rulings in *Höfner*, *ERT* and *Merci* started from the premise that Member States must abstain from compromising the 'effet utile' of the competition rules, but observed that the formulae established in these cases are difficult to apply. In particular, the Court had not indicated how to assess whether a particular monopoly necessarily leads to an abuse or whether it is necessary to determine whether an abuse has been committed. Advocate General Tesauro noted the reasoning in *RTT* and the *Services* cases, but pointed out that there is no difference between measures which *extend* exclusivity and measures which *establish* exclusivity as both

[133] The unanswered question is whether the formula applies even if the privileged undertaking is capable of meeting the demand for the ancillary service. *Höfner* seems to imply that in this case the related service could be legally included in the monopoly whereas *RTT* and the *Services* case indicate the opposite conclusion. Corbeau does not give an explicit answer but Regie des Postes was unable to provide the services rendered by Paul Corbeau. When read in context of the Commission decision referred to in footnote 112 above and the *Telemarketing* formula, the answer is likely to affirmative.

[134] See paragraph 14 of the judgment.

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eliminate the possibility of competition, and that the essential point is to establish how far the measures in question are 'objectively justified' (by public interest requirements consistent with Community objectives). He stated that it is unclear whether these considerations are to be made under Article 90(1) or 90(2) and went on to conclude that the Régie de Postes' core postal monopoly was compatible with Article 90, but that the courier services monopoly was not.

It remains to be confirmed whether the correct interpretation of *Corbeau* is, that in the context of privileged rights an objective justification test prevails based on Article 90(1) and (2) in combination (privileged rights are allowed only insofar as they can be justified under Article 90(2)), or, that the ruling is limited in scope to ancillary monopolies failing to satisfy market demand (the grant of privileged rights is legal unless it can be pointed out that the very existence of the rights leads to an unavoidable infringement of the Treaty rules). Nevertheless, the judgment marks a significant development which surely deserves more reasoning and elaboration from the Court.[135] The subsequent rulings of the Court does not provide any measurable guidance in this respect.

Subsequent judgments

Four rulings were made by the Court on 27 October 1993,[136] on references from the Belgian and French courts, which concerned the compliance of the Member States with regard to the Terminals directive and the issue of the states obligations prior to the implementation date of the directive. The main issue of the cases was the question of separating regulatory and operational activities and although the Court applied Article 90 in conjunction with Article 86 with regard to the period prior to the implementation of the directive, it may be argued that judgments did not in same manner as in the cases reviewed above touch upon the issue of the compatibly of exclusive rights as such with Community competition law. At the end of day this issue is not so much a question of the *existence* of privileged rights but instead a question of how such rights are *exercised.* Given that the full separation of operational and regulatory functions has been

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[135] *Corbeau* is further discussed below in the chapter on Article 90(2).

[136] See joined Cases C-46/90 and C-93/91 *Procureur du Roi v Lagauche et Evrard* [1993] ECR I-5267 and Cases C-69/91 *Decoster* [1993] ECR I-5335 and C-92/91 *Taillandier* [1993] ECR I-5383.

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required by the Terminals and Services directives, the rulings in these cases are of more relevance to the question of how far such separation is required by Article 90(1) in other sectors, such as the postal sector, pending the adoption of Article 90(3) directives or other Community measures.[137]

Two rulings of the Court rendered subsequent to its judgment in *Courbeau* have been suggested to question the proposition that the latter judgment introduced an objective justification test to be applied to the existence of privileged rights (or that the Court has abandoned the test).[138]

On 17 May 1994, the Court rendered a preliminary ruling in *Corsica Ferries*.[139] The facts of the case were that ships entering Italian ports had to rely on the services provided by officially appointed pilots. The tariffs applied by the corporations that employed these pilots were officially approved by the minister for merchant shipping. In the port of Genoa official tariffs were lower for ships flying Italian flag than for foreign vessels. Corsica Ferries considered that these differences were contrary to Community competition rules and initiated proceedings before the Tribunale di Genova which referred the issue to the Court.

The Court observed in the first place that the Italian piloting corporations had an exclusive right to provide the services at issue by virtue of Italian law. Referring to *Merci*, it found that because of its importance the port of Genoa should be considered as a substantial part of the common market. In consequence the corporations in question were regarded as occupying a dominant position within the meaning of Article 86. Instead of applying the objective justification test

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[137] *Lagauche/Evrard* indicate that it may be legitimate for dominant undertakings operating on the market to be allowed to operate a limited regulatory role, such as the grant of type approval, provided the main regulatory functions, such as standard setting, are carried out by an independent body. The rationale is perhaps that it is consistent with Article 90(2) to refuse to connect equipment to the network where necessary to protect recognised essential requirements. However, it is arguable, on the basis of the cases reviewed above (*ERT*, *RTT* and *Corbeau*), that unless a Member State can show technical or financial reasons (or some other objective justification) why it is necessary to delegate *any* regulatory role, including the grant of type approval, to a dominant operator on the market who is liable to use that regulatory role to gain a competitive advantage, such delegation infringes Article 90 in conjunction with Article 86.

[138] See Competition Law Checklist *Article 90* ELR [1995] CC 79 - CC 87, at CC87.

[139] Case C-18/93 *Corsica Ferries Italia* SRL *v Corpo dei Piloti del Porto di Genova* [1994] ECR I-1812

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from *Corbeau*, the Court then stated that the mere fact of creating such a position by granting exclusive rights within the meaning of Article 90(1) is not in itself incompatible with Article 86. Additional elements are required: "a Member State infringes the prohibitions in those two Articles if, by approving the tariffs adopted by the undertaking, it induces it to abuse its dominant position inter alia by applying dissimilar conditions to equivalent transactions with its trading partners within the meaning of Article 86(c) of the Treaty".

The Court's ruling might at first glance be seen as a return to a 'pre-*Corbeau*' approach. However, the judgment must be reviewed in light of the fact that the infringement at issue was quite obvious and in fact regarded the *exercise* and not the *existence* of the exclusive rights in question. Thus, in this the Court was not faced with the problem that no formal infringement of Article 86 had taken place. Clearly, the Italian piloting corporations were infringing that Article by applying discriminatory tariffs. By approving these tariffs the Italian authorities took part in the infringement. The approval by the authorities does not imply a situation similar to that in *Höfner*. In the latter case the federal employment agency was blameless because even though the agency in practice accepted that private companies engaged in businesses formally violating its exclusive rights, German law made it impossible for these companies to collect claims based on services rendered to clients in this respect. Moreover, the application of an objective justification test as introduced in *Corbeau* would not in a *Corsica Ferries* type situation lead to another conclusion than that of the judgment. This test concerns the existence of privileged rights not their exercise. If the exclusive rights of the piloting corporations were to be found justified, which they probably would, that does not imply that the corporations would be entitled to apply discriminatory tariffs even though approved by the authorities. This would still constitute an infringement. Only if an exemption provision (Article 90(2) or Article 56) could be invoked in favour of the discriminatory pricing would legality be obtained.

In its judgment of October 5, 1994 in *La Crespelle*[140] the Court ruled on French law proscribing that artificial insemination of animals was subject to authorisation. Each authorised insemination centre served an exclusive territory. If an in-

[140] Case C-323/93 *Centre d'insémination de la Crespelle* [1994] ECR I-5077.

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semination centre did not produce semen it normally would purchase it on a contractual basis from an authorised production centre. Imports of semen from other Member States were free but had to be delivered to authorised production or insemination centres. Breeders within the area of the competent centre could request that centre to supply them with the semen of their choice. The competent centre could accept such requests under the condition that additional costs entailed by the choice were borne by the users.

Against this background, the authorised insemination centre of the Mayenne Cooperative brought a legal action against the Crespelle Centre for having violated the cooperative's exclusive right. The Cour de Cassation asked the Court whether the French rules were compatible with the rules of the Treaty on competition and on the free movement of (agricultural) goods.[141]

As regards the competition issue, the Court held that granting exclusive rights to serve certain areas established a contiguous series of monopolies, territorially limited but together covering the entire territory of a Member State. This created a dominant position within the meaning of Article 86. The Court then repeated that the mere fact of creating a dominant position by granting exclusive rights within the meaning of Article 90(1) is not as such incompatible with Article 86. "A Member State contravenes the prohibitions contained in those two provisions only if, in merely exercising the exclusive right granted to it, the undertaking in question cannot avoid abusing its dominant position." Since the alleged abuse in the main proceedings concerned exorbitant prices charged by the insemination centres, the Court examined whether this pricing policy was a direct consequence of the French law. The Court noted in this respect that provisions of the law in question allowed the centres to charge additional costs when breeders in their area wanted to use semen of their choice, but did not determine the amount of these costs. French law therefore did not lead the centres to charge disproportionate costs. In consequence, the exclusive rights in question did not infringe Articles 90(1) and 86. However, Article 86 could be applied directly to the conduct of the centres concerned. These centres would be abusing their dominant position if they were to charge users of costs in excess of the

[141] Only the competition law aspect will be reviewed in this context.

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additional costs actually incurred in obtaining, and conserving until insemination, semen imported at the request of a user from another Member State.

As in *Corsica Ferries* the Court was in *La Crespelle* not faced with issue of reviewing the justification for the existence of the privileged rights in question but merely the unlawful exercise of such rights. This time the authorities did not take part in the infringement of Article 86 and consequently there was no need to apply Article 90. The Court's repetition of the sentence, that the mere fact of creating a dominant position by granting exclusive rights within the meaning of Article 90(1) is not as such incompatible with Article 86, can not, it is maintained, be regarded as proof that an objective justification test as introduced in *Corbeau* no longer prevails according to the case law of the Court. In neither *Corsica Ferries* nor *La Crespelle* was it necessary for the Court to apply the test due to the simple fact that formal infringements of Article 86 had taken place on the part of the privileged undertakings and both cases thus regarded, in terms of Article 90, whether the Member States in question took part in these infringements.

Chapter 7

Analysis of the case law on Article 90 and free movement rules

The case law reviewed

The Court's rulings in the *Terminals* case supports the proposition that the grant and maintenance of exclusive rights may infringe Article 30 even in the absence of discrimination but provided that the free movement of goods between Member States is restricted if the existence of the rights is not justified by overriding public interest reasons (*Cassis de Dijon* mandatory requirements).

Given the case law on Article 30 prior to the judgement, it was hardly surprising that the Article could be invoked to question the legality of state measures which result in a restriction of the free movement of goods. However, the fact

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that Article 30 was applied in the context of an Article 90(3) directive and that the latter Article, as the French government argued, presupposes the existence of exclusive rights, gave rise to several issues of consideration. It is beyond the scope of the context of this chapter to examine these issues. It is found sufficient to point out that if other state measures of non-discriminatory nature, but which however restrict the free movement goods, can be declared incompatible with Article 30[142] why should a state measure such as the grant of privileged rights not be eligible for the same application of the Article. This holds true, it is maintained, even if the application concerns the very existence of such rights since in some instances it is the existence in itself (and not only the exercise) which causes the unlawful restriction on trade.[143]

When recognising that the ruling in the *Terminals* case implies that the very existence of privileged rights may infringe Article 30, the question to be considered is whether the Court, in parallel to the developments which has taken place with regard to the application of Articles 90(1) and 86, has extended the principles established in the judgment to one or more of the other free movements provisions. The traditional interpretation of these (other) provisions has been that been that they constituted specific prohibitions complementary to the general (fundamental) prohibition against discrimination based on nationality and basically no more.[144] Thus, if the traditional interpretation still applies this would, in regard to privileged rights, imply that the aforementioned provisions could only be invoked in respect of the exercise of such rights but not in respect of their existence.[145]

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[142] Such as 'indistinctly applicable measures'.

[143] In the same way as with regard to the application of Articles 90(1) and 86 it in some instances is the existence of privileged rights which unavoidably leads to an abuse of the dominant position created by these rights.

[144] See Ehlermann *European Community Competition Policy, Public Enterprise and the Co-operative Mutual and Nonprofit Sector* Annales de L'economie Publique Sociale et Cooperative [1992] 555-571. The author is in favour of the proposition that the Court has gradually aligned the principle of freedom to provide services more closely to that of the free movement of goods. Even before the judgments reviewed in chapter 5 were rendered by the Court, the case law on Article 59 had already to some extent expanded the scope of that Article closer to that of Article 30, see as examples Cases 110 and 111/78 *van Wesemael* [1979] ECR 35; Cases 220, 252, 205 and 206/84 *Commission v France, Denmark, Germany and Ireland* [1986] ECR 3663, 3713, 3755 and 3817; Case C-204/90 *Bachmann* [1992] ECR I-249.

[145] Thereby not said that if the case law merely has gone beyond the traditional interpretation, this necessarily implies that the "other" free movement provisions also can be invoked with the regard to the very existence of privileged rights. The "expansion" could regard only the

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The Court's ruling in *ERT* with regard to the application of the free movement rules indicates that the traditional interpretation still apply. The Court reviewed the exclusive rights in question only as to their ability to lead to discrimination. As it may be recalled, the Court held that the monopoly in question was not contrary to Article 30 provided that it did not give rise to discrimination between national and imported products. Similarly, in relation to the free movement of broadcasting services, the Court stated that Article 59 prohibits rules creating a monopoly over broadcasting national programmes and retransmitting imported programmes where such monopolies give rise to discrimination against broadcasts from other Member States (subject to the derogation contained in Article 56).

The rulings in the *Mediawet* cases[146] on the other hand support the proposition that exclusive rights may infringe Article 59 even in the absence of discrimination provided that the free movement of services between Member States is restricted due to the existence of the rights. In finding the infringement of Article 59, the Court first stated that national rules which discriminate against a service provider on grounds of nationality or country of establishment are contrary to that Article. Then, however, the Court went on to say that (in the absence of Community harmonisation) national rules, which are *non-discriminatory* but *effectively restrict* the freedom to provide services by imposing conditions on undertakings established in another Member State which are not already satisfied by rules imposed in the Member State of establishment, or which *exclude services from competition*, infringe Article 59 unless justified by and proportional to overriding reasons relating to the public interest.

In *Merci*, the Court alluded briefly to the free movement rules, stating that a national measure which facilitates the abuse of a dominant position is usually incompatible with Article 30 insofar as it restricts the importation of goods from

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exercise and not extend as far as the existence. Thus, it is necessary to establish that the case law on the "other" free movement provision applies the same principles as the *Terminals* case did with regard to Article 30.

[146] Case C-288/89 *Stichting Collective Antennevoorzieing Gouda and Others v Commissariat voor de Media* [1991] ECR I-4007, Case C-353/89 *Commission v the Netherlands* [1991] ECR I-4069.

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other Member States. As it may be recalled, the Court also indicated that the requirement that the privileged port companies should comprise only national (Italian) workers was in breach of Article 48 of the Treaty. The judgment does not provide any substantive guidance as to answering the question raised above.

Article 30 was the only of the free movement provisions which was applied in *RTT*, and although the Court found that the lack of appeals procedure infringed the Article, since it allowed the national telecommunications organisation, which had been granted of the power to approve terminal equipment, to adopt an unfavourable attitude towards imported products, the judgment merely confirms the scope of Article 30.

In the *Services* cases, the Court pointed out that Article 59, like Article 30, created directly effective and binding obligations on Member States and confirmed that the Commission could therefore specify the obligations arising from Article 59 without the need for the Council to adopt legislation on the subject. No statement can be found in the judgment either in favour or the opposite as to whether the Article has been given a scope similar to that of Article 30.

It is maintained that the Court's rulings in the *Mediawet* cases clearly supports an affirmative answer to the question of whether Article 59, with regard to privileged rights, has been given a scope similar to that of Article 30, provided of course that the free movement of services between Member States is restricted by the existence of such rights. It is suggested that these rulings, as well as the judgment in the *Terminals* case, are consistent with the case law on Articles 30[147] and 59 and that *ERT* should not be interpreted to mean that a finding of discrimination is a prerequisite to an infringement of (Article 90 in conjunction with) the two Articles.[148] Thus, given the case law reviewed above it should be established that Articles 30 and 59 (in conjunction with Article 90) prohibit the grant and maintenance of privileged rights which restrict the free movement of goods or services between Member States. Like in the case of applying Article 90(1) in conjunction with Article 86, the grant and maintenance of privileged

[147] In La Crespelle the Court held that the obligation to deliver semen to authorised centres constituted an import barrier contrary to Article 30. Although the Court seemed hesitant to apply Article 36, the application of this Article was left to the national court.
[148] See Gyselen footnote 122 above, at 1231 on the requirement of discrimination in *ERT*.

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rights, which concern the free movement of goods and services, needs to be justified on public interest grounds.[149]

That leaves Article 48 concerning the free movement of workers and Article 52 regarding the right of establishment. There seems to be no reason in principle why these, likewise directly effective, Articles should not also apply to the grant of privileged rights in the same manner as the two other free movement provisions.[150] Developments in the Court's case law such as the ruling of 31 March 1993 in *Dieter Kraus*[151] seems to confirm that the general scope of Articles 48 and 52 is moving towards convergence with that of Articles 30 and 59.[152] Whether these developments also will apply with regard to privileged rights remains to be seen but it is difficult to imagine why it should not be so.[153]

Article 37

When reviewing the case law on the free movement provisions with regard to privileged (monopoly) rights, the question may be raised as to the application of Article 37. In particular with regard to the ruling in the *Terminals* case, the Court was remarkable silent when it came to assessing that Article in light of the facts, although the Commission had referred to Article 37 in the recitals to the directive.

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[149] The 'public interest grounds' which may justify privileged rights with regard to Articles 30 and 59 ought to be the same as those which apply with regard to the combined application of Articles 90(1) and 86, see Ehlermann footnote 144. In terms of Article 30, the public interest grounds are usually referred to as mandatory requirements (based on *Cassis de Dijon*). These apply to what is known as 'indistinctly applicable measures', meaning state measures which are not discriminatory but nevertheless restrict the free movement of goods. The scope of application for the derogation provision in Article 36 is usually thought to cover 'distinctly applicable measures' meaning measures which overtly favour national goods, see Josephine Steiner *Textbook on EC Law* [1996] 5th ed. at 138. See chapter 8 for further elaboration and the question of whether a similar doctrine can be transposed to the competition rules.

[150] For example in the case of *Merci*, it could be argued that the monopoly in question was contrary to Article 52 because it made it impossible for companies from other Member States to establish themselves in the port of Genova. However, in *Costa v Enel* Case 6/64 [1964] ECR 585 and *Van Ameyde* Case 30/76 [1977] ECR 1091 the Court rejected the application of Article 52 to exclusive rights.

[151] Case C-19/92 *Dieter Kraus v Land Baden-Württemberg* [1993] ECR I-1663.

[152] For comments on the case see W.-H. Roth *Case Law* [1993] CMLR 1251-1258.

[153] Ehlermann, footnote 144, is in favour of applying all the free movement provisions in the same manner with regard to exclusive rights.

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Cases, in which the Article has been invoked, have been few in numbers which makes it all more difficult to determine its scope of application. As it was mentioned previously, some commentators find that the Article has little (if any) vigour independent of Article 30 whereas others, on the basis of the ruling in *Manghera*, are of the opinion that ultimately the Article requires the abolition of the monopolies referred therein. At the end of the day the two viewpoints portray nothing more than a difference of opinion as to which Article to apply, the result is, on the basis of the *Terminals* case, the same. The relevant question to raise is rather whether Article 37 implies limitations on the scope of Article 30. If Article 37 is read literally it contains nothing more than a prohibition against discrimination with regard to the operation of the monopolies referred to therein. Thus, since the Article is placed in the same chapter of the Treaty as Article 30 it may be argued that the prohibition in the latter Article can not be invoked in respect of the existence of the aforementioned monopolies but only with regard to how the implied (privileged) rights are exercised. In other words, the prohibition contained in Article 37 constitutes a qualification to the general prohibition in Article 30.[154]

Given the scope of Article 30 as determined in the reviewed case law above, it is maintained that the prohibition contained in Article 30 in practice covers that of Article 37 and that the latter Article therefore ultimately constitutes no more than a specific instance of the fundamental prohibition against unjustified obstacles to intra-Community trade in goods, including those which are a result, in the terms of Article 37, state monopolies of commercial character.[155]

Application of Article 90 in regard to the free movement rules

In judgements reviewed above Article 90 was not applied in conjunction with the free movement rules in the same technical manner as regards Article 86.[156] Such an application is not needed since the application of Article 90 with the

[154] In one of the few rulings concerning Article 37, Case C-347/88 *Commission v Greece*, [1990] ECR I-4747, rendered almost nine months subsequent to the ruling in the *Terminals* case, the Court avoided to deal with the problem. For commentary on the case, see Leigh Hancher, [1992] Journal of Energy and Natural Resources Law197-202.

[155] See Ehlermann, footnote 144 above, who is in favour of this interpretation of Article 37.

[156] In the *Terminals* case, Article 30 was, however, applied in the context of an Article 90(3) directive. In *Mediawet* there was no references to Article 90.

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free movement rules adds little from a substantive point of view as it merely reminds Member States of their obligations under these rules and makes it clear, if any clarifications was needed, that those obligations apply to measures relating to privileged undertakings. The reviewed case law has widened the application of the free movement rules to cover the grant and maintenance of privileged rights, but the free movement rules do not depend on Article 90 for their effect. By contrast, the application of Article 90 with Article 86 adds substantive obligations as it requires Member States, with the help of some mental acrobatics and the above guidance of the Court, to comply with Article 86.

Whether Article 90(2) provides an extra defence to the free movement rules, in addition to the derogations in Articles 36 and 56, for privileged which are justified for public interest reasons will be discussed further in chapter 8 below. The answer to this question does not, however, change the fact that Article 90(3) gives the Commission an extra procedural tool in applying the free movement rules to privileged rights. Whereas infringements of the free movement rules alone can only be enforced through the usual channel of bringing a (usually lengthy and) formalistic procedure under Article 169, Article 90(3) enables the Commission to adopt a directive or individual decision outlawing the rights in question without the need to go the Court and on a faster timescale. In the case of directives, the Commission can not only achieve this result for all Member States at once, but can also lay down the specific obligations that must be followed in a particular sector so as to ensure that the Article 90 obligations are met.

Chapter 8

Some remarks on Article 90(2)

As the Court has interpreted Article 90(1) in a broader manner to concern the control of the very existence of privileged rights, so the Article 90(2) public service defence has become increasingly significant. Although it is not the aim of this dissertation to examine the scope of Article 90(2), the application of that provisions seems, on the basis of the case law reviewed, to play a decisive role

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when determining the justification for the grant and maintenance of privileged rights. In the first part of this chapter, some issues concerning the role of Article 90(2) with regard to the justification of privileged rights will be discussed depending on whether the Article is applied in conjunction with the free movement provisions or the competition rules. In the second part, other aspects of Article 90(2) of a more general nature will be examined. By no means, however, does the analysis in this chapter intend to cover even a substantial part of the issues and questions which the application of the Article 90(2) raise.

The role of Article 90(2)

In applying Article 90 in conjunction with Article 86, it seems that on the basis of *Corbeau* public interest grounds would fall to be considered in assessing whether a legal monopoly is objectively justified, although it remains unclear whether that assessment should be made under Article 90(1), Article 90(2) or both. In applying Article 90 with Articles 30 and 59, public interest grounds may justify a legal monopoly on the basis of mandatory requirements (the *Cassis de Dijon* rule), the Article 36 and 56 derogations or even the Article 90(2) public service defence, although the interaction between the free movement rules and Article 90(2) also remains unclear. Thus, when determining whether the existence of a specific privileged right is justified or not, a difference exists depending on whether the competition rules or the free movement rules are invoked.

When applying Article 86, Article 90(2) seems to constitute the only provision for justification.[157] When applying the free movement provisions the situation is different. For example as regards Article 30, the Court has in its case law built-in the mandatory requirements as part of the application of this Article. Thus, justification may be obtained according to these requirements. Moreover, Article 36 provide even further grounds for justifications. If then Article 90(2) is added, yet another defence seems to be at hand.

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[157] Unless justification for the existence of the privileged right is considered to be part of the assessment under Article 90(1).

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This gives rise to a number of questions. First of all, it must be considered whether Article 90(2) can be applied in conjunction with the free movement rules, since provisions for justification, in contrast to Article 86, already are included in the application of these rules. The wording of Article 90(2)[158] and the Court's rulings in the *Terminals* case and *Merci* seem to support an affirmative answer.[159] The second question follows from the first. If Article 90(2) can be applied in conjunction with the free movement rules it must be considered whether Article 90(2) has a scope which is independent of the justification provisions already contained in these rules (mandatory requirements and the derogation Articles such as Articles 36 and 56). The answer to that question is not easy as the following analysis will show.

If one continues on the assumption that there is no need for Article 90(2) in the context of the free movement rules unless it has an independent scope, a brief analysis of the justification provisions contained in these rules is needed. As regards Article 30 for example, two sets of justification provisions exit; namely mandatory requirements and Article 36. Since restrictions of trade already may be justified on the basis of mandatory requirements what is the scope of application of Article 36? In the view of some commentators, mandatory requirements can not be invoked to justify so-called distinctly applicable measures but only those which are characterised as indistinctly.[160] Thus on the basis hereof, a national measure which (clearly) discriminates goods from other Member States and favours national goods can only be justified according to Article 36. This view explains the respective purposes of mandatory requirements and Article 36.

If, on the basis hereof, Article 90(2) is to be given an independent scope, it could be argued that the application of Article 90(2) should be confined to

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[158] Which applies the exception 'in particular' to the competition rules, but also to the other Treaty rules.

[159] In *Merci*, the Court was asked to consider the application of Article 90(2) to Articles 7, 30, 85 and 86 and concluded that it did not apply on the basis that the undertaking was not entrusted with a service of general economic interest. In the *Terminals* case, which was decided on the basis of Article 30, the Court considered the Commission's application of Article 90(2), although not explicitly in the context of Article 30. The Court does not appear to have ruled specifically on the point in any of its judgments.

[160] See Josephine Steiner footnote 149, at pages 138-139.

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situations where privileged rights are *exercised* in an unlawful manner. This would imply that in the context of the free movement rules, Articles 30 and 59 in particular, justification for the *existence* of privileged rights should be sought under Articles 36 or 56, if the grant of the rights in itself is discriminatory, or according to mandatory requirements, if the existence of the rights merely constitutes restrictions on the free flow of goods and/or services. Article 90(2), on the other hand, should be invoked only to justify an otherwise unlawful *exercise* of privileged rights, provided that the existence of the rights already is justified. Thereby, Article 90(2) would be given a scope of application which is independent of mandatory requirements and Articles 36 and 56.

However, such an interpretation does not take due account of the other purpose which Article 90(2) needs fulfil, namely to provide the necessary justification provision for the existence of privileged rights in the context of Article 86. As to the application of the competition rules, Article 86 in particular, no provisions corresponding to mandatory requirements or the derogation Articles (Articles 36 and 56) exit. Thus, if the application of Article 90(2) is confined only to concern the *exercise* of privileged rights, this would necessarily imply that the public interest grounds, which provide justification for the *existence* of such rights, have to be part of the assessment under Article 90(1).[161] Although *Corbeau* could be said to indicate that Article 90(1) should be given such a scope, if this holds true then a reassessment of the free movement rules is necessary. For example in the case of Article 30, what would then be the role of mandatory requirements and Article 36, if Article 90(1) already fulfils the task of providing the necessary justification test?

The above analysis shows that it is difficult, if not impossible, to structure the scope of Article 90(2) in order to take due account of the difference which exits on a theoretical level when applying the Article in the context of the free movement rules on the hand and the competition rules on the other hand. It is maintained that instead of placing emphasis on such theoretical considerations, focus should be turned to the fact that the principle of undistorted competition and the free movement principle go hand in hand and lead to the same conclusion: privileged rights granted by Member States may be maintained in force if and to

[161] That does not concur with the notion that Article 90(1) is a 'reference' provision.

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the extent that they are justified on public interest grounds.[162] On this basis, Article 90(2) is given a scope which is not limited by the way in which the free movement rules and the competition rules are applied respectively outside the context of Article 90. It may be that one of the consequences is that Article 90(2) provides an extra defence in respect of the free movement rules, in addition to mandatory requirements and the relevant derogation provisions, for the justification of legal monopolies. As stated above, such a finding is, however, in accordance with the wording of Article 90(2). Moreover, in the cases where both the free movement rules and the competition rules have been invoked, there seems to be a tendency that the Court considers the application of Article 90(2) only in the context of the latter rules.[163]

Various aspects of Article 90(2)

The question may be raised as to which the authorities that are competent to apply Article 90(2). The Commission set out the view in its 'Guidelines on the Application of EEC Competition Rules in the Telecommunications Sector'[164] that it has exclusive competence, under the control of the Court, to decide that the Article 90(2) exception applies, while recognising that national authorities and courts may decide that the exception does not apply. It seems clear that the Commission's Article 90(3) duty presupposes the competence to evaluate the application of Article 90(2). Indeed, the Terminals and Services directives show that it is willing to apply Article 90(2). However, the Court's rulings in *ERT* and *Corbeau* imply that, at least where Article 90 questions arise in national proceedings, it is for the national court to evaluate whether the Article 90(2) criteria are met. Thus, these rulings indicate that the Commission's competence to assess Article 90(2) is by no means exclusive.[165]

However, there are indications that the Commission's competence to apply Article 90(2) in some respects is of a special nature. The judicial control by the Court of Justice and national courts is to a certain extent limited when it comes to the nature of the sanction which arises whenever it is held that the existence

[162] See Ehlermann, footnote 144 above.
[163] See as an example the ruling in *ERT*.
[164] OJ 1991 C233/2.
[165] These rulings emphasize the need for a Community-wide consensus on Article 90(2).

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of a legal monopoly is contrary to Community law. As some commentators have pointed out, a provision such as Article 86 is a blunt instrument in this context. If the national legislation creating the monopoly rights is contrary to Community law, the result is that the legislation can not be applied. This may risk creating a legislative void, as a court can not itself substitute alternative regulations to govern the activities concerned, either prospectively or retrospectively.[166] The Commission on the other hand appears to be able to take account of such problems. In the telecommunications directives for instance, the Commission came to the finding that the existing monopoly rights infringed Community law. Such a finding would normally imply that the rights could no longer be upheld. However, the Commission had in the directives granted what be may characterised as transitional periods, giving the Member States and telecommunications bodies concerned a limited period in which to adapt the existing monopolies to the provisions of the directives.

If the granting of such transitional periods is to be explained in terms of Article 90, it may be argued that the competence of the Commission stems from the combined application of Article 90(2) and (3). In a complex situation such as the liberalisation of an industry sector, delay may be needed with regard to the changes required to ensure that the liberalisation does not threaten the future provision of the services which are considered of universal nature and thus are exempted from liberalisation. The legal basis for the justification of maintaining in force, for a limited period of time, national measures that in principle are unlawful is Article 90(2) whereas Article 90(3) provides the Commission with the competence to authorise the temporary maintenance of these measures which eventually have to be eliminated.[167]

As to the more specific application of Article 90(2), *Corbeau* confirmed that the 'cherry picking' or 'cream skimming' factor can be invoked to justify the maintenance of monopolies and determine the boundaries to which they may extend under Article 90(2). The Court acknowledged that if private undertakings are

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[166] See Edward and Hoskins, below.

[167] See Giuliano Marenco *Public Sector and Community Law* [1983] CMLR 495-527. The article was written prior to the enactment of the telecommunications directives but nevertheless the author, with particular emphasis on Article 90(3), argues in favour of the viewpoint that the Commission has such a competence (see page 522 of the commentary).

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allowed to compete with the public service undertaking in areas of their choice, they would choose the profitable areas and could offer lower prices since they would not be obliged to operate a trade-off between losses made in unprofitable areas and gains made in profitable areas. In other words, new market entrants tend to cherry-pick or cream-skim the best and leave the rest. This deprives the public service undertaking of the cherries and cream it needs to cross-subsidise its continuing obligation to act in unprofitable (product or geographic) areas. Article 90(2) may thus be relied on to maintain a legal monopoly over a profitable activity which is necessary to cross-subsidise the performance of an unprofitable activity essential to the service of general economic interest entrusted to the undertaking in question. However, the factors to be taken into account in assessing the strength of the public service defence are most likely to differ from sector to sector.

The Court's judgment of 27 April 1994 in *Almelo*[168] shows that the Article 90(2) defence can also apply to anti-competitive agreements and arrangements between public or private undertakings with effects similar to those of monopoly rights. The Court was asked to rule on the legality of an exclusive purchasing obligation imposed by the standard conditions of IJM, a regional electricity distribution company, on local distributors and a prohibition imposed by SEP, the group of electricity generation companies, on the importation of electricity by the regional distributors. The Court considered that the exclusive purchase obligations could restrict competition within the meaning of Article 85 and that given the fact that the exclusivity clause was contained in IJM's standard conditions, the cumulative effect would be to partition off the national market.

In applying Article 90(2), the Court pointed out that IJM was entrusted by the terms of its non-exclusive concession with the task of securing the uninterrupted supply of electricity in a given national territory in the quantities required at any moment, at uniform tariffs and conditions which could only vary on objective grounds. The Court then stated that restrictions of competition must be accepted insofar as necessary for the performance by IJM of its task of general economic interest, taking into account its costs and the need to comply with

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[168] Case C-393/92 *Gemeente Almelo and others v Energiebedriff IJsselmij NV* [1994] ECR I-1477.

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regulations (for example, environmental). The Court concluded that it was for the national court to assess whether the exclusivity clause was necessary for IJM to fulfil its public service task.

Chapter 9

Literature on Article 90

This chapter consists of two parts. In the first part, views on Article 90 in 'early' literature is analysed. Hereby is meant literature published from the time before and until the Court's judgment in the *Terminals* case. Prior to that judgment, literature tended to be of more sporadic nature, not least because the judgment indeed constitutes a milestone in the understanding of the scope of Article 90. In the second part of this chapter, two selected articles, published subsequent to the *Terminals* case, are summarized. The first one is by Marc van der Woude and contains an extensive attack on that judgement. The authors to the second article are David Edward and Mark Hoskins who, on the basis of the cases reviewed above, analyse different approaches to the judicial control of legal monopolies.

Part I: Views in 'early' literature

Until the 1980s, Article 90 was not the object of any significant application, neither in the Commission's practice nor in the Court's case law.[169] Perhaps as a result hereof, the early literature[170] was profoundly diversified when attempting to interpret the Article's peculiar characteristics and the interpretations tended to be of theoretical and academic nature.[171] Part of the literature was concerned with the question whether public undertakings or undertakings holding privileged rights were immune to the competition rules.[172] Other commentators fo-

[169] See Pappalardo footnote 4.
[170] Until 1980s.
[171] International Congress, Bruges *Public Enterprises and Competition* Bruges Week, 1968.
[172] See reference hereto in Marenco *Public Sector and Community Law* [1983] CMLR 495.

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cused more on the liability of the Member States, some on the link between Articles 90 and 37[173] whereas some merely concentrated their comments on a textual analysis of Article 90.[174] To provide an overview of the many suggestions on how the Article should be applied would prove a complex task. Giuliano Marenco has, however, in an article from 1983 successfully reduced the numerous 'early' interpretations to three main views on especially Article 90(1).[175]

According to the first interpretation, "Article 90(1) counterbalances the immunity of public undertakings from a direct application of the rules of the Treaty. It is therefore a lex specialis for public undertakings". The notion behind this interpretation is that since Article 90(1) places a responsibility on the Member States, privileged undertakings escape liability.

The other two interpretations are both based on the assumption that privileged undertakings are subject to the rules of the Treaty on an equal footing with private ones. Thus, the liability imposed on Member States under Article 90(1) is not simply a counterweight to the immunity of privileged undertakings. They two interpretations differ, however, in determining the scope of the State liability.

According to the second interpretation, "Article 90(1) prohibits any State measure in relation to public undertakings liable to produce effects analogous to those which would be caused by a direct infringement of a rule of the Treaty". The idea is that if a Member state imposes measures on a privileged undertaking such as price fixing, the effect of this measure would be the same as an agreement between undertakings forbidden under Article 85.

Finally, the third interpretation endorses the view that "Article 90(1) purports not to offset the immunity of public undertakings through an obligation laid upon the Member States to which they belong, but to supplement the responsibility of the public undertaking themselves with the additional responsibility of

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[173] van Hecke *Government Enterprises and National Monopolies* [1965-66] CMLR 450-461.
[174] Schindler *Public Enterprises and the EEC Treaty* [1970] CMLR 57-71.
[175] See footnote 172.

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the Member State". According to this interpretation, the purpose of Article 90(1) is to prevent Member States from imposing measures with the purpose of inducing privileged undertakings to behave in a manner already forbidden to the State or in a manner already forbidden to undertakings.

Marenco dismisses the first two interpretations on the basis of a number of reasons. As to the first interpretation, one of the consequences of its application would be that if a privileged undertaking acts on its own initiative, without the involvement of any state measure, neither the undertaking nor the state would be liable. An objection to the second interpretation is that different treatment would be accorded to State measures according to whether they apply to public or to private undertakings.[176] When looking at the first two interpretations in hindsight it seems difficult, if not impossible, not to agree with Marenco.

Although the third interpretation from a textual point of view appears to embrace the more recent perception of Article 90(1), neither Marenco nor any pre-1980s commentator seems, however, to envision that it one day would be discussed whether Article 90 provides the necessary tool for Community law to regulate the very existence of privileged rights or, in other words, whether the grant of such rights in itself can constitute a State measure prohibited by Article 90(1). Thus, Marenco and earlier commentators on Article 90 focus only on the exercise of privileged rights and not on the issue of existence which would later prove to be the one of the main points of the debate. Marenco's article does, however, in some sense mark the departure of the period of diversified opinions on the interpretation of Article 90 and at the same time the arrival of a more coherent view in literature, if not on the interpretation of the Article then at least on the issues of relevance.

The reasons for the emergence of more coherence are numerous, but some developments within the Community deserve to mentioned. First of all, the Commission had in 1980 for the first time made use of its Article 90(3) powers and adopted the so-called Transparency directive. Secondly, the technological de-

[176] In this respect it must be remembered that State measures applying to private undertakings can fall foul of a number of Treaty provisions, including Article 5 in conjunction with Article 3(g). See Marenco (footnote 172) at 506-9 for a discussion hereof.

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velopments, especially within the field of telecommunications, had made the Community institutions aware of the need for some sort of Community regulation with regard to (what was once considered) natural monopolies.[177] Thirdly, the White Paper concerning the completion of the Internal Market was about to be drafted.[178] These developments did in some way or other call into question the influence on competition of privileged rights granted by Member States to various undertakings.[179]

What appears to be for the first time in literature, John Temple Lang raises in an article from 1984 the question of "How far may a State establish monopolies and privileged enterprises and protect them from normal competition?". When answering this question, Temple Lang states[180] that "Article 90 contemplates that public undertakings and undertakings to which member states grant special or exclusive rights may be set up and may continue to exist". However, he then continues by saying that "Article 90 seems also to imply that the Treaty imposes some limits in the freedom of member states to establish such enterprises as monopolies or to grant these rights". While previous commentators all had focused on only the exercise of privileged rights and the question of liability for either the undertaking or Member State in question, Temple Lang directs the attention to the issue of possible limitations on the very existence of such rights. His view on the issue is that the Member States freedom to grant privileged rights is limited by Article 90(1) in such a way that a privileged right may only be granted if there are valid objective reasons why the inherent monopoly is necessary.

Temple Lang reaches his conclusion on arguments based partly on Article 5 and partly on Article 90 itself. The arguments are extensive, but basically the line of reasoning is as follows: When a privileged right is granted some sort of legal monopoly is created and inherently competition is restricted. Given this effect, it would be surprising if Community law did not subject such legal monopolies to any kind of restriction. According to the principle of proportionality (which

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[177] Already in 1983 the Council agreed with the Commission to set up a working group (SOGT), consisting of national monopoly organizations and Commission officials, to examine the whole structure of telecommunications. See Overbury and Ravaioli, footnote 24.
[178] COM(85)310.
[179] See Ehlermann footnote 144.
[180] Temple Lang *Community Antitrust law and Government Measures* [1984] Fordham 543.

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Temple Langs reads into Article 5), Member States may not adopt measures which are more restrictive than are necessary to achieve legitimate objectives and Temple Lang sees no reason why the principle should not apply to the power to create monopolies. Thus, applying the principle to this power necessarily implies that the creation of a legal monopoly have to be justified in each case. Moreover, Article 5 also imposes a general duty on Member States not to enact measures which are inconsistent with the objectives of the Community. Among these objectives are the free movement provisions and, according to Article 3(g), a system ensuring that competition is not distorted. Since these objectives govern the interpretation of Article 90, Member States have a duty not to grant privileged rights in such a way that the fundamental freedoms or competition are restricted or eliminated, unless justified by sufficient valid reasons.[181] With regard to the exception from this duty, Temple Lang refers to Article 90(2)).[182]

Although John Temple Lang, for what seems to be the first time in literature, had introduced the notion that Article 90 may impose limits on not only the exercise of privileged rights but also on their existence, some commentators continued to interpret the Article in a way characteristic of the early literature. Among these is Aurelio Pappalardo who has been one of the most frequent commentators on the Article.[183] In a contribution to the same Fordham edition as Temple Lang's article appeared in, Pappalardo[184] gives his interpretation on Article 90. In this article, Pappalardo puts the focus on which kind of state measures that will exclude liability for the undertakings concerned and how the measures as such should be evaluated under the Treaty rules. Pappalardo does not touch upon the notion introduced by Temple Lang. Nevertheless, readers of Pappalardo's article will (probably) get the impression that he would not agree with Temple Lang on his notion that Article 90 may impose limitations on not only the exercise but also the creation and maintenance of privileged rights. This

[181] It should be noted that Temple Lang, with reference to *BRT v SABAM* [1974] ECR 313, argues in favour of applying Article 90 in conjunction with Article 86 in order to establish that the granting of a specific privileged right may be prohibited.
[182] See also Temple Lang *European Community Competition Law and Member State Action* [1989] Northwestern Journal of International Law and Business 114-132.
[183] Aurelio Pappalardo wrote his first paper on Article 90 in 1964, see reference hereto in the panel discussion mentioned in footnote 75
[184] *Measures of the States and Rules of Competition of the EEC Treaty* [1984] Fordham 515.

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impression is confirmed in later works by Pappalardo. It is fruitful to spend some space on the development in Pappalardo's remarks to this notion because they illustrate how the practice of the Commission and hence the case law of the Court overtook the issues of debate in literature, especially since Pappalardo has been one of the strongest opponents against the notion introduced by Temple Lang.

In a panel discussion of the 1989 Fordham proceedings, Pappalardo quotes from an article by Richard Wainwright[185] where the question was raised "whether the granting of special or exclusive rights could itself be a measure prohibited in Article 90(1)". Wainwright argues in favour of an affirmative answer whereas Pappalardo raises a number of doubts as to whether the answer is compatible with Article 90(1) and the case law of the Court. The debate should be seen in light of the facts that the terminals equipment directive had already entered into force and had recently been challenged before the Court (the proceedings were still pending) and that the Services directive had just been adopted by the Commission.[186]

Then in an article from 1991[187], published just before the Court's Judgment in the *Terminals* case, Pappalardo more or less repeats the viewpoints brought forward in his article from 1984, stating that these views have remained untested for many years. He, however, acknowledges that "the situation is about to change as a result of the Commission's adoption of several recent measures". Then, reviewing the Commission's practice on Article 90 as it developed through the 1980s, Pappalardo states with regard to the Terminals directive that while he will not exclude that the grant of privileged rights may been seen as a "measure", he has serious doubts as to the compatibility with Article 90 of the general statement in recital 11 of the directive that the "grant and maintenance of special and exclusive rights for terminal equipment constitutes measures within the meaning of [Article 90(1)]".[188] This statement more than indicate that

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[185] Panel discussion *Public Enterprises and telecommunications* [1989] Fordham 333. Wainwright *Public Undertakings under Article 90* [1989] Fordham 239.
[186] The Terminals directive was the catalysator
[187] See footnote 4.
[188] Exactly where Pappalardo draws the line between the situations where he is willing to accept that the grant of privileged rights can constitute a "measure" and those situations where he is not ready to accept this view, is not clear from the article.

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Pappalardo still could not fully accept the notion put forward by John Temple Lang.

Finally, in a panel discussion which took place in context of the Fordham proceedings 1991, shortly after the Court's judgment in the *Terminals* case, Pappalardo reveals the following opinion:

> *"My understanding of Article 90(1) is (or at least was) as follows: the exclusive rights are a fact, and an undertaking which enjoys such a right is equally a fact; then a Member State issues a measure so that the measure which may be prohibited by Article 90 thus is one which is directed toward an enterprise enjoying such right. Now the Commission first - and the Court has upheld this view - says that the grant of the right as such can be a "measure"; so that when the State grants a special or exclusive right to an undertaking, it can be liable under Article 90.*
>
> *But if this is so - and there is little doubt that this is a correct interpretation of the decision*[189] *- then we lose sight of the specific raison d'etre of Article 90(1). Article 90(1) seems to suggest that there is a special relationship between the State and certain undertakings, ... [I]t is because there is a special relationship that Article 90(1) and (3) exist; this special relationship results from the fact that the State, sometimes in the past, had granted special rights, and now it takes a measure. If, however, we apply the prohibition in Article 90(1) to the very fact of granting the exclusive right, then there is no need for Article 90, no reason at all."*

Pappalardo's statement shows that according to his opinion, Article 90 is provision which is meant to regulate the exercise of exclusive rights only, not their existence and he sees the Court's judgement in the *Terminals* case as contrary to this opinion.

Part II: Selected articles

[189] The judgment in the *Terminals* case. See footnote 75 for the panel discussion.

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Marc van der Woude

In "Article 90: Competing for Competence",[190] Marc van der Woude seeks to define the nature and consequences of the changes caused by the Court's case law on Article 90, in particular with regard to the judgment in the *Terminals* case. The commentary was published prior to the ruling in *Corbeau*, although the author seems to conclude in harmony with the interpretation of this judgment in chapter 6 above. However, to some extent the author bases his conclusion on a different approach. The article represents one of the most extensive comments on the question of applying Community law, Article 90 in particular, to the very existence of privileged rights.

Marc van der Woude's approach to this question is based on the notion that the creation of the common market is primarily a public matter whereas its functioning essentially should be a matter of private concern. In the viewpoint of the author the purpose of the free movement provisions concerns the creation and purpose of the competition rules the functioning. To illustrate this notion he refers to, among other examples, that production and service monopolies are not caught by Article 37.

When assessing privileged rights in light of the notion, Marc van der Woude reaches the conclusion that a distinction exits between the existence of such rights and their exercise. Their existence should be assessed according to the Treaty rules dealing with the creation of the common market whereas their exercise must be controlled under the rules concerning its functioning. This finding is, according to the author, confirmed in *Sacchi*.[191]

The assessment of privileged rights in the light of the free movement provisions implies that the existence of these rights can be justified for reasons of, referring to *Sacchi*, non economic interests. If the Commission considers that an exclu-

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[190] Marc van der Woude *"Article 90: Competing for Competence"* [1992] ELR 60-94, Competition Law Checklist 1991.
[191] Reference is made to paragraph 14 of the judgment.

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sive right is not justified, it may initiate proceedings against the Member State concerned pursuant to Article 169 (but not Article 90(3), cf. below). Private individuals may rely on the fact that the free movement provisions have direct effect and thus can be invoked in national courts (with the possibility of a reference to the Court pursuant to Article 177). The limitation, which *Höfner* is an example of, that the free movement provisions can not be invoked when dealing with a purely internal situation, confirms in the eyes of the author the fundamental distinction which should be made between the existence of privileged rights and their exercise.

Their existence may impede the integration of national markets into a common market. If the rights are assessed in a purely national context, market integration is not jeopardised and the rules relevant for the creation of the common market do not therefore apply.[192] That does not mean, however, that in a purely internal situation privileged rights can not be challenged by private individuals vis-à-vis the state which have granted them. If the state is responsible for an unlawful exercise of the rights, private individuals may rely upon Article 90(1) in conjunction with the rules relating to the functioning of the common market.[193] The same holds true, the author maintains, with regard to the Commission which may use its powers under Article 90(3) and thus is not compelled to initiate the procedure according to Article 169.

Marc van der Woude bases this finding on the notion that Article 90 concerns the functioning of the common market. The Article's aim, he says, is to preserve undistorted competitive relations between all economic operators in this market, whether they are private or public (or privileged). It is beyond the scope of the Article to regulate the creation of the common market since the free movement provisions already play that role (solely). Thus, Article 90(1) does not concern the existence of privileged rights as such. It does however address the ancillary effects of public (national) measures which distort the competitive relations between companies that are granted such rights and other less favoured ones. Article 90(3) provides in this respect a direct decisional power of the Commis-

[192] Van der Woude recognises, however, that *Höfner* is, if not pass then, on the borderline to rule on the existence and not merely the exercise of the privileged rights in question.
[193] The competition rules and Article 86 in particular.

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sion similar to its powers under Regulation 17/62[194] and Article 93. In other words, Article 90(3) provides the Commission with the jurisdiction to prevent a circumvention of its normal competencies under the competition rules. This is, the author maintains, the reason for the placement of Article 90 among the competition rules in the Treaty.[195]

On the basis of his analysis, Marc van der Woude sees the *Terminals* case as a revolution. According to him the Court's judgment necessarily implies that the Commission is competent to control the very existence of privileged rights directly under Article 90. Thus, the ruling of the Court constitutes a landmark judgement and its consequences for the control of the public sector should not, in his view, be underestimated. Article 90(1) has been transformed by the Court into a norm which directly controls the existence of exclusive rights in light of the free movement provisions in the Treaty. Likewise, Article 30 has become a norm which is directly relevant to the competitive relations between companies. The distinction between the creation of the common market and its functioning has been completely abandoned. Marc van der Woude finds that in light of this development, which is both substantive and procedural in nature, the functioning of Article 90 needs to be reassessed and that some major questions remain unanswered by the Court's judgement.

The first question he raises is whether Articles 85 and 86 still have a major role to play under Article 90(1) if the provisions on free movement enable a direct control of exclusive rights without the heavy burden of market analysis imposed by these Articles?

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[194] OJ Special Edition 1962 No. 204/62, p. 87.

[195] To support the statement Marc van der Woude refers to that when the Court confirmed the Commission's authority to adopt decisions under Article 90(3), the Court took account of the Commission's task to ensure that competition is not distorted in the Community. This means, according to van der Woude, that the Commission's competence under Article 90(3) not only results from the text of the Article, but also from its place in the Treaty. However, when reviewing recital 10 of the Terminals directive van der Woude finds that the Commission considers itself competent to assess the compatibility with Article 30 of the grant of exclusive rights under Article 90(3). In the recital it is stated that the Treaty entrusts the Commission with very clear tasks and gives it specific powers with regard to the monitoring of relations between Member States and privileged undertakings, in particular as regards the elimination of restrictions of trade and competition. It is further stated that the only instrument, by which the Commission can efficiently carry out the tasks and powers assigned to it, is a directive based on Article 90(3)

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The author finds that the broad scope of Articles 30 and 59 implies that every exclusive import or sales right is forbidden unless it is justified by Articles 36 or 56 or by mandatory requirements.[196] This means that an exclusive right should in principle be suppressed to allow free access of goods and services from other Member States. This is, in the eyes of the author, a very far reaching conclusion which even affects local or regional monopolies. Marc van der Woude uses the example of a French commune which grants an exclusive right to a French company for local funeral services. Such a grant will be contrary to Article 59, unless justified by Article 56 or mandatory requirements, because foreign companies will not be able to provide these services.[197]

The author states that it is unclear whether the Court is aware of the far reaching consequences of its case law. He sees the rulings rendered subsequent to the *Terminals* case as indications that it is at least not willing to accept them. Thus, cases such as *Merci* and *RTT* indicate that the Court has refused to accept the consequences of the *Terminals* case when assessing exclusive rights under the free circulation provisions. Instead of using these provisions the Court relied upon a combined application of Articles 86 and 90. In doing so the Court seemed to prefer to control the exercise of monopolies rather than the admissibility of their existence. However, the author acknowledges that the application of Articles 86 and 90(1) also has far reaching consequences for the public sector. *Höfner*, *ERT*, *Merci* and *RTT* show that in some respects the grant of exclusive rights becomes almost impossible under these Articles, if the exercise of such rights necessarily leads to an abuse by the company concerned or if a situation is created in which this company could not place itself on its own initiative without infringing Article 86. Thus, even under Articles 86 and 90(1) the approach of the Court is of a structural nature in the sense that the existence of exclusive rights can be challenged under these rules by, what the author refers to as, "the automatic abuse theory".

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[196] Marc van der Woude is of the opinion that the scope of Article 59 is similar to that of Article 30.

[197] The example is inspired by Case 30/87 *Bodson* [1988] ECR 2507.

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The approach is nevertheless surprising because in the *Terminals* case the Court exclusively relied upon Article 30. This provision and the other free movement provisions enable a comprehensive control of the admissibility of exclusive rights without the burdens of market analysis required by Article 86. The reasons why the Court in the subsequent cases nevertheless preferred the competition rules remain unclear according to the author. In his view one explanation lies perhaps in the fact that the Court has developed one of the competition rules into a fundamental norm for the assessment of the admissibility of exclusive rights.

The second question, Marc van der Woude examines, is the question of when exclusive rights are justified?

He points out that a problem of double justification for the existence of the exclusive rights could have occurred in the *Terminals* case because the Court applied Article 30 in the context of Article 90. Thus, in principle the Court could have been placed in the situation where it had to examine twice if the existence of the rights in question were justified or not since on the one hand they could have been justified by mandatory requirements or Article 36 and on the other hand by Article 90(2) which provides yet another provision for justification. However, in the case the Court discarded the application of Article 90(2) since the French government's challenge only regarded Article 90(1) and (3). Consequently, the Court only examined whether the exclusive rights were justified by 36 or mandatory requirements. However, if the French government had argued with reference to 90(2), the Court would have faced a problem of a possible double justification which could have led to difficult assessments. For example the Court could have been placed in a situation where it found the exclusive rights in question unjustified under Article 30 but justified under Article 90(2). Which justification provision should then prevail?[198]

[198] As a specific issue of consideration in context of the problem of double justification is the situation where the Court might rule that neither mandatory requirements nor the relevant derogation Article with regard to the free movement provisions can justify the existence of an exclusive right but the Court then leave it to the national judge to apply Article 90(2). Does this judge have the possibility to declare the exclusive right justified under the latter Article regardless of the fact that the Court already has declared the right in question incompatible with one of the free movement provisions?

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In Marc van der Woude's view such a situation of double justification for the existence of privileged rights would not occur if the application of Article 90 is based on the same notion as referred to above, namely that a distinction exits between the existence of privileged rights and their exercise. As stated above, it is the author's opinion that Article 90 concerns the functioning of the common market and thus only relates to the exercise of privileged rights, not their existence. Therefore, in his view, Article 90(2) becomes without object if the existence of a privileged right is in itself contrary to the rules on free movement. Only if the existence is justified, is it relevant to apply Article 90(2) to an otherwise unlawful exercise. The author acknowledges, however, that it is doubtful if this reasoning will be followed by the Court since in the *Terminals* case it abandoned the distinction between the control of the existence of privileged rights and of their exercise. Nevertheless, it could be argued, he maintains, that the Court tried to avoid the problem of double justification in its case law after the *Terminals* case by focusing on the competition rules because Article 90(2) is the only exception to the application of these rules.

After reviewing *Höfner* and *ERT* with regard to the problem of double justification, Marc van der Woude reaches the conclusion that although *Merci* is not altogether clear on this point it could still be argued that the Court's reasoning on Article 90(2) in that case only concerned the exercise of the monopoly rights. However, then he turns to *RTT* and states that this reasoning can no longer be upheld after the judgment in this case. He reaches this conclusion based on an analysis of the requirements which the Court advanced in *RTT* as possible justifications under Article 90(2). In the author's view these requirements correspond exactly to those mentioned in the *Terminals* case as justifications under Article 30. This finding, the author maintains, is confirmed in *RTT* in the part of the judgment where the Court assessed the privileged rights in question in light of Article 30 and mandatory requirements. In other words, in the eyes of Marc van der Woude there is no difference between the Court's assessment of Article 90(2) and the reasons which may justify the existence of privileged rights under the free movement provisions. Thus, in his view it results from *RTT* that Article 90(2) absorbs all the interests of a non economic nature

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which according to *Sacchi* may justify the existence of monopolies under the rules of free movement.[199]

On the basis of his analysis Marc van der Woude concludes that, in contrast of his view, Article 90(2) not only relates to the exercise of exclusive rights but also to their existence. Exclusive rights are only allowed insofar as they are covered by this provision. If they are not, they either infringe Articles 86 and 90(1) on the basis of 'the automatic abuse theory' or the provisions on free movement. Article 90(2) has thus become the fundamental norm for the assessment of exclusive rights. According to the author, the Court developed this norm in conjunction with the application of Articles 86 and 90(1) but it nevertheless follows from the reviewed case law that Article 90(2) not only relates to the competition rules but also to the free movement provisions. Thus, Marc van der Woude reaches the conclusion that a privileged right is quite simply illegal if it is not covered by Article 90(2).[200]

David Edward and Mark Hoskins

Based on the main issues arising from topic 3 of the Sixteenth FIDE Congress[201] which was entitled "Competition law implications of deregulation and privatization" David Edward and Mark Hoskins[202] reflect on certain aspects of deregulation and, in particular, the nature of Article 90 in their commentary "Article 90: Deregulation and EC law. Reflections arising from the XVI Fide Conference".[203]

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[199] Given that Article 90(2) 'absorbs' the mentioned interests Marc van der Woude does not, however, examine if that Article has a larger scope than the justification provisions under the free movement rules. The latter are confined to interests of non economic nature whereas the wording of Article 90(2) indicates that its application also includes considerations of economic nature. As a matter of fact, *Corbeau* confirmed that the scope of Article 90(2) is not confined to merely non economic considerations.

[200] In his commentary, Marc van der Woude also makes some remarks on the procedural implications of the reviewed case law. These remarks are not, however, considered of relevance in the context of this dissertation.

[201] The conference took place in Rome from 12-15 October 1994.

[202] Respectively Judge and Legal Secretary at the Court. Judge Edward was Rapporteur Général for the mentioned topic at the Conference.

[203] David Edward and Mark Hoskins *Article 90: Deregulation and EC Law. Reflections arising from the XVI FIDE Conference* [1995] CMLR 157-186.

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In the first part of the article the authors deal with the question of judicial control with regard to the existence of legal monopolies. They start out by saying that the Treaty sets out two principles of particular importance in relation to the creation and maintenance of legal monopolies by Member States. Firstly, Article 3(g) establishes the principle of free competition as one of the fundamental objectives of the Treaty. Secondly, Article 222 maintains Member States' system of property ownership. In the authors' view there is clearly a tension between these principles to which Article 90 seeks to provide a balance.

The Authors then turn to various models of judicial control and list four possible approaches with regard to the existence of legal monopolies:

- Member States have exclusive competence in relation to the grant of legal monopolies ("the Absolute Sovereignty approach ");

- Member States are free to grant legal monopolies provided that the operation of the monopoly does not have the necessary consequence of contravening the rules of the Treaty ("the Limited Sovereignty approach ");

- the mere grant of a legal monopoly is a "*per se* violation" of Article 90(1) since the Member State necessarily places the relevant undertaking in a dominant position, free of the normal market constraints, so that it is able to pursue abusive practices ("the Absolute Competition approach"); and

- Member States may create legal monopolies only where this is justified by a legitimate national objective and where the consequent restriction of competition is limited to what is necessary to achieve this objective ("the Limited Competition approach").

According to the authors the first and second approaches look at the problem from the perspective of the competence of the Member States; the third and fourth look at the problem from the perspective of the application of Community competition rules. At opposite ends of a spectrum, the Absolute Sover-

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eignty approach emphasizes the freedom of Member States, while the Absolute Competition approach emphasizes the need for free competition.

The Absolute Sovereignty approach was rejected by the Court in the *Terminals* case. In the eyes of the authors it follows from this case that Member States have not retained complete sovereignty in relation to the creation of monopolies.[204] Rather, the creation must be balanced with the principle of free competition. However, the precise point at which the balance is to be struck is less clear according to Edward and Hoskins.

In their view the limited Sovereignty Approach was adopted in *Höfner* and in *La Crespelle*. They point out that under this approach the privileged undertaking may act contrary to Article 86 without the Member State automatically being liable under Article 90(1). Only if the abusive behaviour of the undertaking is caused by the relevant Member State will the be in breach of the latter Article.

Turning to the Absolute Competition approach the authors note that this approach can be observed in a number of cases. As examples references are made to *ERT* and *Merci*. In practice, they say, literal application of this approach would mean that every grant of special or exclusive rights would constitute a breach of Article 90(1). By definition, the creation of a legal monopoly places the relevant undertaking in a dominant position. The creation of such a position enables the relevant undertaking to abuse that position, if it chooses to do so. Under the Absolute Competition approach, this would be a breach of Article 90(1) on the part of the Member State granting the rights. According to the authors there was no real support for this approach at the FIDE conference because, among other reasons, in the cases where the Court has applied it the Court has begun by saying that legal monopolies may be permissible, but nevertheless the conclusion when using the approach must be that such monopolies are all by their nature contrary to Community law.

Under the Limited Competition approach, the creation of a legal monopoly must: (a) be justified by a legitimate national objective and (b) satisfy the principle of proportionality, that is, the consequent restriction of competition must

[204] Edward and Hoskins refer to paragraph 22 of the judgment.

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not exceed what is necessary in order to attain the objective. According to the authors, the underlying rationale for this approach is that the creation of a legal monopoly will necessarily produce restrictive effects on competition so such monopolies should be permitted only where there is a particular justification for their existence. The authors find support for this approach in *Sacchi* and *Corbeau*.

After examining the four approaches the authors raise the question of choosing the appropriate test. According to them, at the FIDE conference there was support for both the Limited Sovereignty approach and the Limited Competition approach. When applying the first approach, a court must ask:

- Has there been an abuse of a dominant position by an undertaking which enjoys a legal monopoly?

- If so, was that abuse a necessary consequence of national legislative or administrative measures?

Under the latter approach, a court must ask:

- Can the existence of the legal monopoly be justified for reasons of public interest?

- If so, is the restriction of competition which results from the existence of the legal monopoly necessary and proportionate in order to assure the fulfilment of those public interest requirements?

When reviewing the two approaches, the authors maintain that the Limited Sovereignty approach starts from a presumption that Member States have freedom to create legal monopolies and then places restrictions on that freedom. Consequently, no judicial control can be exercised over the reasons for creating a legal monopoly. The authors acknowledge that it can be argued that this reflects the wording and structure of Article 90 more closely than the Limited Competition approach. However, in their viewpoint the literal wording of the Article can not be conclusive.

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Turning to the Limited Competition approach, the authors find that this approach starts from the presumption that the restriction of competition inherent in legal monopolies is illegal. A Member State has to prove that the existence of a particular legal monopoly is justified. To conclude the authors state that if we accept that legal monopolies by definition hinder free competition since they prevent other undertakings from entering the reserved market, and that Member States may choose to create or maintain such monopolies for reasons such as bare protectionism, the Limited Competition approach would appear to be more in keeping with the purpose and aims of the Treaty.

After concluding with regard to which approach to choose, the authors review various aspects of more specific nature. The first of these aspects concerns the issue of whether the lawfulness of a monopoly can change over time. A monopoly which was acceptable at the time of its creation may cease to be so due to changes in economic, social and/or technological conditions. According to the authors, the judgement in *Corbeau* places an obligation on the Member States constantly to review legal monopolies in light of changing market conditions.[205]

The next issue which the authors look at is the role of the courts with regard to the application of the Limited Competition approach.

In order to apply the approach it must be clear as to what constitutes a 'legitimate national objective'. As one of the problems in this connection the authors point out that if wholly free competition was permitted, undertakings would restrict their activities to profitable areas at the cost of universal supply of certain goods and services which constitute a basic social need for private individuals

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[205] The Belgian Law on Postal Services was enacted in 1956. When the monopoly rights were thus granted, the market for postal services was different to when Corbeau started his business in this sector. However, the monopoly rights covered the whole range of postal services, even new ones such as those offered by Corbeau which the Belgian postal authority was unable (or unwilling) to provide. In this respect it might be said that the nature of the problem was not whether the legal monopoly had conformed with Article 90 at the time of its creation, but rather whether the monopoly conformed with Article 90 given the state of the market in 1993 which was the year when the question of the lawfulness of the Belgian postal monopoly arose. Reference is made to Leigh Hancher *Case Law* [1994] CMLR 105-116.

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and business alike. Thus, the authors state that it can be argued that universal supply will only be possible if some legally protected monopoly rights are created in respect of the supply of the aforementioned goods and services. In their view the Court must develop a series of acceptable justifications which satisfy the Limited Competition approach just as it has defined a series of mandatory requirements in the context of its Article 30 jurisprudence. According to the authors, the Limited Competition approach, as it was applied in *Corbeau*, shows certain similarities to the *Cassis de Dijon* approach.

These similarities do, however, to some extent cause a problem. In *Corbeau*, the final application of the Limited Competition approach was left to the national judge. The authors make reference to what they call the Sunday Trading saga[206] to illustrate the danger inherent in requiring national courts to apply a "*Cassis de Dijon*" type of approach. In effect, the outcome of this saga was that the Court of Justice eventually was obliged to apply Community law on the facts of the case presented to it, although the case came before the Court as a request for a preliminary ruling under Article 177.

According to the authors, one possible solution to this problem may lie in the way in which the test of proportionality is applied. They suggest that if the Limited Competition approach was limited to the control of manifest errors with regard to Member States' justification for the grant of privileged rights, the courts would exercise only marginal control over the existence of legal monopolies.

After discussing the role of the courts,[207] the authors turn to the free movement provisions. Apparently, at the FIDE conference certain speakers argued that the existence of legal monopolies should be primarily, or even exclusively, controlled by the application of these provisions rather than the competition rules.

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[206] Case C-145/88 *Torfaen Borough Council v B&Q plc* [1989] ECR 3851 and Case C-169/91 *Stoke-on-Trent City Council v B&Q plc* [1992] ECR I-6635. Reference is made to the commentary in Weatherill and Beumont *EC Law* [1993] 470-473. For latest edition see the same [1995] second edition 533-535.

[207] Further issues are discussed in the article on this point, but reference is omitted with respect to the relevance for this dissertation.

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The authors acknowledge that there clearly is a potential overlap between use of the free movement rules and the use of Article 90 coupled with Article 86 in order to control the existence of legal monopolies. However, in their it would (perhaps) be best to focus primarily on Article 90 in conjunction with Article 86 rather than the free movement rules when considering the legality of legal monopolies.

To support this view, they authors firstly point out that it is clear from the wording of Article 90 that its specific purpose is the control of legal monopolies, and both Article 90(1) and (2) place particular emphasis on the competition rules as the means by which such control is to exercised. In contrast, the free movement rules are not specifically aimed at the existence of legal monopolies. Secondly, emphasis is put on the fact that in contrast to Article 86, the rules on free movement can not apply in a purely internal situation.[208] Thus in the eyes of the authors, it would therefore be more consistent to control the legality of legal monopolies by primarily applying Article 90 in conjunction with Article 86 in all cases, rather than focusing on these rules in some cases and the rules on free movement in others. Thirdly, if some legal monopolies were considered under the free movement rules and others under Article 90 coupled with Article 86 divergent results might appear in the case law of the Court and/or national courts. The authors point out that although there are similarities in the two approaches, the underlying nature of the rules is different. The free movement rules are concerned with barriers to trade whereas the competition rules are concerned with the efficient functioning of markets.

That is not to say, the authors maintain, that there are no cases where the free movement rules should be considered. This would be appropriate where a national rule constitutes a genuine barrier to trade as opposed to a limitation on the exercise of a particular economic activity within a given Member States.[209]

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[208] Reference is made to *Höfner*.

[209] In the remains of their article, David Edward and Mark Hoskins emphasize the need for Community legislation, preferably on a sector-by-sector basis. They also provide an analysis of the scope of the Commission's legislative powers under Article 90(3).

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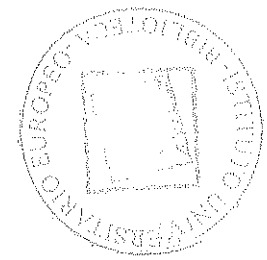

Chapter 10

Conclusion

The developments in the Court's case law confirm that the grant and maintenance of privileged rights may infringe Article 90(1) in conjunction with either the free movement rules (Articles 30, 59 and perhaps 48 and 52) or Article 86. Thus, Article 90(1) imposes limits on not only *exercise* of such rights but also on their very *existence* which implies that the grant and maintenance of a privileged right can in itself constitute a 'measure' within the meaning of that Article.

Although it could be argued that this notion was already confirmed in *Sacchi*, it seems clear that the Commission's adoption of the Terminals directive and the subsequent approval by the Court represent the first instance where Member States and commentators on Community law were compelled to acknowledge the notion. At least it had to be acknowledged, on the basis of the *Terminals* case, that the grant and maintenance of privileged rights can be prohibited if their existence in specific instances constitute infringements of Community law. In other words, in the *Terminals* case the Court seemed to invoke an approach which imply that assessment of privileged rights should be based on a presumption of legality (privileged rights are permitted unless prohibited in specific circumstances). However, as the Court rendered its judgments in the cases that followed the picture got a more fragmented. The subsequent rulings indicate that the Court was ready to 'expand' its approach to one based on a presumption of illegality (privileged rights are prohibited unless justified in specific circumstances) but that it was not quite sure as how to formulate this approach as the following summary shows.

The analysis above of the recitals of the Terminals directive[210] indicate that the Commission was in doubt as to which Treaty Articles to apply Article 90(1) in conjunction with in order to obtain the intended result. Practically all Treaty Articles, which could be of relevance, were invoked. It seems also fair to conclude that by basing its judgment on Article 30, the Court invoked the Treaty Article which fitted best into its prior case law at the time of judgment. In con-

[210] To some extent, also the recitals of the Services directive

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trast to Article 86, Article 30 had already been given a wide scope by the rulings in cases such as *Dasonville* and *Cassis de Dijon*.

Nevertheless, not many months had passed subsequent to the ruling in the *Terminals* case before the Court rendered its judgment in *Höfner*. In this case it was impossible for the Court to apply the free movement provisions. Thereby not said that this was the only reason for the Court to invoke Article 86 but based on the facts of the case it would have been surprising if no infringement of Community law had been established. Perhaps the ruling in *Höfner* was the inspiration for the Court's preference for invoking Article 86 in the judgments that followed. These are primarily based on the application of that Article (in conjunction with Article 90(1)). However, variations exit as to the reasoning behind the application.

As it may be recalled, in *Höfner* it was held that Article 90(1), in conjunction with Article 86, is infringed by the grant or maintenance of privileged rights which lead an undertaking, by the simple exercise of these rights, to abuse its dominant position. In *ERT* it was held that the existence of privileged rights constitute infringements of the two Articles when the rights are liable to create a situation in which the privileged undertaking is led to commit an abuse. In *Merci*, the judgments of *Höfner* and *ERT* were combined. *RTT* and the *Services* case indicate that privileged rights infringe Article 90(1), in conjunction with the 'effet utile' of Article 86, where they place an undertaking in a position that it could not attain without abusing its dominant position (for example, by extending its dominant position to a neighbouring market).

The to some extent fragmented application of Community law in these rulings (which of course partly are due to the facts of the cases) is illustrated in David Edward and Mark Hoskins' article by their reference to the different approaches for judicial control. The cases do not fall under the one and same approach. Some constitute examples of the Limited Sovereignty approach whereas others were assessed under the Limited Competition approach and some even came under the Absolute Competition approach.

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However, the cases are (nearly)[211] all characterized by the same notion, namely that the existence of the privileged rights in question would have been allowed had the necessary grounds for justification been present. The same holds true for the one judgment[212] where the Court did not rely upon the combination of Article 86 and Article 90(1) but instead relied on one of the free movement provisions.[213] The ruling in *Mediawet* indicate that monopoly rights infringe Article 59 even in the absence of direct discrimination provided that the free flow of services between Member States is restricted and that there are no *overriding public interests* justifying the rights.

Although the reviewed cases all are characterized by the above mentioned notion of justification, differences still exit. As David Edward and Mark Hoskins' article shows, the assessment of whether justification can be obtained is not based on the one and same approach. In some cases the assessment of justification is based on a presumption of legality (the Limited Sovereignty approach) and in others on the opposite presumption, namely one of illegality (the Limited Competition approach).[214]

The ruling of the Court in the case that followed, namely *Corbeau*, is admittedly far from clear. It is nevertheless suggested that this judgment represents the culmination of the case law rendered prior thereto. The judgment appears to enact the general principle that the grant of privileged rights, without objective justification, infringes Article 90. The principle is based on a two-tier approach. It is implicit in the application of the first tier that the grant and maintenance of privileged rights, as a point of departure, (automatically) is contrary to Community law. All that have to be assessed is if the incompatibility follows from the free movement provisions or the competition rules (or both). The application of the second tier concerns the assessment of whether the rights can be justified by a legitimate objective. If the free movement rules have been invoked,

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[211] See below.

[212] Rendered subsequent to the judgment in the *Terminals* case.

[213] As it may be recalled, in most of the aforementioned cases the Court did also invoke the free movement provisions but is was the application of Article 86 which characterize the judgments in these cases.

[214] According to Edward and Hoskins *ERT* (and also *Merci*) falls under the Absolute Competition approach which in principle implies that justification can never be obtained. As the authors point out, this is inconsistent with the wording of Article 90(2).

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a range of justification provisions can be relied upon. First of all, justification can be based on mandatory requirements. Secondly, the relevant derogation Article may be relied upon. Thirdly, justification can be sought under Article 90(2).[215] If Article 86 has been invoked, the justification provisions are limited to Article 90(2).

The suggested principle is based on a presumption of illegality and fits what Edward and Hoskins characterize as the Limited Competition approach.[216] However, in their article they place the ruling in *La Crespelle* under the Limited Sovereignty approach. The same probably holds true for *Corsica Ferries*. As it may be recalled, the judgments in these cases were rendered subsequent to the judgment in *Corbeau*. This could call for the conclusion that the Court has not accepted the principle suggested above. Although it will not be argued that the Court's phrasing of certain paragraphs of the judgments fits the Limited Sovereignty approach, it is maintained that these cases concern an illegal *exercise* of privileged rights and not the question of justification for their *existence*. On this basis it is argued that the rulings can not be regarded as a renunciation by the Court of the suggested principle. That said, it must be admitted that the two rulings confuse the general picture (and further enlightenment from the Court would be appreciated).

Marc van der Woude's objection to the suggested principle would probably be that the principle is applied in the context of Article 90. As it may be recalled, in his view attack on the existence of privileged rights should not take place under Article 90 but solely under the free movement provisions. In his article he points out that since the application of Article 90(1) necessarily implies that Article 90(2) also can be applied, a problem of double justification may occur. If for instance the Court of Justice in the context of a preliminary ruling makes the assessment that the existence of a given privileged right can not be justified under the free movement provisions (mandatory requirements or the relevant derogation Article) but then leave it to the national court to apply Article 90(2), what is the national judge to do?

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[215] For further elaboration on this point, see below.

[216] The name of the approach indicates that it only concerns the competition rules. However, Edward and Hoskins do not limit the scope of the approach to the sole application of these rules.

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First of all, is the situation not likely to occur. Should that nevertheless be the case, then it is necessary to address the wording of Article 90(2). If the Court of Justice has established that neither mandatory requirements nor the relevant derogation Article can be applied to justify the rights in question that implies in principle (as a point of departure) that the relevant free movement rule, Article 59 for example, should be applied. However, Article 90(2) proscribes that undertakings which are embraced by that Article shall not be subject to the rules contained in the Treaty if the application of such rules obstructs the performance of the tasks assigned to them. Consequently, if the national court is of the opinion that this is the case, it has by the means of Article 90(2) simply been given the legal foundation to abstain from the application of Article 59.

The assessment of whether a privileged right is justified according to mandatory requirements or, for example, Article 56 is not necessarily identical to the assessment under Article 90(2). *Corbeau* provides an example hereof even though the ruling did not concern the free movement provisions. As it may be recalled, the Court held that privileged rights, which covered the types of services that Mr. Courbeau provided, did in principle infringe Article 86 (in conjunction with Article 90(1)). However, it was for the national court to decide (with certain 'recommendations' from the Court of Justice) whether Article 90(2) could be invoked in order to avoid the application of the aforementioned Article. In parallel, had Mr. Corbeau conducted his business from a residence outside Belgium and had the Court therefore decided the case based on an application of Article 59,[217] no reasons appear as to why the national judge in that situation should not have been given the same opportunities to apply Article 90(2).

Support for the suggested principle can be found, to various degrees, among commentators on Community law. Two references will be made. Anthony Gardner is in support of a principle of the same nature although he reviews its application a little more narrow.[218] According to his viewpoint, privileged rights are presumed to be incompatible (with Community law) such that Article 90(1) has been practically subsumed into the inquiry under Article 90(2) of whether

[217] For the same reasons as in *Höfner*, this was impossible for the Court in the actual case.
[218] See footnote 8 above.

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the 'public mission' exception applies. Professor Claus Dieter Ehlermann takes the view that the principle of undistorted competition and the four fundamental freedoms go hand in hand and lead together to the same conclusion: privileged rights created by the Member States may be maintained in force if and to the extent that they are justified on public interest grounds.[219] He further takes the view that the nature of a given public interest ground can change over the years owing, for example, to technological developments with the implication that the interest ground no longer can be put forward as a possible mean for justification.

Whether the application of Article 90 to privileged rights in the future will based on the suggested principle, implying a presumption of illegality, remains to some extent to be confirmed. At all events, it is certain that the judicial control of legal monopolies under Article 90 at least includes the possibility to attack the very existence of privileged rights, although it may be on the basis of a presumption of legality of such rights. Thus, the trends and developments which have taken place with regard to the judicial control of legal monopolies are likely to result in significant implications for a number of industry sectors dominated by the presence of privileged rights. These sectors have traditionally been fragmented along national lines and have only recently become aware of the benefits and burdens of fair competition and free trade. Article 90 is directly effective in national law and can be enforced in the national courts, subject to referral under Article 177 to the Court of justice, with the further possibility of damages actions brought by undertakings against Member States which fail to comply with their Article 90 obligations.[220] Furthermore on the basis hereof, the Article 90(2) public service defence is likely to take on an increasing significance as a safeguard clause for the protection of 'objectively justified' interest grounds.

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[219] See footnote 144 above.

[220] See Joined Cases C-6/90 and 9/90 *Francovich v Italy* [1991] ECR I-5357 and Joined Cases C-46/93 and 48/93 *Brasserie du Pêcheur* and *Factortame* [1996] ECR I-1029.

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