EXCLUSIVITY (EXPRESS MAIL): THE TNT TRACO CASE

Subject: Exclusivity
Trade between Member States
Public undertakings

Industry: Express mail services; postal services

Parties: TNT Traco SpA
Poste Italiane SpA, formerly Ente Poste Italiane
The Italian Government (intervener)
The Commission of the European Communities (intervener)
The EFTA Surveillance Authority (intervener)

Source: Judgment of the Court of Justice of the European Communities, on 17 May 2001, in Case C-340/99 (*TNT Traco SpA v Poste Italiane SpA, formerly Ente Poste Italiane, and Others*)

(Note. This case sheds light on a number of points, including: first, the extent to which a request for a preliminary ruling by the Court of Justice is admissible in a competition case (paragraphs 24-37); second, the principle that an undertaking abuses its dominant position where it charges for its services fees which are unfair or disproportionate to the economic value of the service provided (paragraph 46); and, third, the conditions on which cross-subsidisation of services is necessary and permissible (see, in particular, paragraphs 54 to 57). The case is largely concerned with the relationship between Article 82 (formerly 86) on the abuse of a dominant position and Article 86 (formerly 90) on public undertakings and provides a useful commentary on the previous case law. References to the old and new numbering in the judgment are erratic: caveat lector. The provisions of the EC Treaty governing preliminary rulings by the Court of Justice are contained in Article 234 (formerly 177); here the Court refers to the new numbering.)

Reference to the Court

1. By order of 21 June 1999, received at the Court on 13 September 1999, the Tribunale civile di Genova (Civil District Court, Genoa) referred to the Court for a preliminary ruling under Article 234 EC a question on the interpretation of Articles 86 and 90 of the EC Treaty (now Articles 82 EC and 86 EC).

2. That question was raised in proceedings between (i) TNT Traco SpA (TNT Traco), which provides throughout Italy a private service for the collection, carriage and delivery of express mail on behalf of third parties, (ii) Poste Italiane SpA (Poste Italiane) and (iii) three employees of Poste Italiane, concerning a decision by which those employees imposed a fine on TNT Traco pursuant to Article 39 of Presidential Decree No 156 of 29 March 1973 on assent to the single text of the legislative provisions on mail, postal banking services and

telecommunications (GURI No 113 of 3 May 1973, ordinary supplement, hereinafter the Postal Code).

The regulatory framework

3. Article 1 of the Postal Code, headed Exclusive right in respect of postal services and telecommunications provides:
Within the limits of this decree, the State shall have the sole right to provide the following services:
collection, carriage and delivery of letter post;
....

4. Article 7 of the Postal Code provides:
Save for the power reserved to the Minister for Posts and Telecommunications in the cases provided for herein, charges for postal services, postal banking services and telecommunication services shall, as regards domestic services, be laid down by decree of the President of the Republic, on a proposal from the same minister, in consultation with the Treasury Minister, and after hearing the views of the Council of Ministers.

5. Article 8 of the Postal Code provides that charges for postal services and for international postal banking services are set by the Minister for Posts and Telecommunications, in agreement with the Treasury Minister, on the basis of international conventions or agreements entered into with the relevant foreign authorities.

6. Article 39 of the Postal Code, entitled Contraventions of the postal monopoly, provides:
Any person who either directly or through the intermediary of a third party, collects, carries or delivers letter post in breach of Article 1 of this decree is liable to a fineequal to twenty times the amount of the postage rate, subject to a minimum amount of ITL 800.
Any person who habitually entrusts letter post to third parties for carriage or delivery shall be liable to the same penalty.
...
Correspondence conveyed in breach hereof shall be confiscated and immediately delivered to a post office and a report of the breach shall be drawn up at the same time.

7. Article 41 of the Postal Code provides:
Article 39 shall not apply to:
...
(b)the collection, carriage and delivery of letter post in respect of which postage duty has been paid by means of a franking machine or stamps bearing a postmark or directly by the sender by affixing in indelible ink the date on which the carriage commenced;
....

8. Initially, the services referred to in Article 1 of the Postal Code were supplied by the Posts and Telecommunications authorities, which, pursuant to Law No 71 of 29 January 1994 (GURI No 24 of 31 January 1994, Law No 71/94), became a public entity known as Ente Poste Italiane. As a result of Decision No 244/1997 of 18 December 1997 made by the inter-departmental committee on economic planning, Ente Poste Italiane became, with effect from 28 February 1998, a joint stock company called Poste Italiane SpA. All the shares in the company were allocated to the Ministry responsible for the Treasury, the Budget and Economic Planning.

9. Article 2 of Law No 71/94 relating to the activities of Poste Italiane provides that the latter is to carry on the activities and provide the services described in its memorandum and articles of association and in the programme contract to be agreed between the Minister for Posts and Telecommunications and the President of Poste Italiane.

10. Article 6 of the programme contract agreed in 1995 provides:
1. Without prejudice to the guarantee given by [Poste Italiane] to ensure that universal services, whether they are reserved or not, are provided throughout the whole of the national territory, [Poste Italiane] shall identify small peripheral post offices in remote areas which do not guarantee conditions of economic viability and shall arrange management rationalisation measures for them in order to ensure a progressive reduction in the operating losses attributable to each of them.
On the basis of the principle that [Poste Italiane's] business and social functions must remain separate, the parties shall, within three months of the close of each accounting period, determine the extent of the universal-service obligations arising from the retention of the abovementioned offices.
To that end, as regards each small office, it will be necessary to examine only the direct and indirect costs determined on a proper accounting basis and specifically attributable to the office concerned and in respect of which the office's business does not generate any corresponding receipts.
...
3. Where the State lays down certain actions to be taken by [Poste Italiane] which give rise to undue burdens or the application of specific charges, the State shall none the less ensure that [Poste Italiane's] expenditure or loss of revenue is made good.
...

11. It is apparent from the order for reference that it was in order to ensure 'fair competitive conditions in relation to rates charged for comparable services by competing undertakings that Poste Italiane undertook in Article 11 of the programme contract to adopt an accounting system with separate accounts designed to allow ... in particular, verification that there are neither cross-subsidies between the reserved services and the non-reserved services nor discriminatory practices.

12. As is clear from the written observations submitted to the Court by the parties to the main proceedings and by the Italian Government, that obligation was confirmed by Law No 662 of 23 December 1996 relating to rationalisation

measures concerning public finances (GURI No 303 of 28 December 1996, ordinary supplement No 233), the last sentence of Article 2(19) of which provides:
The body concerned is required to make separate accounting entries, in particular segregating the expenditure and income relating to services supplied under the statutory monopoly from that relating to services supplied on the open market.

13. Article 41 of the Postal Code was repealed by Legislative Decree No 261 of 22 July 1999 (GURI No 182 of 5 August 1999, 'Decree No 261/99), which entered into force on 6 August 1999 and transposed into Italian law Directive 97/67/EC of the European Parliament and of the Council of 15 December 1997 on common rules for the development of the internal market of Community postal services and the improvement of quality of service (OJ 1998 L 15, p. 14).

14. Article 1 of Directive 97/67 provides:
This Directive establishes common rules concerning:
-the provision of a universal postal service within the Community,
- the criteria defining the services which may be reserved for universal service providers and the conditions governing the provision of non-reserved services,
-tariff principles and transparency of accounts for universal service provision,
-the setting of quality standards for universal service provision and the setting-up of a system to ensure compliance with those standards,
-the harmonisation of technical standards,
-the creation of independent national regulatory authorities.

15. Article 9(4) of Directive 97/67 provides that, in order to ensure that the universal service (as defined in Article 3 thereof) is safeguarded, Member States may establish a compensation fund intended to compensate the universal service provider for any unfair financial burden arising from the obligation to supply that service. That fund may be financed by contributions from operators who are authorised to supply non-reserved services, irrespective of whether those services fall within the universal service.

16. Furthermore, Article 14 of Directive 97/67 requires Member States to bring into force the measures necessary to ensure that, within two years of the date of its entry into force, the universal service providers ensure that there are separate accounts within their internal accounting systems for the various reserved and non-reserved services. As is clear from the 28th recital in the preamble to Directive 97/67, separate accounts are necessary in order to introduce transparency as regards the actual costs of the various services and to ensure that cross-subsidies from the reserved sector to the non-reserved sector do not adversely affect the conditions of competition in the latter.

17. Directive 97/67 entered into force, pursuant to Article 25 thereof, on 10 February 1998. In accordance with Article 24 of the directive, the Member States were required to bring into force the laws, regulations and administrative provisions necessary to comply with it not later than 12 months after the date of its entry into force.

The dispute in the main proceedings and the question referred for a preliminary ruling

18. On 27 February 1997, TNT Traco was inspected by three employees of Poste Italiane. Having ascertained that mail entrusted to TNT Traco for express delivery had been collected, carried and delivered in breach of Article 1 of the Postal Code, those employees imposed a fine of ITL 46 331 000 on TNT Traco pursuant to Article 39 of the Postal Code.

19. In its order for reference, the national court finds that TNT Traco's express mail service was distinguished by speed, certainty and personalised delivery to the addressee and that it could thus be clearly differentiated from the ordinary postal delivery service provided by Poste Italiane as part of the universal service. It considers that an express mail service of that kind, whether it is provided by TNT Traco, Poste Italiane or any other undertaking, includes a value added service which is not 'supplementary to a basic service but is a different and independent service distinguished by its features, qualities and cost.

20. TNT Traco brought an action before the Tribunal civile di Genova against both Poste Italiane and the three employees who had carried out the inspection referred to in paragraph 18 of this judgment. TNT Traco relied on the fact that both the exclusive rights enjoyed by Poste Italiane and the conduct of Poste Italiane and its employees were incompatible with Articles 86 and 90 of the Treaty. It claims, first, that the rules of free competition laid down in those provisions should be applied to the express mail service that it provides. It goes on to seek payment from Poste Italiane of compensation for the damage, estimated at over ITL 500 000 000, suffered as a result of the unlawful levying of the fine imposed on it. Finally, it seeks payment from Poste Italiane and its employees of compensation for the damage, estimated at over ITL 100 000 000, suffered as a result of those employees' unlawful inspection and acquisition of commercial information at its offices in breach of Article 2598 of the Italian Civil Code relating to unfair competition.

21. On 8 June 1999 the Tribunale civile di Genova gave judgment in part and ordered Poste Italiane to repay TNT Traco ITL 46 331 000 by way of compensation for damage caused by the levying of the fine. It ruled in that regard that it had been unlawful to levy the fine, inasmuch as the supervisory, regulatory and disciplinary powers previously held by Poste Italiane had been transferred to the Ministry of Posts and Telecommunications by Law No 71/94. Since it went on to hold, first, that Poste Italiane alone was liable for the unlawful acts of its employees and for any damages resulting therefrom and, second, that no evidence had been adduced to show that the names of TNT Traco's clients had been improperly used in such a way as to amount to unfair competition for the purposes of Article 2598 of the Italian Civil Code, the Tribunale dismissed TNT Traco's claims against Poste Italiane's employees and ordered TNT Traco to pay their costs. It finally decided, by a separate order, to refer a question to the Court of Justice for a preliminary ruling under Article 234 EC and to rule on costs as between TNT Traco and Poste Italiane in its final judgment.

22. The national court does not rule out the possibility that the levying of postal dues may be compatible with Community law if it applies, by reference to objective criteria, to all private persons operating in the market in express mail and if it is justified by the need to secure the universal service and to cover unprofitable areas. It observes, however, that the Italian Republic grants to Poste Italiane, in addition to the proceeds of the postal dues at issue in the main proceedings, direct subsidies designed to cover the costs entailed by the obligation to provide a universal service. It also observes that prior to the transposition of Directive 97/67, Italian law did not contain any compensatory or regulatory mechanism (other than the requirement that Poste Italiane should maintain separate accounts), which, like the mechanism in Article 9(4) of the directive, would have enabled it to ensure on a permanent basis that compensation to be paid in respect of universal and reserved services did not exceed what was necessary and did not unlawfully become cross-subsidisation of non-universal and non-reserved services.

23. In those circumstances the Tribunale civile di Genova deemed it necessary and relevant, for the purposes of giving judgment in the main proceedings, to refer a question to the Court for a preliminary ruling. Consequently, by order of 21 June 1999, it decided to stay proceedings and to refer the following question to the Court for a preliminary ruling:
Do the provisions of the EC Treaty, and in particular Articles 86 and 90 thereof, preclude a Member State, in organising its postal service, from maintaining in force legislation which, though distinguishing between so-called universal services in respect of which exclusive rights are conferred on a private-law undertaking and non-universal services offered and provided on the open market:
(a)requires undertakings, other than that on which the monopoly to operate the universal service has been conferred, to pay, even when providing non-universal or value-added services, the postal dues payable for the basic ordinary postal service, which in such a case is not in fact provided by the monopoly-holder;
(b)directly allocates the proceeds of those dues to the undertaking entrusted with the operation of the universal service, without there being any compensatory or regulatory mechanism designed to ensure that there is no allocation of cross-subsidies to non-universal services?

Admissibility

24. Poste Italiane and the Italian Government submit principally that the request for a preliminary ruling is inadmissible.

25. Poste Italiane asserts, first, that the question referred is no longer relevant. The only claim on which the national court reserved judgment appears to be the claim relating to the inapplicability of the postal monopoly provided for in the Postal Code, in so far as it is incompatible with the provisions of the EC Treaty. Following the amendments made to the legislation in the process of implementing Directive 97/67 and account being taken, in particular, of the repeal of Article 41 of the Postal Code, the question of whether the monopoly is compatible with the Treaty has become devoid of purpose.

26. Poste Italiane submits, in second place, that even if the question raised by the national court were held to be relevant, the Court's answer would be so obvious that, in accordance with the doctrine of *acte clair* (see Case 283/81 *Cilfit and Others*, paragraph 16), a preliminary ruling would no longer be necessary. In fact, the Court's answer can be no different from that given in Case C-320/91 *Corbeau*. In that case, the Court held that it was for the national court to assess to what extent competition in the special postal services sector, dissociable from the basic postal service, could be restricted, or even prevented, in order not to compromise the economic stability of the operator holding the exclusive right to operate that service.

27. For its part, the Italian Government submits that the national court has failed to specify in the order for reference the nature of the conduct allegedly constituting an abuse of a dominant position within the meaning of Article 86 of the Treaty and in respect of which Poste Italiane is allegedly liable.

28. It also submits that, in ordering Poste Italiane, by judgment in part, to repay the sum improperly collected on the basis of Article 39 of the Postal Code, the national court must necessarily have refrained from applying Articles 1, 39 and 41 of the Code, with the result that it is no longer necessary to answer the question referred for a preliminary ruling in order to give judgment in the main proceedings.

29. Without making a formal submission that the reference for a preliminary ruling is inadmissible, TNT Traco also expresses doubt as to its usefulness, given that Decree No 261/99 implementing Directive 97/67 has entered into force.

30. The Court observes that, according to settled case-law, in the context of the cooperation between the Court of Justice and the national courts provided for by Article 234 EC, it is solely for the national court before which the dispute has been brought, and which must assume responsibility for the subsequent judicial decision, to determine in the light of the particular circumstances of the case both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions which it submits to the Court. Consequently, where the questions submitted by the national court concern the interpretation of Community law, the Court of Justice is, in principle, bound to give a ruling (see, inter alia, Case C-415/93 *Bosman*, paragraph 59, and Case C-379/98 *PreussenElektra*, paragraph 38).

31. Nevertheless, the Court has also stated that, in exceptional circumstances, it may examine the conditions in which the case was referred to it by the national court, in order to determine whether it has jurisdiction (see, to that effect, Case 244/80 *Foglia*, paragraph 21). The Court may refuse to rule on a question referred for a preliminary ruling by a national court only where it is quite obvious that the interpretation of Community law that is sought bears no relation to the facts of the main action or its purpose, where the problem is hypothetical, or where the Court does not have before it the elements of fact or law necessary to enable it to give a useful answer to the questions submitted to it (see, inter alia, *Bosman*, paragraph 61, and *PreussenElektra*, paragraph 39).

32. In the present case, the Court would point out that it is apparent from the case-file in the main proceedings that the action is still pending before the national court. That court has specifically stated that the judgment by which it ordered, inter alia, Poste Italiane to repay TNT Traco the amount of the fine imposed is only a judgment as to part and that a preliminary reference seems to it to be necessary and relevant in order to give final judgment in the action before it.

33. In that regard, the fact that changes have been made to the postal regime that operated in Italy at the material time and that, in particular, Article 41 of the Postal Code has been repealed has not deprived the request for a preliminary ruling of purpose.

34. First, as the national court has itself pointed out, the facts in the dispute in the main proceedings predate the adoption of Directive 97/67 and, a fortiori, the entry into force of Decree No 261/99. Second, it is for the national court alone to withdraw its request for a preliminary ruling if it deems that such a ruling is no longer necessary to enable it to decide the action before it, since the plaintiff in the main proceedings may cause the reference to be withdrawn by discontinuing its action.

35. Furthermore, far from preventing a national court from referring questions to the Court under Article 234 EC, the case-law as stated in *Cilfit* (cited above) - assuming that it is relevant in the present case - gives the national court sole responsibility for determining whether the correct application of Community law is so obvious as to leave no scope for any reasonable doubt and for deciding, as a result, to refrain from referring to the Court of Justice a question concerning the interpretation of Community law which has been raised before it.

36. As regards the Italian Government's contention that the facts are inaccurate, it is sufficient to note that the question referred by the national court describes the conduct which it asks the Court to consider in order to ascertain whether it may be prohibited as an abuse of a dominant position under Article 86, in conjunction with Article 90, of the Treaty.

37. It follows from the foregoing considerations that it is necessary to reply to the question referred by the national court.

The question referred for a preliminary ruling

38. By its question, the national court is essentially asking whether Articles 86 and 90 of the Treaty, when read together, preclude legislation of a Member State which grants a private-law undertaking an exclusive right to operate the universal postal service from making the right of any other economic operator to provide an express mail service not forming part of the universal service subject to payment of postal dues equivalent to the postage charge normally payable to the undertaking responsible for the universal service, where the legislation contains no compensatory and regulatory mechanism designed to prevent that undertaking from allocating cross-subsidies to its own non-universal activities.

39. In that regard, the first point to be made is that an undertaking like Poste Italiane, in its capacity as a public economic entity or, subsequently, as a joint stock company in which the State is the only shareholder, is a public undertaking for the purposes of Article 90(1) of the Treaty.

40. As TNT Traco, the EFTA Surveillance Authority and the Commission have submitted, Poste Italiane must also be considered as an undertaking which has been granted by the Member State concerned special or exclusive rights within the meaning of Article 90(1) of the Treaty, having been given the exclusive right to collect, carry and deliver mail on that Member State's territory, without being required to pay - as must all other persons providing the same services - postal dues equivalent to the postage charge normally payable.

The prohibition in Article 90(1) of the Treaty

41. Article 90(1) of the Treaty states that in the case of public undertakings and undertakings to which they grant special or exclusive rights, Member States may neither enact nor maintain in force any measure contrary to the rules of the Treaty, in particular to those provided for in Article 86.

42. In so far as it may affect trade between Member States, the abuse of a dominant position within the common market or in a substantial part of it is prohibited by Article 86 of the Treaty.

43. In that regard, it must first be noted that it is not in dispute that Poste Italiane, which is the holder of the special or exclusive rights described in paragraph 40 of this judgment, has a dominant position within the meaning of Article 86 of the Treaty, since the case-law indicates that the territory of a Member State over which a dominant position extends is capable of constituting a substantial part of the common market (see, to that effect, Case C-203/96 *Dusseldorp and Others*, paragraph 60; Case C-7/97 *Bronner*, paragraph 36; and Case C-67/96 *Albany*, paragraph 92).

44. In second place, it must be observed that, although merely creating a dominant position by the grant of special or exclusive rights is not, in itself, incompatible with Article 86 of the Treaty, a Member State breaches the prohibitions laid down by Article 90(1) of the Treaty in conjunction with Article 86 if it adopts any law, regulation or administrative provision that creates a situation in which an undertaking on which it has conferred exclusive rights cannot avoid abusing its dominant position (see to that effect, in particular, Case C-242/95 *GT-Link*, paragraph 33; and *Dusseldorp*, paragraph 61).

45. In that regard, it is important to bear in mind that the national legislation at issue in the main proceedings requires economic operators providing an express mail service to pay Poste Italiane postal dues equivalent to the postage charge normally payable by the latter's customers, without Poste Italiane being required to provide a service of any description to those operators.

46. As the Court has already held, an undertaking abuses its dominant position where it charges for its services fees which are unfair or disproportionate to the economic value of the service provided (see, inter alia, Case C-323/93 *Centre d'Insémination de la Crespelle*, paragraph 25; and *GT-Link*, cited above, paragraph 39).

47. That must be all the more so where an undertaking in a dominant position is paid for services which it has not itself supplied.

48. It follows that legislation of the kind at issue in the main proceedings creates a situation in which the undertaking which has been given special or exclusive rights cannot avoid abusing its dominant position within the meaning of Article 86 of the Treaty.

49. It must, however, be observed in third place that, as is apparent from the wording of Article 86 of the Treaty, such legislation is prohibited under Articles 86 and 90(1) of the Treaty only in so far as trade between Member States may be affected.

50. That would be the case, for example, if economic operators supplying express mail services between the Italian Republic and another Member State were also obliged to pay Poste Italiane the postal dues at issue in the main proceedings. It is for the national court to ascertain whether that is the case.

Justification under Article 90(2) of the Treaty

51. Poste Italiane and the Italian Government submit that the obligation to pay the postal dues at issue in the main proceedings, even when it applies to operators of an express mail service not forming part of the universal service, is in any event justified under Article 90(2) of the Treaty because it is necessary in order to safeguard the economic stability of the undertaking entrusted with the operation of the universal postal service.

52. In that regard, it must be noted, first, that the combined effect of paragraphs (1) and (2) of Article 90 of the Treaty is that paragraph (2) may be relied upon to justify the grant by a Member State to an undertaking entrusted with the operation of services of general economic interest of special or exclusive rights which are contrary to, inter alia, Article 86 of the Treaty, to the extent to which performance of the particular task assigned to that undertaking can be assured only through the grant of such rights and provided that the development of trade is not affected to such an extent as would be contrary to the interests of the Community (see to that effect, in particular, Case C-209/98 *Sydhavnens Sten & Grus*, paragraph 74).

53. Second, it is necessary to point out that an undertaking like Poste Italiane, responsible by virtue of the legislation of a Member State for securing the universal postal service, which entails the duty to collect, carry and distribute post throughout the territory of the Member State concerned irrespective of the profitability of the sector being served, constitutes an undertaking entrusted with

the operation of services of general economic interest for the purposes of Article 90(2) of the Treaty.

54. Third, it is apparent from the case-law of the Court that it is not necessary, in order for the conditions for the application of Article 90(2) of the Treaty to be fulfilled, that the financial balance or economic viability of the undertaking entrusted with the operation of a service of general economic interest should be threatened. It is sufficient that, in the absence of the rights at issue, it would not be possible for the undertaking to perform the particular tasks entrusted to it, defined by reference to the obligations and constraints to which it is subject, or that maintenance of those rights is necessary to enable the holder of them to perform tasks of general economic interest which have been assigned to it under economically acceptable conditions (see, in particular, *Albany*, cited above, paragraph 107).

55. To that end, it may prove necessary not only to permit the undertaking entrusted with the task, in the general interest, of operating the universal service to offset profitable sectors against less profitable sectors (see to that effect, in particular, *Corbeau*, cited above, paragraph 17), but also to require suppliers of postal services not forming part of the universal service to contribute, by paying postal dues of the kind at issue in the main proceedings, to the financing of the universal service and in that way to enable the undertaking entrusted with that task to perform it in conditions of economic stability.

56. It must, however, be observed that, since Article 90(2) is a provision which permits, in certain circumstances, derogation from the rules of the Treaty, it must be restrictively interpreted (see, to that effect, *GT-Link*, cited above, paragraph 50).

57. Therefore, Article 90(2) of the Treaty does not allow the total proceeds from postal dues of the kind at issue in the main proceedings, which are paid by economic operators supplying an express mail service not forming part of the universal service, to exceed the amount necessary to offset any losses which may be incurred in the operation of the universal postal service by the undertaking responsible therefor.

58. In those circumstances, the undertaking responsible for the universal postal service must also be required, when itself supplying an express mail service not forming part of that service, to pay the postal dues. It must also ensure that neither all nor part of the costs of its express mail service are subsidised by the universal service, lest charges for the universal service and, consequently, the potential losses of that service be improperly increased.

59. It is for the national court to ascertain whether those conditions are fulfilled, since it is incumbent on the Member State or the undertaking which seeks to rely on Article 90(2) of the Treaty to show that the conditions for application of that provision are fulfilled (see to that effect, in particular, Case C-159/94 *Commission v France*, paragraph 94).

60. In that regard, it is clear from the case-law of the Court that, in the absence of any Community legislation on the subject, evidence of a breach of Article 86 of the Treaty may be adduced in accordance with the rules of the domestic legal system of the Member State concerned, provided that those rules are not less favourable than those governing similar domestic actions and do not render virtually impossible or excessively difficult the exercise of rights conferred by that provision (see, to that effect, *GT-Link*, paragraphs 23, 24, 26 and 27).

61. The same principles apply when, on the basis of Article 90(2) of the Treaty, a Member State, or the undertaking to whom it has entrusted a task in the general interest for the purposes of that provision, seeks to show that the grant to that undertaking of special or exclusive rights contrary to Article 86 of the Treaty is necessary.

62. It follows that the absence at the material time of any compensatory or regulatory mechanism designed to ensure that the undertaking responsible for operation of the universal service did not allocate cross-subsidies to its non-universal activities is not necessarily sufficient to establish that the conditions necessary for Article 90(2) of the Treaty to apply were not met.

63. In view of the foregoing considerations, the question must be answered as follows:
-in so far as trade between Member States may be affected, Article 86 of the Treaty, read in conjunction with Article 90 thereof, precludes legislation of a Member State which grants a private-law undertaking the exclusive right to operate the universal postal service from making the right of any other economic operator to provide an express mail service not forming part of the universal service subject to payment of postal dues equivalent to the postage charge normally payable to the undertaking responsible for the universal service, unless it can be shown that the proceeds of such payment are necessary to enable the undertaking to operate the universal postal service in economically acceptable conditions and that the undertaking is required to pay the same dues when itself providing an express mail service not forming part of the universal service;
-that may be proved in accordance with the rules of the domestic legal system of the Member State concerned, provided that those rules are not less favourable than those governing similar domestic actions and do not render virtually impossible or excessively difficult the exercise of rights conferred by Community law.

Costs

64. The costs incurred by the Italian Government, the Commission and the EFTA Surveillance Authority, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court.

[The Court's formal ruling is in the same terms as paragraph 63 of the judgment.]