JUDGMENT OF THE COURT OF FIRST INSTANCE (Fourth Chamber, Extended Composition)

17 July 1998 (1)

(Competition - Actions for annulment - Rejection of a complaint - Article 86 of the EC Treaty - Abuse of a dominant position - Actions before national courts - Right of access to the courts - Claim for performance of an agreement - Manifest error of assessment - Obligation to carry out an examination - Error of characterisation - Inadequate statement of reasons)

In Case T-111/96,

ITT Promedia NV, a company incorporated under Belgian law, established at Antwerp (Belgium), represented by Ivo Van Bael, Peter L'Ecluse and Kris Van Hove, of the Brussels Bar, with an address for service in Luxembourg at the Chambers of Loesch & Wolter, 11 Rue Goethe,

applicant,

v

Commission of the European Communities, represented by Wouter Wils, of its Legal Service, assisted by Rosemary Caudwell, a national civil servant seconded to the Commission under an arrangement for the exchange of officials, acting as Agents, with an address for service in Luxembourg at the office of Carlos Gómez de la Cruz, of its Legal Service, Wagner Centre, Kirchberg,

defendant,

supported by

Belgacom SA, a public company incorporated under Belgian law, established in Brussels, represented by Jules Stuyck and subsequently by Herman De Bauw and Paul Maeyaert, of the Brussels Bar, with an address for service in Luxembourg at the Chambers of Arendt & Medernach, 8-10 Rue Mathias Hardt,

intervener,

APPLICATION for annulment of a Commission decision definitively rejecting the heads of the applicant's complaint which allege that Belgacom SA had initiated vexatious litigation against it before the Belgian courts and had requested the transfer by it to Belgacom SA of its industrial and commercial know-how in accordance with contractual commitments between the two parties, those acts allegedly constituting infringements of Article 86 of the EC Treaty,

THE COURT OF FIRST INSTANCE

OF THE EUROPEAN COMMUNITIES (Fourth Chamber, Extended Composition),

composed of: P. Lindh, President, R. García-Valdecasas, K. Lenaerts, J.D. Cooke and M. Jaeger, Judges,

Registrar: A. Mair, Administrator,

having regard to the written procedure and further to the hearing on 3 December 1997,

gives the following

Judgment

Legal and factual background to the dispute

1. The applicant, ITT Promedia NV, formerly NV Promedia, is a company incorporated under Belgian law whose main business is concerned with the publication of commercial telephone directories in Belgium. It is a subsidiary of, and owned as to 99.95% by, ITT World Directories Inc., a company incorporated under United States law, whose main business is the publication of commercial telephone directories worldwide. ITT World Directories Inc. is owned as to 80% by ITT World Directories Enterprises Inc., which in its turn is a wholly-owned subsidiary of ITT Corporation, the latter two companies being both incorporated under United States law.

The relevant national provisions

2. The Belgian Law of 13 October 1930, coordinating the various legislative provisions concerning telegraphy and wireless telephony, conferred on the State-owned undertaking Régie des Télégraphes et Téléphones (RTT) the exclusive right to operate telecommunications (including the publication and distribution of telephone directories) in Belgium. That Law also conferred on RTT the right to authorise third parties to publish directories.

3. By the Law of 21 March 1991 on the reform of certain public economic undertakings, RTT was initially transformed into an autonomous public undertaking known as Belgacom. Subsequently, by the Law of 12 December 1994 amending the Law of 21 March 1991, Belgacom was transformed into a public limited company, Belgacom SA (hereinafter Belgacom). The majority of the shares in Belgacom are held by the Belgian State. Belgacom had a statutory monopoly in respect of voice telephony services in Belgium until 1 January 1998.

4. Belgacom's exclusive right to publish directories was abolished, with effect from 10 January 1994, by Article 45 of the Law of 24 December 1993, which amended Article 113(2) of the Law of 21 March 1991. Article 113(2), as amended (hereinafter Article 113(2) of the 1991 Law), entitles not only Belgacom but also other persons authorised by the Institut Belge des Services Postaux et des Télécommunications (Belgian Institute for Postal Services and Telecommunications, hereinafter the BIPT) to publish directories in accordance with the criteria and procedures laid down by Royal enactment.

5. The criteria and procedures governing the grant of authorisation to publish directories were laid down by the Royal Decree of 15 July 1994 on the reform of certain public economic undertakings as regards directories of subscribers to the reserved telecommunications services operated by Belgacom (hereinafter the Royal Decree of 15 July 1994), which entered into force on 26 August 1994.

Under Article 1(2) and the first paragraph of Article 3 of that decree, the authorisation is to take the form of a declaration by the BIPT that the definitive text of an agreement for the supply of the data necessary for the production, sale or distribution of a directory, defining all the technical, financial and commercial rights and obligations of Belgacom and of the party seeking the authorisation, is in conformity with the decree. Before it is signed, the agreement must be notified jointly by Belgacom and the other party thereto. According to Article 2, each authorised person shall ... have access to the data needed for the production, sale or distribution of a directory on commercial, financial and technical conditions which are fair, reasonable and non-discriminatory. Those conditions are to be fixed by Belgacom and published by it in the *Moniteur Belge* (Belgian Official Journal). Under the second paragraph of Article 3, Belgacom is required to provide the BIPT at the latter's request with any information which is needed in order to verify that those conditions are fair, reasonable and non-discriminatory. Article 9 states that authorisations are to be granted for the publication of directories from 1 January 1995 onwards.

Background to the dispute

6. In a first agreement concluded in 1969 RTT granted NV Promedia the exclusive right to publish directories based on data which RTT was to supply to it. That concession was renewed by a second agreement dated 9 May 1984 (the agreement of 9 May 1984) which conferred on NV Promedia the exclusive right, for a period of ten years commencing on 1 January 1985 and ending upon publication of the complete tenth edition of the official telephone directories, to publish and distribute the official telephone directory in RTT's name and commercial directories in its own name. Pursuant to those two agreements, the latter of which expired on 15 February 1995, the applicant published commercial directories under the trade mark Gouden Gids/Pages d'Or.

7. Belgacom and the applicant entered into negotiations in 1993 with a view to concluding a new agreement. In September 1993 Belgacom broke off those negotiations and issued an invitation to tender for the publication of telephone directories from 1 January 1995. On 22 December 1993 it decided, however, to resume negotiations with the applicant. As the two parties were unable to agree terms, on 12 July 1994 Belgacom decided to cease its cooperation with the applicant and to seek another partner for the publication of telephone directories from 1 January 1995.

8. Meanwhile, on 29 June 1994, the applicant brought an action before the Belgian Cour d'Arbitrage (Court of Arbitration) in which it sought annulment of Article 45 of the Law of 24 December 1993. That action was followed on 25 October 1994 by an application to the Belgian Conseil d'État (Council of State) for suspension of the entry into force of the Royal Decree of 15 July 1994. Both actions were dismissed.

9. On 13 July 1994 the applicant announced in a press release that it had decided to continue to publish its Gouden Gids/Pages d'Or. At the same time, the applicant intensified its activities in relation to the canvassing and sale of advertising space in preparation for the 1995 edition of its directories.

10. On the same day, 13 July 1994, Belgacom issued a press release in which it warned its customers that any canvassing or sales activities engaged in by the applicant for the 1995 edition of its telephone directories were undertaken without the authorisation of Belgacom and fell outside the scope of any contractual relationship. Belgacom also informed its customers that it had decided to publish the white and yellow pages of its official telephone directory itself, in cooperation

with a partner specialising in that field. It stated that Belgacom's commercial advisers, armed with the necessary authorisation, would shortly be contacting customers to inform them of the possibilities of advertising in the next edition of the white and yellow pages of the official annual telephone directory.

11. On 22 July 1994 the applicant brought a action against Belgacom, summoning it to appear before the President of the Brussels Tribunal de Commerce (Commercial Court) in summary proceedings for an injunction. The President was asked to rule that Belgacom had infringed the Belgian legislation on commercial practices and on competition, as well as Article 86 of the EC Treaty, and to order Belgacom to cease spreading false, misleading and disparaging information concerning the applicant. Belgacom counterclaimed in that action (hereinafter Belgacom's first counterclaim or Belgacom's first action), requesting the President of the Tribunal de Commerce to rule that, in the absence of an authorisation granted by the BIPT as required by Article 113(2) of the 1991 Law, any canvassing or sale of advertising space by the applicant for the 1995 edition of the directories infringed the Belgian legislation on commercial practices and on competition and also Article 86 of the EC Treaty. It also applied for an order requiring the applicant to cease all canvassing and/or sales activities until such time as it had obtained the authorisation in question.

12. By judgment of 5 October 1994 the President of the Brussels Tribunal de Commerce allowed the applicant's action on the basis of the Belgian legislation on commercial practices and on competition and of Article 86 of the EC Treaty, and on the same grounds dismissed Belgacom's first counterclaim as unfounded. By judgment of 19 October 1995 the Brussels Cour d'Appel (Court of Appeal) upheld that judgment, holding that Belgacom's conduct was contrary to the Belgian legislation on commercial practices. It also dismissed Belgacom's counterclaim on the ground that the relevant national provisions relied on by Belgacom in support of its counterclaim - in particular Article 113(2) of the 1991 Law and the Royal Decree of 15 July 1994 - were contrary to Articles 86 and 90(1) of the EC Treaty and could not therefore be applied in that case.

13. Having requested Belgacom, by letters of 10 May, 1 July and 27 July 1994, to make it a fair, reasonable and non-discriminatory offer for the supply of data relating to subscribers (hereinafter subscriber data), the applicant again brought an action against Belgacom on 16 August 1994, summoning it to appear before the President of the Brussels Tribunal de Commerce in summary proceedings for an injunction. It sought a declaration that Belgacom's refusal to supply it with subscriber data on fair, reasonable and non-discriminatory terms constituted an unfair commercial practice contrary to the Belgian legislation on commercial practices and on competition and to Article 86 of the EC Treaty, and an order that Belgacom should desist from that practice and supply the data to it on fair, reasonable and non-discriminatory terms. Belgacom brought a counterclaim against the applicant's new action (hereinafter Belgacom's second counterclaim or Belgacom's second action), in which it requested the President of the Brussels Tribunal de Commerce to rule that the applicant's application for access to the subscriber data, as requested in the applicant's letters of 10 May, 1 July and 27 July 1994, constituted a practice which was contrary to the Belgian legislation concerning commercial practices and economic competition and to Article 86 of the Treaty.

14. Having commissioned an expert to determine a fair, reasonable and non-discriminatory price for the subscriber data, the President of the Brussels Tribunal de Commerce delivered a judgment on 11 June 1996 in which he allowed the applicant's claim and declared that the price should be established in accordance with the expert's findings, subject to the condition that that price was to be

automatically adapted to such lower price as might be determined by the Commission in the decision which it would adopt in response to a complaint submitted by the applicant (see paragraphs 22 and 23 below). He dismissed, on the same grounds, Belgacom's second counterclaim as unfounded. An application by the applicant for damages, in which it claimed that Belgacom's second counterclaim was frivolous and vexatious, was also dismissed by the President on the ground that it had not been established that Belgacom had abused its right to bring actions before the courts.

15. Pursuant to Article 2 of the Royal Decree of 15 July 1994, Belgacom published in the *Moniteur Belge* on 24 September 1994 a communication concerning the commercial, financial and technical conditions of access to the data needed for the production, sale and distribution of directories of subscribers to the reserved telecommunications services operated by Belgacom. Article 3.1 of the communication specified an annual fee of BFR 200 per subscriber listing plus 34% of the authorised person's turnover from the sale of advertising space. On 20 April 1995 the BIPT, considering that charge to be unfair, unreasonable and discriminatory, recommended Belgacom to alter it to BFR 67 per subscriber listing plus 16% of the authorised person's turnover from the sale of advertising space. Article 3.1 of the abovementioned communication was amended by a communication published in the *Moniteur Belge* on 20 June 1995, in which the charge was fixed in accordance with the BIPT's recommendation.

16. On 21 October 1994 Belgacom and GTE Information Services Inc., a company incorporated under United States law, created a joint venture company to publish telephone directories in Belgium, Belgacom Directory Services SA (BDS), the two partners holding 80% and 20% of its shares respectively. BDS, a company incorporated under Belgian law, commenced its activities in 1995.

17. On 16 March 1995 Belgacom and the applicant concluded an agreement concerning the supply of subscriber data. By letter of 24 March 1995 the BIPT, having received a copy of that agreement, informed the applicant that it had been granted a provisional authorisation. The letter stated that the authorisation could become definitive once the financial conditions of the agreement had been modified to correspond with the fair, reasonable and non-discriminatory conditions to be determined by the BIPT.

18. By letter of 29 March 1995 Belgacom gave the applicant formal notice requiring it to comply with its contractual obligations under Article XVI(2) of the agreement of 9 May 1984. That letter was accompanied by a list of the items which Belgacom was claiming from the applicant in accordance with that article. On 7 April 1995 the applicant sent a copy of the letter to the Commission.

19. Article XVI(2) of the agreement of 9 May 1984 provided as follows:

Ten einde de Regie in staat te stellen de continuiteit van de uitgaven te verzekeren, dient de contractant:

(a) ten laatste één maand na de uitreikingsperiode van elk boekdeel van de 10de uitgave alle abonneebestanden, tekeningen, specificaties en andere gegevens die nodig zijn voor de publikatie en de uitreiking van de OTG en de HBG zonder enige vergoeding an de Regie af te staan;

(b) uiterlijk één maand na het uitreiken van het laatste boekdeel van de 10de uitgave zonder enige vergoeding bovendien af te staan: de licenties, voortvloeiend uit octrooien of uit soortgelijke wettelijke vormen van bescherming, naar aanleiding van werken uitgevoerd of in verband met onderhavige

overeenkomst alsmede de know how nodig voor de uitgave en de uitreiking van de OTG en de HBG.

(To enable the Regie to ensure the continuity of the publication, the contractor shall:

(a) not later than one month after the period of distribution of each volume of the 10th edition, transfer to the Regie, free of charge, any subscriber records, drawings, specifications and other information required for the publication and distribution of the official telephone directory and the commercial directory;

(b) not later than one month after the distribution of the last volume of the 10th edition, also transfer, free of charge, the licences resulting from patents or similar forms of legal protection granted in relation to works performed or carried out in connection with this agreement, as well as the know-how required for the publication and distribution of the official telephone directory and the commercial directory.)

20. That demand for performance of the agreement of 9 May 1984 gave rise to a third set of legal proceedings between Belgacom and the applicant (hereinafter Belgacom's third action). On 14 April 1995 Belgacom made a summary application to the President of the Brussels Tribunal de Commerce, seeking an order that the applicant, pursuant to Article XVI(2) of the agreement of 9 May 1984, should transfer to Belgacom various items of data, commercial know-how and intellectual property rights. By judgment of 19 June 1995 the President of the Tribunal de Commerce declared that the action did not fulfil the criteria for summary proceedings and dismissed it as unfounded.

21. Following the summary proceedings, substantive proceedings were initiated on 7 August 1995 by Belgacom and BDS before the President of the Brussels Tribunal de Commerce in which they sought an order requiring the applicant to pay the damages provided for in Article XVI(3) of the agreement of 9 May 1984 for failure to comply with Article XVI(2) thereof. By judgment of 11 December 1996 the President of the Tribunal de Commerce declared that the exclusivity clause in the agreement of 9 May 1984 infringed Article 85(1) of the EC Treaty and that, since that clause went to the very essence of the agreement, the entire agreement was void under Article 85(2) of the EC Treaty. He therefore dismissed the action as unfounded. He held that it had not been shown that the institution of the proceedings was frivolous and vexatious, and therefore also dismissed the applicant's counterclaim as unfounded. He stated that the fact of having misconstrued an agreement did not in itself constitute fault of such gravity as to amount to evidence of bad faith.

The administrative procedure before the Commission

22. On 20 October 1994 the applicant submitted a complaint to the Commission in which it claimed, first, under Article 3 of Regulation No 17 of the Council - First Regulation implementing Articles 85 and 86 of the Treaty (OJ, English Special Edition 1959-1962, p. 87, hereinafter Regulation No 17), that Belgacom's conduct infringed Article 86 of the Treaty and, second, that the relevant Belgian provisions were incompatible with Articles 86 and 90(1) of the Treaty. The Commission separated the complaint into two parts: the complaint against Belgacom's conduct was registered under No IV/35.268 (hereinafter complaint No IV/35.268) and that against the relevant Belgian provisions under No 94/5103 SG(94) A/23203.

23. In complaint No IV/35.268, the applicant asserted that Belgacom had abused a dominant position, contrary to Article 86 of the Treaty, by:

(i) communicating to the applicant's existing or potential customers false, misleading and disparaging statements concerning the applicant;

(ii) refusing to supply to the applicant the subscriber data needed for the production of directories on terms which were fair, reasonable and non-discriminatory;

(iii) imposing excessive and/or discriminatory prices for the sale of the subscriber data in question;

(iv) initiating vexatious litigation against the applicant before the Belgian courts; and

(v) requiring the applicant to surrender to it its industrial and commercial know-how in accordance with contractual commitments binding the two parties.

24. By letter of 7 March 1995 the Commission informed the applicant of its preliminary view regarding the five heads of complaint No IV/35.268 and requested the applicant to submit its comments. The applicant sent its comments to the Commission by letters dated 6, 18, 25 and 27 April and 16 June 1995.

25. On 6 December 1995 the applicant submitted a fresh complaint to the Commission, registered under No 96/4067 SG(95) A/19911/2, in which it claimed that the Belgian legislation governing telephone directories infringed Articles 59 and 90 of the Treaty.

26. On 20 December 1995 the Commission sent to Belgacom a statement of objections concerning the third head of complaint No IV/35.268, namely the price demanded for the subscriber data (hereinafter the statement of objections of 20 December 1995). It was followed by a hearing on 10 April 1996. In April 1997 the Commission reached a settlement with Belgacom regarding the conditions of access to the subscriber data, following which the applicant withdrew that head of complaint (see the Commission's press release of 11 April 1997).

27. By letter of 21 December 1995 the Commission notified the applicant of its final decision to reject the first and second heads of complaint No IV/35.268 (see paragraph 23 above). No action has been brought before the Court of First Instance concerning the rejection of those heads of complaint. It also informed the applicant of the dispatch to Belgacom of a statement of objections (see paragraph 26 above) and gave its preliminary view, under Article 6 of Regulation No 99/63/EEC of the Commission of 25 July 1963 on the hearings provided for in Article 19(1) and (2) of Council Regulation No 17 (OJ, English Special Edition 1963-1964, p. 47), concerning the fourth and fifth heads of complaint No IV/35.268 (see paragraph 23 above).

28. By letter of 9 February 1996 the applicant sent the Commission its comments on that preliminary view concerning the last two heads of complaint No IV/35.268.

The contested decision

29.

By decision of 21 May 1996 (hereinafter the contested decision), communicated to the applicant by letter of the same date, the Commission definitively rejected the fourth and fifth heads of complaint No IV/35.268 (see paragraph 23 above), concerning Belgacom's allegedly vexatious litigation and the claim for performance of Article XVI(2) of the agreement of 9 May 1984 requiring the transfer to Belgacom of the applicant's industrial and commercial know-how.

The litigation before the Belgian courts

30. The Commission considers that in principle the bringing of an action, which is the expression of the fundamental right of access to a judge, cannot be characterised as an abuse unless an undertaking in a dominant position brings an action (i) which cannot reasonably be considered as an attempt to establish its rights and can therefore only serve to harass the opposite party, and (ii) which is conceived in the framework of a plan whose goal is to eliminate competition (point 11 of the contested decision).

31. With regard to Belgacom's first counterclaim, the Commission observes that it stated in the letter of 21 December 1995 that that counterclaim constituted a defence against an accusation [by the applicant] and did indeed aim to assert what Belgacom considered to be a right resulting from [the applicant's] situation before it obtained the legally required authorisation. The applicant submitted two arguments contesting this view in its letter of 9 February 1996 (points 14 and 15 of the contested decision).

32. As regards the first argument, alleging that Belgacom's pricing practices made it impossible for the applicant to obtain an authorisation from the BIPT, the Commission states (in points 15 and 16 of the contested decision) that the statement of objections relates to excessive and discriminatory pricing practices which are still taking place, whereas [the applicant] has in the meantime obtained an authorisation. The alleged impossibility for [the applicant] to obtain an authorisation does not therefore result from practices which are the subject of the Commission's statement of objections to Belgacom.

33. As regards the second argument, alleging that the Commission had not examined the compatibility with the Treaty - and, more specifically, with Articles 59, 86 and 90 thereof - of the legislative and regulatory framework within which Belgacom's action took place, the Commission observes that that argument relates to acts taken by the Belgian State and not to practices of Belgacom. Consequently, as long as that framework had not been invalidated by a court of competent jurisdiction, Belgacom could legitimately refer to it in its actions before the courts (points 15 and 17 of the contested decision).

34. The Commission notes further that, if Belgacom's action was really part of a deliberate strategy to eliminate competition, Belgacom would not have awaited the initiation of legal proceedings by the applicant before asserting that claim before the courts in the form of a counterclaim. It would have brought the claim against the applicant directly (point 18 of the contested decision).

35. As regards Belgacom's second counterclaim, the Commission again points out that it stated in its letter of 21 December 1995 that that counterclaim constituted a defence against an accusation by the applicant and aimed to assert what Belgacom considered to be a right, resulting this time from the legal situation which prevailed in Belgium prior to adoption of the Royal Decree of 15 July 1994. In its letter of 9 February 1996 the applicant submitted two arguments challenging this view (point 19 of the contested decision).

36. In response to the first argument, alleging that Article 86 of the Treaty placed Belgacom under an obligation to supply the subscriber data, the Commission states that Article 86 of the Treaty, considered in isolation, could require an undertaking in a dominant position to supply data to another undertaking only if the latter undertaking was in fact capable of using that data in the context of an economic activity. In the absence of any implementing decree specifying the conditions governing the exercise of the activity of publishing directories, the applicant could not have used the data requested without infringing Belgian law, even if it had been supplied by Belgacom. Even though the impossibility of publishing directories resulted from failure to act on the part of the Belgian State, which had not promptly enacted the decree governing the exercise of that activity, Belgacom could legitimately rely upon it in its actions as long as the absence of the implementing decree had not been found unlawful by a court of competent jurisdiction (points 20 and 21 of the contested decision).

37. As to the second argument, alleging that the refusal to supply the data could not be justified by a concern on the part of Belgacom to defend its rights because such a supply did not affect the right to publish directories pursuant to Article 113 of the Law of 21 March 1991, the Commission contends that, even if the supply of data by Belgacom to the applicant did not call in question the right to exercise that activity, Belgacom had legitimate grounds for fearing that [the applicant] would use that data to canvass customers on the market for advertising through telephone directories, which would have affected Belgacom's statutory monopoly on that market (points 20 and 22 of the contested decision).

38. In addition, in point 23 of the contested decision the Commission repeats the finding made in point 18 thereof (see paragraph 34 above).

39. As regards Belgacom's third action, concerning the applicant's failure to comply with Article XVI of the agreement of 9 May 1984, the Commission explains that it stated in its letter of 21 December 1995 that Belgacom brought its action in order to defend what Belgacom regarded as a right derived from contractual commitments entered into by the applicant (point 24 of the contested decision).

40. In the letter of 9 February 1996 the applicant argued that the action, which sought to enforce claims falling outside the scope of the contractual commitments between the two parties, itself went beyond what would constitute the legitimate defence of a right acquired by Belgacom by virtue of those commitments. In the Commission's view, the applicant had not put forward any facts or legal argument showing how Belgacom's claims went beyond what was provided for by the agreement of 9 May 1984 (points 25 and 26 of the contested decision).

41. By way of conclusion, the Commission finds that, since Belgacom's three actions can reasonably be regarded as having been brought with a view to asserting its rights, they do not constitute an abuse within the meaning of Article 86 of the Treaty (point 27 of the contested decision).

42. Moreover, the Commission argues that since the first two actions before the Belgian courts are counterclaims whereby Belgacom is defending its rights, and not autonomous actions brought by Belgacom with a view to harassing the applicant, they could not have been conceived as part of a plan to eliminate competition. They could not therefore constitute an abuse within the meaning of Article 86 of the Treaty (point 28 of the contested decision).

Claim for performance of a contract

43. The Commission states that Belgacom's claim in respect of Article XVI(2) of the agreement of 9 May 1984 concerns the performance, and not the conclusion, of a contract. It explains that it stated in the letter of 21 December 1995 that a claim for performance of a contract cannot in itself constitute an abuse under Article 86 of the Treaty. In its letter of 9 February 1996 the applicant submitted three arguments challenging this view (points 30 to 32 of the contested decision).

44. In response to the first argument, contending that there can be no justification, when applying Article 86 of the Treaty, for distinguishing between the inclusion in a contract of a clause and the performance of that clause, the Commission argues that the concept of an abuse within the meaning of that article is an objective one, implying *inter alia* behaviour which is prejudicial to the structure of competition. A claim for performance of a contract clearly adds nothing to the effects flowing from the conclusion of that contract, since its conclusion entails its performance by the signatories or, in default thereof, a claim for performance by the party seeking to defend its rights. It would be different if such a claim went beyond the scope of the contract and had a specific effect on the structure of competition. The Commission finds that the applicant has not put forward any factual or legal argument showing that Belgacom's demand had a specific effect on the structure of competition which went beyond what the parties could expect from the agreement of 9 May 1984 (points 32 to 34 of the contested decision).

45. As regards the second argument, alleging that Belgacom's claim was aimed at excluding the applicant from the telephone directories market, the Commission finds that the applicant has not put forward any factual or legal argument to show in what respect the aim of Belgacom's claim was otherwise than to defend the rights which it acquired when the agreement of 9 May 1984 was signed. The fact that that claim, if upheld, would affect competition in the directories market in the manner described by the applicant is the result of the circumstances in which the contract was concluded, at a time when the publication of directories was an activity governed by exclusive rights reserved to Belgacom (points 32 and 35 of the contested decision).

46. In response to the third argument, contending that the Commission infringed Article 89 of the Treaty by declining to conduct an investigation into the compatibility of the agreement of 9 May 1984 with Articles 85 and 86 of the Treaty, the Commission points out that nowhere has it set out its position concerning the compatibility of the agreement with Articles 85 and 86 of the Treaty. It states that the adoption of the contested decision did not in any way render it impossible for it to open a proceeding in that regard or for the applicant to lodge a complaint concerning that agreement in accordance with Article 3 of Regulation No 17 (see points 32 to 36 of the contested decision).

Procedure

47. By application lodged at the Registry of the Court of First Instance on 22 July 1996, the applicant brought the present action.

48. On 6 December 1996 Belgacom applied for leave to intervene in support of the form of order sought by the Commission. That application was granted by order of the President of the Fourth Chamber, Extended Composition, of the Court of First Instance on 19 February 1997.

Forms of order sought by the parties

49. The applicant claims that the Court should:

- annul the contested decision;

- order the Commission to pay the costs.

50. The Commission contends that the Court should:

- dismiss the application;

- order the applicant to pay the costs.

51. Belgacom, intervening in support of the form of order sought by the Commission, contends that the Court should:

- dismiss the application;

- order the applicant to pay the costs.

Substance

52. In support of its application, the applicant puts forward seven pleas in law. The first plea is that there was a manifest error of assessment of Belgacom's pricing practices, resulting in an inadequate statement of reasons for the contested decision. The second plea alleges manifest error of assessment of the relevant Belgian provisions governing the publication of telephone directories. The third plea is that Belgacom's rights were incorrectly characterised. The fourth plea alleges manifest error of assessment regarding Belgacom's refusal to supply the subscriber data. The fifth plea alleges manifest error of assessment regarding the strategy pursued by Belgacom in seeking to eliminate the applicant. The sixth plea is that there was an infringement of Article 190 of the Treaty as regards the rejection of the head of the complaint relating to Belgacom's third action. The seventh plea alleges infringement of Article 86 of the Treaty in regard to the characterisation of the claim for performance of Article XVI of the agreement of 9 May 1984.

53. The first five pleas relate to Belgacom's counterclaims, the sixth plea to Belgacom's third action, and the seventh plea to the claim for performance of Article XVI of the agreement of 9 May 1984.

54. The first six pleas therefore raise the question whether the fact that an undertaking with a dominant position on a particular market brings legal proceedings against a competitor on that market may constitute an abuse within the meaning of Article 86 of the Treaty.

55. The Commission states that, in order to be able to determine the cases in which such legal proceedings are an abuse, it laid down two cumulative criteria in the contested decision: it is necessary that the action (i) cannot reasonably be considered as an attempt to establish the rights of the undertaking concerned and can therefore only serve to harass the opposite party and (ii) it is conceived in the framework of a plan whose goal is to eliminate competition (hereinafter the two cumulative criteria).

56. According to the Commission, under the first of the two criteria the action must, on an objective view, be manifestly unfounded. The second criterion requires that the aim of the action must be to eliminate competition. Both criteria must be fulfilled in order to establish an abuse. The fact that unmeritorious litigation is instituted does not in itself constitute an infringement of Article 86 of the Treaty unless it has an anti-competitive object. Equally, litigation which may reasonably be regarded as an attempt to assert rights *vis-à-vis* competitors is not abusive, irrespective of the fact that it may be part of a plan to eliminate competition.

57. It is clear from the documents before the Court that the applicant is challenging the application in this case of the two cumulative criteria, but does not challenge the compatibility of those criteria as such with Article 86 of the Treaty.

58. In the present case, the Court must therefore establish whether the Commission correctly applied the two cumulative criteria and there is no need for it to rule on the correctness of the criteria chosen by the Commission in the contested decision.

59. In that regard, the Court finds that the applicant, by the first four pleas in its application, is seeking to show that the first of the two cumulative criteria was satisfied and, by its fifth plea, that the second criterion was also satisfied. Having regard to the fact that those criteria are cumulative, it will be necessary to consider the fifth plea only if the Court's examination of the first four pleas leads it to conclude that the first criterion was in fact satisfied.

60. Before considering those various pleas, three points should be made. First, as the Commission has rightly emphasised, the ability to assert one's rights through the courts and the judicial control which that entails constitute the expression of a general principle of law which underlies the constitutional traditions common to the Member States and which is also laid down in Articles 6 and 13 of the European Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950 (see Case 222/84 *Johnston* v *Chief Constable of the Royal Ulster Constabulary* [1986] ECR 1651, paragraphs 17 and 18). As access to the Court is a fundamental right and a general principle ensuring the rule of law, it is only in wholly exceptional circumstances that the fact that legal proceedings are brought is capable of constituting an abuse of an dominant position within the meaning of Article 86 of the Treaty.

61. Second, since the two cumulative criteria constitute an exception to the general principle of access to the courts, which ensures the rule of law, they must be construed and applied strictly, in a manner which does not defeat the application of the general rule (see, *inter alia*, Case T-105/95 *WWF UK* v Commission [1997] ECR II-313, paragraph 56).

62. Lastly, it is settled law that where the Commission has decided to reject a complaint submitted under Article 3(2) of Regulation No 17 without holding an investigation, the purpose of judicial review by the Court of First Instance is to ensure that the decision at issue is not based on materially incorrect facts, and not vitiated by any error of law, manifest error of assessment or abuse of power (see Case T-37/92 *BEUC and NCC* v *Commission* [1994] ECR II-285, paragraph 45).

The first plea: manifest error of assessment of Belgacom's pricing practices, resulting in an inadequate statement of reasons

Arguments of the parties

63. The applicant points out that in complaint No IV/35.268 it argued that Belgacom had sought to put it out of business by requesting the Brussels Tribunal de Commerce, on the basis of the Belgian provisions governing the publication of telephone directories (which were incompatible with Community law), to order the applicant to discontinue its canvassing and sales activities for the 1995/1996 edition of its commercial directories, on the ground that the applicant had not obtained authorisation from the BIPT to publish directories, as required by Article 113(2) of the 1991 Law. In its letter of 21 December 1995 the Commission stated that Belgacom's first counterclaim did not constitute an abuse, because Belgacom had merely asserted a right resulting from the situation of [the applicant] before the authorisation required by law had been obtained. The applicant argued in response, in its letter of 9 February 1996, that that approach completely ignored the fact that its initial failure to obtain an authorisation was caused by Belgacom's pricing practices, which had been the subject of close scrutiny in the statement of objections of 20 December 1995.

64. The response given by the Commission in point 16 of the contested decision (see paragraph 32 above) is based on an incorrect assessment of the facts. In the first place, the initial pricing practices which caused the applicant not to conclude an agreement with Belgacom for the supply of subscriber data, namely a charge of BFR 200 per subscriber listing plus 34% of the authorised person's turnover from the sale of advertising space, no longer applied at the time when the contested decision was adopted and did not concern the prices forming the subject-matter of the agreement between Belgacom and the applicant of 16 March 1995 on the basis of which the applicant was able to obtain an authorisation from the BIPT. In the second place, in the statement of objections of 20 December 1995 the Commission found the initial pricing practices to be excessively high and abusive. Those were the very pricing practices which prevented the applicant from obtaining an authorisation from the BIPT. Consequently, the Commission erred in finding in point 16 of the contested decision that there was no connection between Belgacom's pricing practices which were the subject of the statement of objections of 20 December 1995 and the applicant's inability to obtain an authorisation.

65. That incorrect assessment of the facts prevented the applicant from ascertaining the reasons which led the Commission to reject its main argument that Belgacom's pricing practices prevented it from obtaining authorisation and, consequently, enabled Belgacom to request the President of the Brussels Tribunal de Commerce to prohibit the applicant from engaging in its directory-publishing activities, by alleging that it had carried on unlawful canvassing and sales activities. The factually incorrect assessment of that argument therefore also affects the statement of reasons for the contested decision. In other words, Belgacom, by exploiting the applicant's refusal to pay an excessive price for the subscriber data, sought to use the courts in order to force the applicant to cease business. The Commission's approach is, moreover, inconsistent because it criticised Belgacom's abusive pricing practices but failed to object to the abusive and vexatious litigation which accompanied them.

66. The Commission maintains that in the contested decision it clearly stated the reasons for its rejection of complaint No IV/35.268. In point 11 of the contested decision, the Commission laid down two cumulative criteria which must be fulfilled if a legal action brought by an undertaking in a dominant position is to be regarded as an abuse. In point 14 it indicated the reason for which the first criterion was not fulfilled in the present case and, in point 18, the reason for which the second criterion was not fulfilled.

67.

In the contested decision the Commission noted that Belgacom's plea in its first counterclaim, to the effect that the applicant had no authorisation, could reasonably be regarded as an attempt by Belgacom to assert its rights and that the first criterion for determining infringement of Article 86 of the Treaty was therefore not satisfied. The reasons for the applicant's lack of such authorisation was a separate issue. In any event, the Commission answered the accusation of inconsistency by expressly pointing out that the practices which were the subject of the statement of objections of 20 December 1995 were still continuing at the time when the contested decision was adopted, a situation which had not prevented the applicant from obtaining authorisation from the BIPT. The applicant's assertion that it had only been able to conclude an agreement with Belgacom on the basis of revised pricing practices is of no relevance to the point being made by the Commission. Those pricing practices were still the subject of a statement of objections at the time when the contested decision was adopted and, in the Commission's view, constitute an abuse.

Findings of the Court

68. The first plea is in fact in two parts, the first part alleging a manifest error of assessment and the second alleging an inadequate statement of reasons.

69. In the first part the applicant submits in essence that point 16 of the contested decision is based on a manifest error of assessment. In that regard, the Court finds, first, that it must reject the applicant's argument that the Commission wrongly concluded that the pricing practices which were the subject-matter of the statement of objections of 20 December 1995 had no bearing on the applicant's inability to obtain authorisation.

70. The pricing practices which were the subject-matter of the statement of objections of 20 December 1995 were both those published in the *Moniteur Belge* of 24 September 1994, namely BFR 200 per subscriber listing plus 34% of the authorised person's turnover from the sale of advertising space and also those published in the *Moniteur Belge* of 20 June 1995, namely BFR 67 per subscriber listing plus 16% of the authorised person's turnover from the sale of advertising space (see paragraph 15 above). The applicant entered into an agreement with Belgacom on 16 March 1995 and the BIPT informed the applicant, by letter of 24 March 1995, that it had obtained a provisional authorisation (see paragraph 17 above). It follows that the pricing practices which were the subject-matter of the statement of objections of 20 December 1995 did not prevent the applicant from obtaining an authorisation allowing it to publish directories.

71. Nor, second, can the Court accept the applicant's argument that the Commission failed to take account of the fact that the applicant's lack of authorisation was due specifically to Belgacom's abusive pricing practices.

72. According to the first of the two cumulative criteria set out by the Commission in the contested decision, legal proceedings can be characterised as an abuse, within the meaning of Article 86 of the Treaty, only if they cannot reasonably be considered to be an attempt to assert the rights of the undertaking concerned and can therefore only serve to harass the opposing party. It is therefore the situation existing when the action in question is brought which must be taken into account in order to determine whether that criterion is satisfied.

73. Furthermore, when applying that criterion, it is not a question of determining whether the rights which the undertaking concerned was asserting when it brought its action actually existed or whether that action was well founded, but

rather of determining whether such an action was intended to assert what that undertaking could, at that moment, reasonably consider to be its rights. According to the second part of that criterion, as worded, it is satisfied solely when the action did not have that aim, that being the sole case in which it may be assumed that such action could only serve to harass the opposing party.

74. Under Article 113(2) of the 1991 Law, only Belgacom and persons authorised by the BIPT were entitled to publish telephone directories. According to the Royal Decree of 15 July 1994, that authorisation took the form of a declaration by the BIPT that the definitive text of an agreement concluded between Belgacom and the person concerned for the supply of subscriber data was in conformity with the decree. It was for Belgacom to fix the conditions of access to the subscriber data, which had to be fair, reasonable and non-discriminatory, and to publish them in the *Moniteur Belge* (see paragraphs 4 and 5 above).

75. The Court points out, in the present case, that in the *Moniteur Belge* of 24 September 1994 Belgacom published a notice relating to the conditions of access to the subscriber data and fixed an annual fee of BFR 200 per subscriber listing plus 34% of the authorised person's turnover from the sale of advertising space; that only on 20 April 1995 did the BIPT recommend that Belgacom reduce that fee, by setting it at BFR 67 per subscriber listing plus 16% of the authorised person's turnover from the sale of advertising space, which Belgacom did by notice published in the *Moniteur Belge* of 20 June 1995; and that Belgacom's first counterclaim was rejected by judgment of the President of the Brussels Tribunal de Commerce on 5 October 1994.

76. In those circumstances, an examination of the question whether the applicant's lack of authorisation was due to Belgacom's pricing practices could not have shown that Belgacom's first action was not intended to assert what that company could, at the moment when it brought that action, have reasonably considered to have been its rights and that the action only served to harass the applicant. That question was therefore irrelevant to the question whether the first criterion was satisfied. It therefore fell within the scope of the substantive proceedings and was a matter for the national court before which the applicant's first action had been brought.

77. As the applicant has not proved the manifest error of assessment which it alleges, the first part of the plea must be rejected.

78. In the second part of its first plea the applicant alleges that the statement of the reasons for the contested decision is inadequate.

79. It is settled law that the statement of reasons for a decision must be such as, first, to enable the person concerned to ascertain the matters justifying the measure adopted so that he can, if necessary, defend his rights and verify whether or not the decision is well founded and, second, to enable the Community judicature to exercise its power of review. In that regard, the Commission, in stating the reasons for the decisions which it is led to take in order to apply the competition rules, is not obliged to adopt a position on all the arguments relied on by the parties concerned in support of their request; it is sufficient if it sets out the facts and legal considerations having decisive importance in the context of the decision (see Case T-387/94 *Asia Motors France and Others* v *Commission* [1996] ECR II-961, paragraphs 103 and 104).

80. In the contested decision the Commission defined the two cumulative criteria for determining whether the bringing of a legal action by an undertaking in a dominant position constituted an abuse (point 11); it set out its view that the first

of the two cumulative criteria was not satisfied, since Belgacom's first action was indeed aimed at asserting what Belgacom considered to be a right resulting from [the applicant's] situation before it obtained the legally required authorisation (point 14); and it answered the applicant's argument that the position adopted in the letter of 21 December 1995 was inconsistent (point 16).

81. The contested decision therefore sets out the considerations on which the Commission based its view and thus enabled the applicant to challenge the correctness of that part of the contested decision and the Court to exercise its power of review. This part of the plea cannot therefore be upheld either.

82. The first plea must therefore be rejected.

The second plea: manifest error of assessment of the relevant Belgian provisions governing the publication of telephone directories

Arguments of the parties

83. The applicant maintains that the Commission committed a manifest error of assessment by relying on a conclusion which could only have been reached after a proper review of the applicant's complaints concerning the relevant Belgian provisions governing the publication of telephone directories.

84. The applicant points out that in points 17 and 21 of the contested decision, the Commission concluded that in its court actions Belgacom could legitimately rely on the relevant Belgian provisions, even in their incomplete state, as long as they had not been held invalid by a competent authority. However, the Commission failed to investigate the complaints registered under nos 94/5103 SG(94) A/23202 and 96/4067 SG(95) A/19911/2 in which the applicant had challenged those provisions (see paragraphs 22 and 25 above), despite the fact that the applicant had clearly indicated in its complaint and in its letter of 9 February 1996 that a review would show that Belgacom could not substantiate any of its claims under those provisions.

85. The applicant states that the Commission was not entitled to conclude that the Belgian provisions created rights for Belgacom on which it could rely in its court actions, unless the Commission had examined those provisions in order to assure itself that they at least appeared to indicate the existence of such rights. In so doing, the Commission failed to discharge its obligation to examine carefully all factual and legal issues brought to its attention by the applicant (see Case T-24/90 *Automec* v *Commission* [1992] ECR II-2223, paragraph 79, and Case T-7/92 *Asia Motor France and Others* v *Commission* [1993] ECR II-669, paragraph 34). That principle was applied by the Court of First Instance in its judgment in Case T-548/93 *Ladbroke Racing* v *Commission* [1995] ECR II-2565, paragraph 50, in which it held that issues relevant to the case may include the question whether a specific piece of national legislation is compatible with Community law.

86. The essence of the abuse underlying Belgacom's two counterclaims is the fact that under the relevant Belgian provisions there is no basis for Belgacom's claims. First, Belgacom had no right to impose excessive and discriminatory prices, but was able to do so because of the deficiencies in those provisions and, second, it was not entitled to refuse to supply its subscriber data but tried to hide behind the absence of an implementing Royal decree in order to protect its monopoly rights in respect of directory activities which Article 45 of the Law of 24 December 1993 had abolished. Belgacom's abusive and anti-competitive conduct was reinforced by the entry into force of the Royal Decree of 15 July 1994 nearly nine months

after publication of the Law of 24 December 1993. The incompatibility of the Belgian provisions with Community law was thus a material element of complaint No IV/35.268 which, according to the case-law, the Commission should have taken into account.

87. With particular regard to Belgacom's second counterclaim, it is clear from point 21 of the contested decision that the Commission failed to investigate the full implications of the Royal Decree of 15 July 1994 or the temporary absence of such decree. The Commission unambiguously acknowledged that the applicant had been hindered in its activities not because the Belgian provisions had conferred an exclusive right on Belgacom but because those provisions were incomplete. Nevertheless, it concluded that Belgacom could legitimately rely in its court actions on that lack of regulation.

88. The applicant observes the Commission is asserting that the determination of the abusive nature of a court action does not depend on the question whether or not a claim is correct in law. However, in giving the reasons for its refusal to examine the compatibility of the relevant Belgian provisions with Community law as part of its investigation into the abusive nature of Belgacom's claim, the Commission states that it is for the national courts to consider whether the action is well founded. The applicant concludes that, according to the Commission, this means that, in order for the incompatibility of national law with Community law to serve as an indication that a court action constitutes an abuse, it is first necessary to assess the merits of that action. That conclusion is based on an incorrect application of the Commission's own criteria for establishing whether a court action constitutes an abuse for the purposes of Article 86 of the Treaty. Whilst a decision on the merits of an action concerns the question whether the relevant national provisions confer the right claimed, a decision on the abusive nature of such an action concerns the question whether those provisions appear to indicate the existence of the right claimed. All issues of law or fact, including the compatibility of national law with Community law, may be relevant in establishing whether or not a right exists or appears to exist.

89. In reply, the Commission contends that, in the contested decision, it did not take the view that the question whether an action brought by an undertaking in a dominant position was an abuse turned on whether or not the claim was correct in law, but rather that it turned on whether or not the two criteria set out in point 11 of the contested decision were fulfilled. Moreover, the Commission noted that the applicant's assertion that there had been no examination of the relevant provisions in the context of which Belgacom's action took place related to acts on the part of the Belgian Government and not to the practices of Belgacom. The Commission found that Belgacom's reliance in its counterclaims on a provision of national law which had not been held to be unlawful could reasonably be regarded as an attempt to assert its rights and was not part of a plan to eliminate a competitor.

90. It did not commit a manifest error of assessment in adopting that position without itself examining the compatibility of the Belgian provisions with Community law. The applicant's first action was brought before a national court which was itself competent to examine the compatibility of national law with the EC Treaty (see Case C-234/89 *Delimitis* [1991] ECR I-935, paragraph 45, and Case T-353/94 *Postbank* v *Commission* [1996] ECR II-921, paragraphs 65 to 67). The Brussels Cour d'Appel did in fact find that the relevant Belgian provisions were contrary to Articles 86 and 90 of the Treaty and dismissed Belgacom's counterclaim.

91. According to Belgacom, it was not for the Commission to find that the relevant Belgian provisions did not provide any indication of the apparent existence of the

rights invoked by Belgacom. If it had done so that would have necessarily entailed a finding on the merits and the interpretation of provisions of national law, the existence of which is not contested by the applicant. Moreover, if the Commission had found that Belgacom's conduct was an abuse, that would have entailed an assessment of the way in which the Belgian Government had implemented a Belgian act of parliament. Such an assessment can be made by the Commission only in the context of Article 90(1) of the Treaty in a procedure initiated against the Kingdom of Belgium under Article 90(3) of the Treaty.

Findings of the Court

92. Under Article 113(2) of the 1991 Law, apart from Belgacom, only persons authorised by the BIPT were authorised to publish telephone directories, in accordance with the criteria and procedures laid down by Royal enactment. It is common ground that such authorisation could not be granted until the measure determining those criteria and procedures had entered into force. That measure, the Royal Decree of 15 July 1994, entered into force on 26 August 1994 (see paragraphs 4 and 5 above). Prior to that date, it therefore followed that under the relevant Belgian provisions no one could obtain the necessary authorisation to publish telephone directories and, accordingly, that Belgacom was, as a result of that legislation, the only undertaking entitled to publish such directories.

93. The purpose of Belgacom's first two actions must therefore be regarded as the assertion of what Belgacom, at the moment when it brought those two actions, could reasonably consider, on the basis of the Belgian provisions governing the publishing of telephone directories, to be its rights. Consequently, the first of the Commission's two cumulative criteria was not satisfied.

94. In such circumstances, an examination of the question whether the relevant Belgian provisions governing the publishing of telephone directories were compatible with Community law could not have shown that the objective of Belgacom's first two actions was not to assert what Belgacom, at the moment when it brought those actions, could reasonably consider to be its rights under those provisions and that the two actions therefore served only to harass the applicant. Consequently, that question fell to be considered in the examination of the merits, which was a matter for the national court hearing Belgacom's first two actions.

95. In that context, the Court rejects the applicant's argument that the Commission should have examined whether the relevant Belgian provisions were, at least apparently, compatible with Community law. Such an interpretation of the first of the two cumulative criteria would make it practically impossible for undertakings in a dominant position to have access to the courts. In order to avoid the risk of infringing Article 86 of the Treaty solely because they had brought an action before the courts, those undertakings would have to ensure beforehand that the relevant provisions on which they based their rights were compatible with Community law.

96. Furthermore, the Court points out that it is settled law that the compatibility of national legislation with the Treaty rules on competition cannot be regarded as decisive in an examination of the applicability of Articles 85 and 86 of the Treaty to the conduct of undertakings which are complying with that legislation. In such an examination by the Commission, the prior evaluation of national legislation which has an effect on the conduct of undertakings concerns only the question whether the national legislation leaves open the possibility of competition which might be prevented, restricted or distorted by autonomous conduct on their part.

If that is not the case, Articles 85 and 86 of the Treaty do not apply (see Joined Cases C-359/95 P and C-379/95 P *Commission and Others* v *Ladbroke Racing* [1997] ECR I-6265, paragraphs 31, 33 and 35).

97. Furthermore, to the extent that this plea by the applicant alleges a failure by the Commission to investigate the complaints registered under Nos 94/5103 SG(94) A/23203 and 96/4067 SG(95) A/19911/2 concerning the relevant Belgian provisions, and thus the measures adopted by the Belgian State, the Court points out that it is settled that the exercise of the power conferred by Article 90(3) of the Treaty to assess the compatibility of State measures with the Treaty rules is not coupled to an obligation on the part of the Commission to take action. Consequently, legal and natural persons who request the Commission to take action under Article 90(3) do not have the right to bring an action against a Commission decision not to use the powers which it has in this regard (see Case T-575/93 *Koelman* v *Commission* [1996] ECR II-1, paragraph 71). Accordingly, the applicant would not on any view be entitled to require the Commission to intervene by issuing a directive or a decision under Article 90(3) of the Treaty.

98. When applying the first of its two cumulative criteria, the Commission therefore correctly held in points 17 and 21 of the contested decision, without having previously considered the question whether the relevant Belgian provisions were compatible with Community law, that Belgacom could legitimately refer to those provisions, in the case of its first action, so long as they had not been invalidated and, in the case of its second action, so long as the absence of an implementing decree had not been held to be unlawful.

99. It follows from the foregoing that this plea must be rejected.

The third plea: incorrect characterisation of Belgacom's rights

Arguments of the parties

100. The applicant challenges the Commission's finding in point 22 of the contested decision, claiming that it is based on an incorrect characterisation. Since Article 45 of the Law of 24 December 1993 abolished all of Belgacom's exclusive rights in regard to directory activities with effect from 10 January 1994, the monopoly right could no longer be relied upon in order to justify the refusal to supply the subscriber data. The Commission therefore fails to apply the first of its two criteria for determining whether an action aims to assert a right, in other words a title recognised or protected by law, because, as Belgacom's exclusive rights were abolished with effect from 10 January 1994, its subsequent court action to prevent the applicant from canvassing or selling advertising space could not, by definition, have been intended to assert a legitimate title to exclusivity that was protected or recognised by Belgian or Community law.

101. The Commission observes that, pursuant to Article 113(2) of the 1991 Law in its unamended form, only Belgacom or other parties authorised to cooperate in the activities of Belgacom were entitled to publish telephone directories and that Article 45 of the Law of 24 December 1993 provided that this activity was to be opened up to other parties authorised by the BIPT on conditions to be laid down by Royal Decree. The Commission noted in point 19 of the contested decision that Belgacom could be regarded as relying on a right which it believed to result from the legal situation prevailing in Belgium prior to the adoption of the Royal Decree of 15 July 1994. Belgacom could therefore have legitimately feared that the applicant might use the subscriber data requested by it in such a way as to affect the legal position which it thought it was in before the adoption of that decree.

102. Belgacom maintains that, not only could it legitimately fear that the applicant would use the subscriber data in a way which would affect the legal position which it thought it was in prior to the Royal Decree of 15 July 1994, but in addition, as a public entity, it had no choice but to act in accordance with the legislative provisions which were in force and had not been declared invalid by a binding judicial decision. Until the Royal Decree had been adopted, Belgacom had no choice but to refuse to supply the subscriber data to the applicant.

Findings of the Court

103. In point 19 of the contested decision the Commission states that Belgacom's second action aimed to assert what Belgacom considered to be a right under the provisions in force in Belgium before the adoption of the Royal Decree of 15 July 1994.

104. It is in the light of that statement that point 22 of the contested decision must be read, in which the Commission observes that Belgacom could legitimately fear that the applicant would use Belgacom's data to canvass customers on the telephone directory advertising market, which would have affected Belgacom's statutory monopoly on that market.

105. Although Article 45 of the Law of 24 December 1993, amending Article 113(2) of the 1991 Law, abolished, with effect from 10 January 1994, Belgacom's exclusive right to publish telephone directories, it is nevertheless the case that, pursuant to that same article, apart from Belgacom, only persons authorised by the BIPT have a right to publish directories, in accordance with the criteria and procedures laid down by Royal enactment (see paragraph 4 above). Consequently, so long as another undertaking had not obtained that authorisation - and it is not disputed that an authorisation could not be granted until the criteria and procedures had been laid down by Royal enactment - Belgacom was, under the relevant Belgian provisions, the only undertaking with the right to publish directories. Belgacom's legal position was therefore such that in actual fact it enjoyed a monopoly on the market for publishing telephone directories in Belgium.

106. On a reading of point 19 of the contested decision, in conjunction with point 22, it is therefore clear that the expression Belgacom's statutory monopoly on that market must be understood as meaning that Belgacom's legal position on the market for telephone directories, as a direct result of Article 13(2) of the 1991 Law and the absence of any Royal Decree laying down the criteria and procedures for the grant of authorisations, was in actual fact that of a monopoly.

107. In any event, the present plea is ineffective. Even if the Commission had committed an error of appraisal in characterising Belgacom's position on the Belgian market for telephone directories as a statutory monopoly, it nevertheless follows from the foregoing that in actual fact Belgacom had a monopoly on that market by virtue of the relevant Belgian provisions. It is clear from point 19 of the contested decision that this is the factor which led the Commission to conclude that Belgacom's second action did not satisfy the first of the two cumulative criteria.

108. Since the contested decision is not based on the error of assessment of which the applicant complains, the third plea must be rejected.

The fourth plea: manifest error of assessment regarding Belgacom's refusal to supply the subscriber data

Arguments of the parties

109. The applicant states that Article 86 of the Treaty prohibits an undertaking in a dominant position from refusing to supply a product or service unless that refusal is objectively justified. In the present case, Belgacom's refusal to supply the applicant with the subscriber data requested substantially affected the applicant's ability to prepare its directory publishing activities. By contrast, Belgacom's directories business was not affected by a decision to supply those data or not. Belgacom's refusal was therefore unjustified. That refusal was designed solely to protect Belgacom's monopoly (see point 22 of the contested decision), which had been abolished by the Law of 24 December 1993. Consequently, the Commission committed a manifest error of assessment regarding Belgacom's refusal to supply the subscriber data requested. Contrary to the view advanced by the Commission, that refusal could not be justified by the relevant Belgian provisions.

110. The applicant adds that the Commission, in contending that it cannot investigate the merits of a claim made in legal proceedings, incorrectly applies its own criteria for determining whether an action brought by an undertaking in a dominant position constitutes an abuse. If the Commission's reasoning in points 19 to 23 of the contested decision were to be followed, the Commission could never find a vexatious action to be an abuse, as this would always result in the Commission substituting its own assessment for that of the national courts. In the contested decision the Commission found that Belgacom's second action did not constitute an abuse because its refusal to supply the subscriber data was justified under the relevant Belgian provisions. The applicant argues from this that the Commission should also be able to come to the contrary conclusion.

111. The Commission states that it was not concerned with whether Belgacom's second counterclaim would ultimately succeed. It would be unacceptable to allow undertakings in a dominant position to have access to the courts only where the basis of their actions is, in the Commission's view, correct in law. Such an approach would amount to depriving those undertakings of fundamental rights which should only be denied where the exercise of those rights does in fact constitute an abuse. Moreover, by expressing views on the merits of an action pending before national courts, the Commission would in fact be substituting its view for that of the national court both on questions of national law and on questions of Community law. This would amount to a denial of the concurrent jurisdiction of the Commission and the national courts in the enforcement of Article 86 of the EC Treaty (see the judgments in *Delimitis* and *Postbank* v *Commission*, cited above). The Commission therefore correctly took the view in the contested decision that Belgacom could reasonably be considered to have brought its second counterclaim in reliance on rights which it believed it held prior to the Royal Decree of 15 July 1994.

112. Belgacom states that the Commission did not examine, and was under no obligation to examine, the question whether Belgacom's refusal to supply the subscriber data to the applicant was justified. The Commission merely verified whether Belgacom's second counterclaim constituted an abuse. Belgacom contests the applicant's argument that, if the Commission is able to find that an action does not constitute an abuse, it is also able to find that an action does constitute an abuse. It follows as a matter of course from the criteria defined by the Commission for determining whether a legal action brought by an undertaking in a dominant position constitutes an abuse that the control exercised by the Commission is merely marginal, namely to verify whether the action is an abuse. If it is not, the Commission will refrain from undertaking a full examination of the

merits of the action. That examination is the responsibility of the national courts hearing the action.

Findings of the Court

113. As the applicant confirmed at the hearing, the fourth plea must be construed as alleging that the Commission, when applying the first of the two cumulative criteria to Belgacom's second action, committed a manifest error of appraisal in point 22 of the contested decision by failing to take into account the fact that Belgacom's refusal to supply the subscriber data was contrary to Article 86 of the Treaty.

114. It has been shown to be the case that, prior to the entry into force of the Royal Decree of 15 July 1994, the content of the relevant Belgian provisions was such that no one was able to obtain the necessary authorisation to publish telephone directories and that, accordingly, Belgacom was, by law, the only undertaking entitled to publish such directories.

115. The Commission therefore correctly found in point 22 of the contested decision, when applying the first of the two cumulative criteria, that Belgacom could legitimately fear that the applicant would use the subscriber data in order to canvas customers on the telephone directory advertising market, and that this would have affected Belgacom's legal position on that market under the relevant Belgian provisions (see paragraph 104 above).

116. Similarly, Belgacom's first and second actions must both be regarded as intended to assert what Belgacom could reasonably consider to be its rights under the relevant Belgian provisions (see paragraph 93 above), so that the first of the two cumulative criteria laid down by the Commission in the contested decision was not satisfied.

117. That conclusion cannot be affected by the answer to the question whether Belgacom's refusal to supply the subscriber data was contrary to Article 86 of the Treaty. Consideration of that question could not have shown that Belgacom's second action did not aim to assert what Belgacom could reasonably consider, at the time when it brought that action, to be its rights, and that the action therefore served only to harass the applicant. That question therefore fell to be considered in the examination of the merits, which was a matter for the national court hearing the second action.

118. The fourth plea must therefore be rejected.

119. Since the applicant has failed in its first four pleas, relating to the application of the Commission's first criterion to Belgacom's first two actions, and since the two criteria are cumulative (see paragraph 59 above), the fifth plea, relating to the application of the second criterion to those same actions, has become irrelevant. Accordingly, it is unnecessary for the Court to examine the fifth plea.

The sixth plea: infringement of Article 190 of the Treaty as regards the rejection of the head of complaint IV/35.268 relating to Belgacom's third action

Arguments of the parties

120.

The applicant maintains that, by merely stating, in point 26 of the contested decision, that the applicant had failed to advance any factual or legal argument to show how Belgacom's claims in relation to Article XVI of the agreement of 9 May 1984 were excessive, the Commission infringed Article 190 of the Treaty.

121. In its complaint the applicant stated that Belgacom was in reality seeking to expropriate the applicant's business under the false pretence that it was merely exercising contractual rights under Article XVI of the agreement of 9 May 1984. That agreement was concluded at a time when Belgacom still held a statutory monopoly in respect of directory publishing. In its letter of 21 December 1995, the Commission stated that Belgacom's third action had been brought with the object of defending what Belgacom [considered] a right stemming from the contractual commitments of [the applicant]. The applicant states that in its letter of 9 February 1996 it replied to the Commission and explained that the wording of the agreement of 9 May 1984 provided no basis for the long list of items claimed by Belgacom. It mentioned, as an illuminating example, the claim for the transfer of the trade mark Gouden Gids/Pages d'Or, which could not be justified on the basis of Article XVI of the agreement but which, if upheld, would have a devastating effect on the survival of the applicant. Article XVI of the Agreement of 9 May 1984 makes no reference whatsoever to trade marks. The anti-competitive intent underlying the claim for a licence is clear: to require the applicant to provide a licence for the use of its trade mark would be devastating for the applicant's business, whereas such a licence would not strengthen its competitors otherwise than by weakening the applicant's competitive position. Indeed, following such a transfer the trade mark would completely lose its *raison d'être*, namely its distinctive character.

122. Moreover, in its complaint the applicant contends that it stated that Belgacom was claiming trade marks held by the applicant's sister company, ITT World Directories Netherlands, which was not even a party to the agreement of 9 May 1984. The applicant states that since Article XVI of the agreement of 9 May 1984 does not even mention trade marks, and since the applicant could not possibly have undertaken to transfer trade marks which it did not own but which were held by it as licensee, Belgacom's claim once again fell clearly outside the scope of the agreement. In addition, if that claim had been upheld, the effect on the applicant's business would have been devastating.

123. In addition, on 7 April 1995 the applicant sent to the Commission Belgacom's letter of 29 March 1995 giving formal notice and containing the list of items claimed under Article XVI of the agreement of 9 May 1984. Moreover, in its letter of 9 February 1996, the applicant pointed out that Belgacom's acknowledgement, in its comments on the complaint, that it was construing Article XVI of that agreement differently in the light of the changes to the relevant Belgian provisions was evidence of the abusive nature of its claim. The new construction applied by Belgacom to Article XVI of the agreement of 9 May 1984 implied the virtual confiscation of the applicant's business, without compensation, to the advantage of its own competitor, namely BDS.

124. All that evidence showing that Belgacom's demand constituted an abuse was brought to the Commission's attention, but it chose to ignore it.

125. The Commission submits that the grounds on which it rejected the complaint concerning that point are clearly apparent from points 24 to 26 of the contested decision. It was explained there that the action brought by Belgacom to enforce the agreement of 9 May 1984 did not satisfy the first of the two criteria set out in point 11 of the contested decision, because that action could reasonably be

regarded as having been brought to enforce a legal right which Belgacom had by virtue of the agreement.

126. As regards the applicant's response in its letter of 9 February 1996, the Commission states that, according to consistent case-law, it is for the complainant to bring to the attention of the Commission the factual and legal arguments which support its complaint (see *Automec* v *Commission*, cited above, paragraph 79, and Case T-57/91 *NALOO* v *Commission* [1996] ECR II-1019, paragraph 258). The Belgian court before which Belgacom brought its action is competent to rule on the arguments advanced by the applicant in its application concerning the interpretation of Article XVI of the agreement of 9 May 1984. The applicant has not brought to the Commission's notice any factual or legal argument showing that Belgacom's court action went beyond what Belgacom could legitimately consider to be its rights under the agreement, and accordingly Belgacom's action to enforce Article XVI of the agreement did not constitute an abuse of a dominant position.

127. Belgacom observes that, according to the relevant case-law, the scope of the obligation to state reasons must in practice be assessed in the light of the circumstances of the case (see, in particular, Case T-46/92 *Scottish Football Association* v *Commission* [1994] ECR II-1039, Case T-49/95 *Van Megen Sports* v *Commission* [1996] ECR II-1799 and Case T-16/91 RV *Rendo and Others* v *Commission* [1996] ECR II-1827). Likewise, where the Commission is called upon, in the context of a complaint lodged pursuant to Regulation No 17, to ascertain whether an action brought before a national court constitutes an abuse of a dominant position, it is not obliged to review all the facts and legal arguments which the complainant has put before the national court and brought to the attention of the Commission.

Findings of the Court

128. It is settled case-law that the statement of reasons for a decision affecting a person must be such as, first, to enable the person concerned to ascertain the matters justifying the measure adopted so that he can, if necessary, defend his rights and verify whether or not the decision is well founded and, second, to enable the Community judicature to exercise its power of review; the scope of that obligation depends on the nature of the act in question and on the context in which it was adopted. Since a decision constitutes a single whole, each of its parts must be read in the light of the others (see Case T-387/94 *Asia Motor France and Others* v *Commission*, cited above, paragraph 103, and *Van Megen Sports* v *Commission*, cited above, paragraph 51).

129. In the present case, the contested decision states that the Commission considered that Belgacom's third action had to be regarded as brought for the purpose of defending what Belgacom considered to be a right stemming from contractual undertakings given by the applicant (point 24). After explaining that the applicant had indicated in its letter of 9 February 1996 that the aim of Belgacom's third action was to enforce claims which fell outside the scope of the contractual obligations assumed by the two parties (point 25), the contested decision asserts that the applicant has not adduced any matter of fact or of law to explain in what respect Belgacom's demands went beyond what was provided for by that contract (point 26). It is also apparent from the contested decision that the Commission considers that Belgacom's third action did not satisfy the first of the two cumulative criteria laid down in point 11 (point 27).

130.

The contested decision therefore sets out the matters on which the Commission based its view with regard to the application of the two cumulative criteria to Belgacom's third action.

131. As regards the argument that the Commission failed to take account of the evidence submitted by the applicant to show that Belgacom's claim for performance of Article XVI of the agreement of 9 May 1984 was an abuse, the contested decision states that the Commission, when applying the first criterion, took the view that the facts and legal arguments adduced by the applicant did not show that Belgacom's demands went beyond what was provided for by the agreement (point 26). In that regard, the Court points out that the Commission, in stating the reasons for the decision which it is led to take in order to apply the competition rules, is not obliged to adopt a position on all the arguments relied on by the parties concerned in support of their request; it is sufficient if it sets out the facts and legal considerations having decisive importance in the context of the decision (see Case T-387/94 *Asia Motors France and Others* v *Commission*, cited above, paragraph 104).

132. Consequently, the Commission gave an adequate statement of the reasons for the contested decision as regards Belgacom's third action. The sixth plea must therefore be rejected.

The seventh plea: infringement of Article 86 of the Treaty as a result of the Commission's characterisation of the claims for performance of Article XVI of the agreement of 9 May 1984

Arguments of the parties

133. The applicant submits, first, that by stating in points 33 and 34 of the contested decision that the claim for performance of Article XVI of the agreement of 9 May 1984 was not an abuse, since it did not have anti-competitive effects on the structure of the market beyond those which the parties could expect under the contract, the Commission infringed Article 86 of the Treaty.

134. In its letter of 9 February 1996, the applicant pointed out that, according to the relevant case-law, an abuse within the meaning of Article 86 of the Treaty is an objective concept. It involves conduct which is intended to distort, or which has the effect of distorting, a market structure which is actually competitive. In that letter, it also clearly showed how Belgacom's sweeping claim based on Article XVI of the agreement of 9 May 1984 would affect the structure of the market following the elimination of the applicant as competitor. Thus the enforcement of Article XVI of the agreement of 9 May 1984 would have profoundly distorted the actual structure of the market, whereas if that article were not enforced its inclusion in the agreement would not have had any effect.

135. Furthermore, the case-law draws no distinction, for the purposes of applying Article 86 of the Treaty, between the conclusion and the enforcement of an agreement. Any conduct on the part of an undertaking in a dominant position may therefore be characterised as an abuse, including the enforcement of particular contract terms. For example, in its judgment in Case 66/86 *Ahmed Saeed Flugreisen and Others* [1989] ECR 803, paragraph 34 et seq., the Court of Justice held that the application of tariffs which were the result of concerted action falling within the scope of the prohibition in Article 85 of the Treaty could be qualified as an abuse within the meaning of Article 86 (see also Commission Decision 92/262/EEC of 1 April 1992 relating to a proceeding pursuant to Articles 85 and

86 of the EEC Treaty (IV/32.450 - French-West African shipowners' committees), OJ 1992 L 134, p. 1).

136. The applicant maintains, second, that the Commission infringed Article 86 of the Treaty by professing, in point 35 of the contested decision, to have seen a justification for the anti-competitive effects of Belgacom's enforcement of Article XVI of the agreement of 9 May 1984 in the fact that that article came into being at a time when Belgacom held a statutory monopoly. By contrast with an infringement of Article 85 of the Treaty, an infringement of Article 86 cannot be exempted or justified. The conclusion arrived at by the Commission thus has no basis in law and, moreover, completely disregards the changes in the relevant Belgian provisions since the conclusion of the agreement of 9 May 1984.

137. The Commission notes that complaint No IV/35.268 concerned only Belgacom's claim for performance of the agreement of 9 May 1984. The Commission was not asked to consider the compatibility of the agreement with Community law. The applicant has therefore misunderstood the contested decision, point 31 of which states that a claim for performance of an agreement is not in itself an abuse within the meaning of Article 86 of the Treaty. The Commission expressly stated in point 36 of the contested decision that it in no way prejudged the possibility of opening a procedure concerning the infringement of the Treaty by the agreement in question, nor the possibility for the applicant to lodge a complaint concerning the terms of the agreement. The Commission points out that the applicant has now brought a complaint pursuant to Article 3 of Regulation No 17 regarding the lawfulness of the agreement itself.

Findings of the Court

138. It is settled case-law that an abuse, for the purpose of Article 86 of the Treaty, is an objective concept referring to the behaviour of an undertaking in a dominant position which is such as to influence the structure of a market on which, as a result of the very presence of the undertaking in question, the degree of competition is already weakened and which, through recourse to methods different from those conditioning normal competition in products or services on the basis of the transactions of commercial operators, has the effect of hindering the maintenance of the degree of competition still existing in the market or the growth of that competition (see Case 85/76 *Hoffmann-La Roche* v *Commission* [1979] ECR 461, paragraph 91).

139. It follows from the nature of the obligations imposed by Article 86 of the Treaty that, in specific circumstances, undertakings in a dominant position may be deprived of the right to adopt a course of conduct or take measures which are not in themselves abuses and which would even be unobjectionable if adopted or taken by non-dominant undertakings (see, to that effect, Case 322/81 *Michelin* v *Commission* [1983] ECR 3461, paragraph 57). Thus, the conclusion of a contract or the acquisition of a right may amount to abuse for the purposes of Article 86 of the Treaty if that contract is concluded or that right is acquired by an undertaking in a dominant position (see, to that effect, Case T-51/89 *Tetra Pak* v *Commission* [1990] ECR II-309, paragraph 23).

140. A claim for performance of a contractual obligation may also constitute an abuse for the purposes of Article 86 of the Treaty if, in particular, that claim exceeds what the parties could reasonably expect under the contract or if the circumstances applicable at the time of the conclusion of the contract have changed in the meantime.

141.

The Court finds that the applicant has not submitted any evidence to show that those conditions are satisfied in the present case.

142. First, as to the question whether Belgacom's claim exceeded what the parties could expect under the contract, it follows from the applicant's submissions in the context of its sixth plea that it is relying, in essence, on three separate arguments. First, it alleges that Belgacom's demand that it transfer to Belgacom the trade mark (Gouden Gids/Pages d'Or) falls outside the scope of Article XVI of the agreement of 9 May 1984, which makes no reference whatsoever to trade marks. Second, it complains that Belgacom claimed trade marks owned by ITT World Directories Netherlands, which was not even a party to that agreement. Finally, it submits that Belgacom admitted in its observations on the complaint that it was placing a new construction on Article XVI of the agreement.

143. The Court points out, first, that Article XVI(2)(b) of the agreement of 9 May 1984 provides that to enable the Régie to ensure continuity of the publication the applicant is to transfer to it free of charge the licences resulting from patents or similar forms of legal protection granted in relation to works performed or carried out in connection with this agreement. It cannot therefore be ruled out that the wording of that passage, read in the light of the remainder of the agreement, also covers trade marks. It is also clear from the documents before the Court that Belgacom solely claimed the transfer of trade marks registered in the Benelux countries by the applicant or its predecessor in title. Lastly, it is apparent that the applicant merely asserts that Belgacom admitted placing a new construction on Article XVI of the agreement of 9 May 1984, but does not provide any proof of that assertion. The admission which Belgacom is alleged to have made in its observations on the complaint is merely an explanation specifying the reasons for which, in Belgacom's view, the opening of the market for the publishing of directories does not affect the need for Belgacom to ensure continuity of publication of its directories.

144. Nor does the applicant show in what respect the fact that the exclusive right to publish directories which Belgacom enjoyed when the agreement of 9 May 1984 was concluded, which included the right to authorise third parties to publish, has been enjoyed since 10 January 1994 by Belgacom and undertakings authorised by the BIPT causes the claim for performance of Article XVI of that agreement to be an act which amounts to an abuse under Article 86 of the Treaty.

145. In that context, the Court points out, moreover, that the applicant, shielded from any competition, was able to acquire unique experience, develop its business and enhance the value of its trade marks for 25 years by virtue of Belgacom's exclusive rights.

146. Consequently, the applicant's arguments that the conclusions drawn by the Commission in points 33 and 34 of the contested decision are contrary to Article 86 of the Treaty cannot be upheld.

147. The Court points out that, according to the documents in the case, on 25 July 1996 the applicant lodged a complaint against Belgacom alleging that it had infringed Article 85(1) and Article 86 of the Treaty by concluding and seeking to enforce the agreement of 9 May 1984. At the hearing the Commission's representative supplied the Court with a copy of the Commission's decision of 29 April 1997 rejecting that complaint on the ground that it lacked Community interest. No action has been brought to challenge that decision before the Court of First Instance.

148.

Furthermore, the applicant's argument that the Commission justified the anticompetitive effects of the claim for performance of Article XVI of the agreement of 9 May 1984 by the fact that it had been concluded when Belgacom enjoyed a statutory monopoly is based on a misreading of the second sentence of point 35 of the contested decision. In point 35 of the contested decision the Commission merely replies to the applicant's argument that the purpose of Belgacom's claim was to exclude the applicant from the market for telephone directories. It notes there that the applicant has not adduced any fact or legal argument to show in what respect that claim was not for the purpose of defending Belgacom's rights under the agreement of 9 May 1984, and explains in the second sentence that the alleged effects on competition which Belgacom's claim would have, if it were to succeed, is a consequence of the conclusion of that agreement at a time when the publication of directories was an activity which was the subject-matter of exclusive rights reserved to Belgacom. Consequently, what is in point is not a justification but a mere finding that, in fact, it is not Belgacom's claim which causes the effects in question, but the conclusion of the agreement.

149. Consequently, this plea must also be rejected.

150. It follows from the whole of the foregoing that the application must be dismissed in its entirety.

Costs

151. Under Article 87(2) of the Rules of Procedure the unsuccessful party is to be ordered to pay the costs if an application has been made to that effect. Since the applicant has been unsuccessful and the Commission and Belgacom, which intervened in support of the form of order sought by the Commission, have applied for costs, the applicant must be ordered to pay their costs.

On those grounds,

THE COURT OF FIRST INSTANCE (Fourth Chamber, Extended Composition)

hereby:

1. Dismisses the application;

2. Orders the applicant to bear its own costs and to pay those incurred by the Commission and Belgacom.

Lindh García-Valdecasas

Lenaerts

Cooke

Jaeger

Delivered in open court in Luxembourg on 17 July 1998.

H. Jung

P. Lindh

Registrar

President

1: Language of the case: English. </HTML