

JUDGMENT OF THE COURT

19 May 1993

In Case C-320/91,

REFERENCE to the Court under [Article 267 TFEU] by the Tribunal Correctionnel de Liege (Belgium) for a preliminary ruling in the criminal proceedings before that court against

Paul Corbeau,

Civil party claiming damages: **Regie des Postes** (The Post Office),

on the interpretation of [Articles 102 and 106 TFEU],

THE COURT,

composed of: O. Due, President, C. N. Kakouris, G. C. Rodriguez Iglesias, M. Zuleeg and J. L. Murray (Presidents of Chambers), G. F. Mancini, R. Joliet, F. A. Schockweiler, J. C. Moitinho de Almeida, F. Grevisse, M. Diez de Velasco, P. J. G. Kapteyn and D. A. O. Edward, Judges,

Advocate General: G. Tesauro,

Registrar: L. Hewlett, Administrator,

after considering the written observations submitted on behalf of:

- Paul Corbeau, by Luc Misson, of the Liege Bar,
- the Regie des Postes, by Edouard Marissens, of the Brussels Bar,
- the Government of the Kingdom of Spain, by Alberto Navarro Gonzalez, Director-General of [Union] legal and institutional

coordination, and Miguel Bravo-Ferrer Delgado, Abogado del Estado in the Legal Department for [Union] litigation, acting as Agents,

- the United Kingdom, by S. Cochrane, of the Treasury Solicitor's Department, acting as Agent,
- Ireland, by Louis J. Dockery, Chief State Solicitor, acting as Agent,
- the Commission of the European [Union], by Giuliano Marenco, Legal Adviser, Berend Jan Drijber and Francisco Enrique Gonzalez Diaz, of the Legal Service, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations of Paul Corbeau, the Regie des Postes, the United Kingdom, represented by V. Rose, Barrister, the Spanish Government, the Greek Government, represented by V. Kontolaimos and P. Athanassoulis, Legal Advisers, acting as Agents, the Italian Government, represented by I.M. Braguglia, Avvocato dello Stato, acting as Agents, Ireland, represented by J. Cooke SC, and B. Lenihan, Barrister-at-Law, acting as Agents, and the Commission at the hearing on 2 December 1992,

after hearing the Opinion of the Advocate General at the sitting on 9 February 1993,

gives the following

Judgment

- 1 By judgment of 13 November 1991, received at the Court on 11 December 1991, the Tribunal Correctionnel de Liege (Criminal

Court, Liege) referred to the Court for a preliminary ruling under [Article 267 TFEU] four questions on the interpretation of [Articles 102 and 106 TFEU] in order to enable it to determine the compatibility with those articles of the Belgian rules on the postal monopoly.

- 2 The questions were raised in criminal proceedings before that court against Paul Corbeau, a businessman from Liege, charged with infringing the Belgian legislation on the postal monopoly.
- 3 In Belgium the Law of 26 December 1956 on the postal service (*Moniteur Beige* of 30-31 December 1956, p. 8619) and the Law of 6 July 1971 establishing the Regie des Postes (*Moniteur Beige* of 14 August 1971, p. 9510) confer on the Regie des Postes, a legal person under public law, an exclusive right to collect, carry and distribute throughout the Kingdom all correspondence of whatever nature, and lay down penalties for any infringement of that exclusive right.
- 4 It may be seen from the documents in the main proceedings which have been sent to the Court, from the written observations submitted and from the oral argument presented at the hearing, that Mr Corbeau provides, within the City of Liege and the surrounding areas, a service consisting in collecting mail from the address of the sender and distributing it by noon on the following day, provided that the addressee is located within the district concerned. As regards correspondence destined for addressees outside that district, Mr Corbeau collects it from the sender's address and sends it by post.
- 5 Upon complaint from the Regie des Postes, the Tribunal Correctionnel de Liege decided, in view of its doubts with regard to the compatibility of the Belgian rules

in question with [Union] law, to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

- (a) To what extent is a postal monopoly, such as that organized under the Belgian Law of 26 December 1956 on the postal monopoly, in conformity, as [Union] law now stands, with the rules of the Treaty [on the Functioning of the European Union] of Rome (and in particular with [Articles 106, 101 and 102 TFEU]) and with the rules of derived law in force which are applicable in this area?
- (b) To what extent, if at all, must such a monopoly be modified in order to comply with the [Union] obligations imposed on the Member States in this area, and in particular with [Article 106(1) TFEU], and with the rules of derived law applicable in this area?
- (c) Is an undertaking in which a statutory monopoly is vested and which enjoys exclusive rights analogous to those described in the Belgian Law of 26 December 1956, subject to the rules of European competition law (and in particular to [Articles 18 and 101 to 106 TFEU] inclusive) by virtue of [Article 106(2) TFEU]?
- (d) Does such an undertaking hold a dominant position in a substantial part of the common market within the meaning of [Article 102 TFEU], a position deriving either from a statutory monopoly or from the particular circumstances?

6 Reference is made to the Report for the Hearing for a fuller account of the facts, the procedure in the main proceedings and the written observations submitted to the Court, which are hereinafter mentioned or discussed only in so far as is necessary for the reasoning of the Court.

- 7 With regard to the facts in the main proceedings, the questions referred to the Court must be understood as meaning that the national court is substantially concerned with the question whether [Article 106 TFEU] must be interpreted as meaning that it is contrary to that article for the legislation of a Member State which confers on a body such as the Regie des Postes the exclusive right to collect, carry and distribute mail to prohibit an economic operator established in that State from offering, under threat of criminal penalties, certain specific services on that market.
- 8 To reply to that question, as thus reformulated, it should first be pointed out that a body such as the Regie des Postes, which has been granted exclusive rights as regards the collection, carriage and distribution of mail, must be regarded as an undertaking to which the Member State concerned has granted exclusive rights within the meaning of [Article 106(1) TFEU].
- 9 Next it should be recalled that the Court has consistently held that an undertaking having a statutory monopoly over a substantial part of the common market may be regarded as having a dominant position within the meaning of [Article 102 TFEU] (see the judgments in Case C-179/90 *Merci Convenzionali Porto di Genova* [1991] ECR I-5889 at paragraph 14 and in Case C-18/88 *RTT v GB-Inno-BM* [1991] ECR I-5941 at paragraph 17).
- 10 However, [Article 102 TFEU] applies only to anti-competitive conduct engaged in by undertakings on their own initiative, not to measures adopted by States (see the *RTT v GB-Inno-BM* judgment, cited above, paragraph 20).
- 11 The Court has had occasion to state in this respect that although

the mere fact that a Member State has created a dominant position by the grant of exclusive rights is not as such incompatible with [Article 102 TFEU], the Treaty none the less requires the Member States not to adopt or maintain in force any measure which might deprive those provisions of their effectiveness (see the judgment in Case C-260/89 *ERT* [1991] ECR I-2925, paragraph 35).

12 Thus [Article 106(1) TFEU] provides that in the case of public undertakings to which Member States grant special or exclusive rights, they are neither to enact nor to maintain in force any measure contrary to the rules contained in the Treaty with regard to competition.

13 That provision must be read in conjunction with [Article 106(2) TFEU] which provides that undertakings entrusted with the operation of services of general economic interest are to be subject to the rules on competition in so far as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them.

14 That latter provision thus permits the Member States to confer on undertakings to which they entrust the operation of services of general economic interest, exclusive rights which may hinder the application of the rules of the Treaty on competition in so far as restrictions on competition, or even the exclusion of all competition, by other economic operators are necessary to ensure the performance of the particular tasks assigned to the undertakings possessed of the exclusive rights.

15 As regards the services at issue in the main proceedings, it cannot be disputed that the *Regie des Postes* is entrusted with a service of general economic interest consisting in the obligation to collect, carry and distribute mail on behalf of all users throughout the territory of the Member State concerned, at uniform tariffs and on

similar quality conditions, irrespective of the specific situations or the degree of economic profitability of each individual operation.

16 The question which falls to be considered is therefore the extent to which a restriction on competition or even the exclusion of all competition from other economic operators is necessary in order to allow the holder of the exclusive right to perform its task of general interest and in particular to have the benefit of economically acceptable conditions.

17 The starting point of such an examination must be the premise that the obligation on the part of the undertaking entrusted with that task to perform its services in conditions of economic equilibrium presupposes that it will be possible to offset less profitable sectors against the profitable sectors and hence justifies a restriction of competition from individual undertakings where the economically profitable sectors are concerned.

18 Indeed, to authorize individual undertakings to compete with the holder of the exclusive rights in the sectors of their choice corresponding to those rights would make it possible for them to concentrate on the economically profitable operations and to offer more advantageous tariffs than those adopted by the holders of the exclusive rights since, unlike the latter, they are not bound for economic reasons to offset losses in the unprofitable sectors against profits in the more profitable sectors.

19 However, the exclusion of competition is not justified as regards specific services dissociable from the service of general interest which meet special needs of economic operators and which call for certain additional services not offered by the traditional postal service, such as collection from the senders' address, greater speed or reliability of distribution or the possibility of changing the destination in the course of transit, in so far as such specific

services, by their nature and the conditions in which they are offered, such as the geographical area in which they are provided, do not compromise the economic equilibrium of the service of general economic interest performed by the holder of the exclusive right.

20 It is for the national court to consider whether the services at issue in the dispute before it meet those criteria.

21 The answer to the questions referred to the Court by the Tribunal Correctionnel de Liege should therefore be that it is contrary to [Article 106 TFEU] for legislation of a Member State which confers on a body such as the Regie des Postes the exclusive right to collect, carry and distribute mail, to prohibit, under threat of criminal penalties, an economic operator established in that State from offering certain specific services dissociable from the service of general interest which meet the special needs of economic operators and call for certain additional services not offered by the traditional postal service, in so far as those services do not compromise the economic equilibrium of the service of general economic interest performed by the holder of the exclusive right. It is for the national court to consider whether the services in question in the main proceedings meet those criteria.

Costs

22 The costs incurred by the Spanish, United Kingdom and Irish Governments and by the Commission of the European [Union], which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the proceedings pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT,

in answer to the questions referred to it by the Tribunal Correctionnel de Liege by judgment of 13 November 1991, hereby rules:

It is contrary to [Article 106 TFEU] for legislation of a Member State which confers on a body such as the Regie des Postes the exclusive right to collect, carry and distribute mail, to prohibit, under threat of criminal penalties, an economic operator established in that State from offering certain specific services dissociable from the service operated of general interest which meet the special needs of economic operators and call for certain additional services not offered by the traditional postal service, in so far as those services do not compromise the economic stability of the service of general economic interest performed by the holder of the exclusive right. It is for the national court to consider whether the services in question in the main proceedings meet those criteria.

Due	Kakouris	Rodriguez Iglesias	Zuleeg
	Murray Mancini	Joliet	
	Schockweiler	Moitinho de Almeida	
Grevisse	Diez de Velasco	Kapteyn	Edward

Delivered in open court in Luxembourg on 19 May 1993.

J.-G. Giraud
Registrar

O. Due
President