

JUDGMENT OF THE COURT
26 March 1996 *

In Case C-392/93,

REFERENCE to the Court under Article 177 of the EEC Treaty by the High Court of Justice, Queen's Bench Division, Divisional Court, for a preliminary ruling in the proceedings pending before that court between

The Queen

and

H. M. Treasury

ex parte: **British Telecommunications plc**

on the interpretation of Article 8(1) of Council Directive 90/531/EEC of 17 September 1990 on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors (OJ 1990 L 297, p. 1),

* Language of the case: English.

THE COURT,

composed of: G. C. Rodríguez Iglesias, President, C. N. Kakouris, D. A. O. Edward and J.-P. Puissochet (Presidents of Chambers), G. F. Mancini, F. A. Schockweiler, J. C. Moitinho de Almeida (Rapporteur), C. Gulmann and J. L. Murray, Judges,

Advocate General: G. Tesauro,
Registrar: L. Hewlett, Administrator,

after considering the written observations submitted on behalf of:

- British Telecommunications plc, by G. Barling QC, T. Sharpe and H. Davies, Barristers, instructed by C. Green, Solicitor and Chief Legal Adviser,
- the United Kingdom, by J. Collins, Assistant Treasury Solicitor, acting as Agent, and M. J. Beloff QC,
- the French Government, by H. Duchène, Secretary for Foreign Affairs in the Ministry of Foreign Affairs, and C. de Salins, Foreign Affairs Adviser in that Ministry, acting as Agents,
- the Commission of the European Communities, by H. van Lier, Legal Adviser, and D. McIntyre, a national civil servant on secondment to the Commission's Legal Service, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations of British Telecommunications plc, represented by G. Barling QC, T. Sharpe and H. Davies, the United Kingdom, represented by J. Collins, K. P. E. Lasok QC and S. Richards, Barrister, the German Government,

represented by E. Röder, Ministerialrat in the Federal Ministry of Economic Affairs, acting as Agent, the Italian Government, represented by I. Braguglia, Avvocato dello Stato, and the Commission, represented by H. van Lier and D. McIntyre, at the hearing on 26 October 1994,

after hearing the Opinion of the Advocate General at the sitting on 28 November 1995,

gives the following

Judgment

- 1 By order of 28 July 1993, received at the Court on 23 August 1993, the High Court of Justice, Queen's Bench Division, Divisional Court ('the Divisional Court'), referred to the Court for a preliminary ruling under Article 177 of the EEC Treaty four questions on the interpretation of Article 8(1) of Council Directive 90/531/EEC of 17 September 1990 on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors (OJ 1990 L 297, p. 1, 'the directive').
- 2 Those questions arose in proceedings brought by British Telecommunications plc ('BT') against the Government of the United Kingdom for annulment of Schedule 2 to the Utilities Supply and Works Contracts Regulations 1992 ('the 1992 Regulations'), implementing Article 8(1) of the directive.
- 3 Article 2(2)(d) of the directive provides that relevant activities for the purposes of the directive are to include, in particular, 'the provision or operation of public telecommunications networks or the provision of one or more public telecommunications services'.

- 4 According to Article 2(1)(b), the directive is to apply to contracting entities which, 'when they are not public authorities or public undertakings, have as one of their activities any of those referred to in paragraph 2 or any combination thereof and operate on the basis of special or exclusive rights granted by a competent authority of a Member State'. Article 2(3)(a) further provides that, for the purpose of applying Article 2(1)(b), a contracting entity is to be considered to enjoy special or exclusive rights in particular where, 'for the purpose of constructing the networks or facilities referred to in paragraph 2, it may take advantage of a procedure for the expropriation or use of property or may place network equipment on, under or over the public highway'.
- 5 According to Article 2(6), 'the contracting entities listed in Annexes I to X shall fulfil the criteria set out above'. Annex X, which specifically concerns the 'Operation of telecommunications networks or provision of telecommunications services', refers in particular, as regards the United Kingdom, to BT, Mercury Communications Ltd ('Mercury') and the City of Kingston upon Hull ('Hull').
- 6 Article 8 of the directive provides as follows:

'1. This directive shall not apply to contracts which contracting entities ... award for purchases intended exclusively to enable them to provide one or more telecommunications services where other entities are free to offer the same services in the same geographical area and under substantially the same conditions.

2. The contracting entities shall notify the Commission at its request of any services they regard as covered by the exclusion referred to in paragraph 1. The Commission may periodically publish the list of services which it considers to be covered by this exclusion, for information, in the *Official Journal of the European Communities*. In so doing, the Commission shall respect any sensitive commercial aspects the contracting entities may point out when forwarding this information.'

7 Lastly, Article 33(1) provides:

‘1. Contracting entities shall keep appropriate information on each contract which shall be sufficient to permit them at a later date to justify decisions taken in connection with:

...

(d) non-application of Titles II, III and IV in accordance with the derogations provided for in Title I.’

8 In the United Kingdom, Article 8(1) of the directive has been transposed into national law by Regulation 7(1) of the 1992 Regulations, which provides as follows:

‘These Regulations shall not apply to the seeking of offers in relation to a contract by a utility specified in Schedule 2 for the exclusive purpose of enabling it to provide one or more of the public telecommunications services specified in the Part of Schedule 2 in which the utility is specified.’

9 Part B of Schedule 2 is set out thus:

‘British Telecommunications plc.

Kingston Communications (Hull) plc.

2. All public telecommunications services, other than the following services when they are provided within the geographical area for which the provider is licensed as a public telecommunications operator: basic voice telephony services, basic data transmission services, the provision of private leased circuits and maritime services’.

10 Regulation 7(2) further provides:

‘A utility specified in Schedule 2 when requested shall send a report to the Minister for onward transmission to the Commission describing the public telecommunications services provided by it which it considers are services specified in the Part of Schedule 2 in which the utility is specified.’

11 BT is a joint stock limited liability company set up on 1 April 1984 under the British Telecommunications Act 1984 (‘the 1984 Act’), which transferred to it the property, together with all rights and obligations, of the former public corporation also known as British Telecommunications, itself the successor, pursuant to the British Telecommunications Act 1981, to the Post Office, which had previously held an exclusive monopoly in the running of telecommunications systems throughout almost the entire national territory.

12 In the field of fixed-link telecommunications services (including fixed-terminal voice telephony), the Government granted the necessary licences under the 1984 Act to BT and Mercury. In order to ensure greater competition, the 1984 Act required interconnection of the two networks. BT and Mercury thereby acquired

the exclusive right to operate fixed-link telecommunications services until 1990 (the 'duopoly' period).

- 13 The duopoly policy was abandoned in that sector in the early 1990s. Numerous licences were issued by the Government. However, in 1992 BT still controlled 90% of telephone business, with Mercury controlling 7% and the new operators only 3%. Between 1984 and July 1993 the Government gradually sold off its remaining shareholding in BT.
- 14 The licence granted to BT for 25 years imposes an obligation to provide voice telephony services throughout the United Kingdom, subject to certain exceptions, to anyone who asks for them, even where demand is insufficient to cover the costs of providing them (the 'universal service obligation'). BT is the only licensee which is subject to regulation in respect of tariff changes (the 'price cap').
- 15 In transposing Article 8 of the directive into national law, the 1992 Regulations exclude almost all of the operators in the sector concerned, including Mercury, from the obligation to comply therewith as regards contracts for the supply of telecommunications services. Only BT (and Hull, in the area for which it holds a licence) remains subject to the provisions of the directive, albeit solely as regards basic voice-telephony services, basic data-transmission services, the provision of private leased circuits and maritime services.
- 16 In its action before the Divisional Court, BT seeks annulment of Schedule 2 to the 1992 Regulations on the ground that Regulation 7(1) and Schedule 2 implement Article 8 of the directive incorrectly. BT claims that the Government should have transposed the criteria laid down in Article 8(1) of the directive rather than proceeded to apply them. By determining, in respect of each contracting entity, which

of the services provided meet those criteria, the Government is alleged to have deprived BT of the power conferred on it by the directive to make its own decisions.

- 17 BT further claims damages for the loss it claims to have suffered as a result of incorrect implementation of the directive, namely the additional expense borne by it in complying with the 1992 Regulations. Furthermore, those regulations have allegedly prevented it from concluding profitable transactions and placed it at a commercial and competitive disadvantage, by subjecting it to the requirement, from which the other operators in the sector are exempt, to publish its procurement plans and contracts in the *Official Journal*.
- 18 The Divisional Court has decided to stay the proceedings brought by BT and to refer the following questions to the Court of Justice for a preliminary ruling:
 - '1. On the proper interpretation of Council Directive 90/531, does it fall within the discretion accorded to a Member State by Article 189 of the Treaty, when implementing Article 8(1) of the directive, itself to identify the telecommunication services provided by each contracting entity in respect of which the exclusion in that article does or does not apply?
 2. (a) Do the words "where other entities are free to offer the same services in the same geographical area and under substantially the same conditions" in Article 8(1) refer only to "freedom" and to "conditions" of a legal or regulatory nature?

(b) If the answer to Question 2(a) is in the negative:

- (i) what other matters do the words refer to; and
 - (ii) is a contracting entity's position in the market for a particular telecommunications service relevant to those matters; and
 - (iii) if its position is relevant, how is it relevant and, in particular, in what circumstances may it be conclusive?
- (c) Are the answers to questions (ii) and (iii) in subparagraph (b) above affected by the fact that the entity is subject to regulatory constraints and, if so, in what respects are they affected?

3. If the answer to Question 1 is in the affirmative:

- (a) in the event of a dispute between a contracting entity and the national authorities charged with the implementation of Article 8(1), how is the national court seised with the dispute to ensure that the criteria for the application of the exclusion in Article 8(1) are properly applied and, in particular, must it substitute its own assessment of the application of the exclusion in Article 8(1) for that made by the national authorities charged with the implementation of Article 8(1);
- (b) if the national court finds that the definitions of certain telecommunications services, adopted by the national authorities charged with the implementation of Article 8(1) in order to determine whether or not a particular service is or is not covered by the exclusion, are such that it is impossible for the contracting entity to ascertain whether a particular service is or is not so covered, has Directive 90/531 or any general principle of Community law, in particular the requirement of legal certainty, been infringed;

(c) in defining certain telecommunications services is a Member State entitled to adopt definitions based upon descriptions of the technical means by which a service is provided rather than a description of the service itself?

4. If a Member State has erred in its implementation of Article 8(1) of Council Directive 90/531, is that Member State liable as a matter of Community law to compensate a contracting entity in damages for loss which it has suffered as a result of that error and, if so, under what conditions does such liability arise?

Question 1

- 19 By its first question, the Divisional Court seeks in essence to ascertain whether a Member State may, when transposing the directive into national law, determine which telecommunications services are to be excluded from its scope pursuant to Article 8(1), or whether that determination is a matter for the contracting entities themselves.
- 20 The French, German and Italian Governments and the United Kingdom consider that the directive does not preclude the Member States from determining which of the telecommunications services provided by each contracting entity are covered by the exemption laid down in Article 8(1). In so doing, the Member States specify the content of that provision and permit the exercise of judicial review, which would not otherwise be possible.
- 21 In addition, the German Government and the United Kingdom consider that it may be particularly necessary to implement Article 8(1) in that way where, as in the present case, there is disagreement between a Member State and a contracting entity as to the scope of the exclusion. The German Government adds that the

Member States are in a much better position than the Commission to assess whether competition exists in the telecommunications market as regards a specific service and, consequently, that the determination by those States of the matters covered by Article 8(1) will permit the exercise of more effective control than that exercised by the Commission on the basis of information obtained pursuant to Article 8(2).

- 22 Lastly, the German Government observes that Articles 8(2) and 33(1)(d) do not support the conclusion that it is for the contracting entities alone to determine which services are to be regarded as excluded. The fact that those provisions require such entities to notify the Commission of services which are excluded, and to keep appropriate information on each contract to enable them at a later date to justify non-application of Titles II, III and IV of the directive, does not mean that the Member States cannot be regarded as empowered themselves to determine the scope of the exception laid down in Article 8(1).
- 23 Those arguments cannot be accepted.
- 24 Article 8(2) of the directive, like Articles 6(3) and 7(2), provides that contracting entities are to notify the Commission at its request of any services which they regard as excluded under the aforementioned articles. If it were for the Member States to determine the services in question, they would also be obliged to notify the Commission of the services so excluded from the scope of the directive, in order to enable the Commission to accomplish the task assigned to it by those provisions.
- 25 Since the directive does not impose any such obligation on the Member States, as it does in Article 3(4), it is for the contracting entities alone to determine the services excluded pursuant to Article 8(1).

- 26 That interpretation is confirmed by the objective of Council Directive 92/13/EEC of 25 February 1992 coordinating the laws, regulations and administrative provisions relating to the application of Community rules on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors (OJ 1992 L 76, p. 14), namely to provide adequate legal protection for suppliers or contractors in the event of infringement of Community legislation on public procurement (see, in that regard, the fifth recital in the preamble to Directive 92/13).
- 27 If the decision to exclude certain services from the scope of the directive were left to the Member States, economic operators would be denied recourse to the legal remedies afforded by Directive 92/13 in the event of infringement by contracting entities of the Community rules on public procurement, in particular the right to claim damages and to apply for injunctive relief, as provided for by Article 2(1), with a view to prevention or termination of any infringement.
- 28 Lastly, that interpretation makes it possible to ensure equality of treatment between contracting entities and their suppliers, who thereby remain subject to the same rules.
- 29 The answer to Question 1 must therefore be that it is not open to a Member State, when transposing the directive into national law, to determine which telecommunications services are to be excluded from its scope in implementation of Article 8(1), since that power is vested in the contracting entities themselves.

Question 2

- 30 By its second question, the Divisional Court asks whether the criterion laid down by Article 8(1), namely that 'other entities are free to offer the same services in the

same geographical area and under substantially the same conditions', is to be verified only as a matter of law or also as a matter of fact. In the latter case, the national court wishes to know which matters are to be taken into account for the purposes of assessing whether, as regards a particular service, real competition exists in the telecommunications market.

- 31 BT maintains that the criterion laid down in Article 8(1) is fulfilled where there are legal or regulatory provisions guaranteeing, in law, freedom of competition in the sector concerned, so obviating any need to examine whether such competition exists in practice.
- 32 That interpretation runs counter to the wording and purpose of Article 8(1). The criterion that other contracting entities must be able to offer the same services under substantially the same conditions is couched in general terms in Article 8(1). Moreover, the 13th recital in the preamble states that, to fall outside the scope of the directive, activities of contracting entities must be 'directly exposed to competitive forces in markets to which entry is unrestricted'.
- 33 Consequently, the criterion laid down by Article 8(1) is to be interpreted as meaning that other contracting entities must not only be authorized to operate in the market for the services in question, without any legal barrier to entry thereto, but must also be in a position actually to provide the services in question under the same conditions as the contracting entity.
- 34 In those circumstances, a decision to exclude certain services from the scope of the directive must be taken on an individual basis, having regard in particular to all their characteristics, the existence of alternative services, price factors, the dominance or otherwise of the contracting entity's position on the market and the existence of any legal constraints.

- 35 The answer to Question 2 must therefore be that the criterion laid down by Article 8(1) of the directive, namely that ‘other entities are free to offer the same services in the same geographical area and under substantially the same conditions’, is to be verified as a matter of law and of fact, having regard in particular to all the characteristics of the services concerned, the existence of alternative services, price factors, the dominance or otherwise of the contracting entity’s position on the market and any legal constraints.

Question 3

- 36 In the light of the answer to Question 1, there is no need to reply to Question 3.

Question 4

- 37 By its fourth question, the Divisional Court seeks to ascertain whether a Member State which, in transposing the directive into national law, has itself determined which services of a contracting entity are to be excluded from its scope pursuant to Article 8, is required by Community law to compensate that undertaking for any loss suffered by it as a result of the error committed by the State.

- 38 It should be recalled, as a preliminary point, that the principle of State liability for loss and damage caused to individuals as a result of breaches of Community law for which the State can be held responsible is inherent in the system of the Treaty (judgments in Joined Cases C-6/90 and C-9/90 *Francovich and Others* [1991] ECR I-5357, paragraph 35, and in Joined Cases C-46/93 and C-48/93 *Brasserie du Pêcheur and Factortame* [1996] ECR I-1029, paragraph 31). It follows that that principle holds good for any case in which a Member State breaches Community law (judgment in *Brasserie du Pêcheur and Factortame*, cited above, paragraph 32).

- 39 In the latter judgment the Court also ruled, with regard to a breach of Community law for which a Member State, acting in a field in which it has a wide discretion in taking legislative decisions, can be held responsible, that Community law confers a right to reparation where three conditions are met: the rule of law infringed must be intended to confer rights on individuals; the breach must be sufficiently serious; and there must be a direct causal link between the breach of the obligation resting on the State and the damage sustained by the injured parties (paragraphs 50 and 51).
- 40 Those same conditions must be applicable to the situation, taken as its hypothesis by the national court, in which a Member State incorrectly transposes a Community directive into national law. A restrictive approach to State liability is justified in such a situation, for the reasons already given by the Court to justify the strict approach to non-contractual liability of Community institutions or Member States when exercising legislative functions in areas covered by Community law where the institution or State has a wide discretion — in particular, the concern to ensure that the exercise of legislative functions is not hindered by the prospect of actions for damages whenever the general interest requires the institutions or Member States to adopt measures which may adversely affect individual interests (see, in particular, the judgments in Joined Cases 83/76, 94/76, 4/77, 15/77 and 40/77 *HNL and Others v Council and Commission* [1978] ECR 1209, paragraphs 5 and 6, and in *Brasserie du Pêcheur and Factortame*, paragraph 45).
- 41 Whilst it is in principle for the national courts to verify whether or not the conditions governing State liability for a breach of Community law are fulfilled, in the present case the Court has all the necessary information to assess whether the facts amount to a sufficiently serious breach of Community law.
- 42 According to the case-law of the Court, a breach is sufficiently serious where, in the exercise of its legislative powers, an institution or a Member State has

manifestly and gravely disregarded the limits on the exercise of its powers (judgments in *HNL and Others v Council and Commission*, cited above, paragraph 6, and in *Brasserie du Pêcheur and Factortame*, paragraph 55). Factors which the competent court may take into consideration include the clarity and precision of the rule breached (judgment in *Brasserie du Pêcheur and Factortame*, paragraph 56).

- 43 In the present case, Article 8(1) is imprecisely worded and was reasonably capable of bearing, as well as the construction applied to it by the Court in this judgment, the interpretation given to it by the United Kingdom in good faith and on the basis of arguments which are not entirely devoid of substance (see paragraphs 20 to 22 above). That interpretation, which was also shared by other Member States, was not manifestly contrary to the wording of the directive or to the objective pursued by it.
- 44 Moreover, no guidance was available to the United Kingdom from case-law of the Court as to the interpretation of the provision at issue, nor did the Commission raise the matter when the 1992 Regulations were adopted.
- 45 In those circumstances, the fact that a Member State, when transposing the directive into national law, thought it necessary itself to determine which services were to be excluded from its scope in implementation of Article 8, albeit in breach of that provision, cannot be regarded as a sufficiently serious breach of Community law of the kind intended by the Court in its judgment in *Brasserie du Pêcheur and Factortame*.
- 46 The answer to Question 4 must therefore be that Community law does not require a Member State which, in transposing the directive into national law, has itself determined which services of a contracting entity are to be excluded from its scope in implementation of Article 8, to compensate that entity for any loss suffered by it as a result of the error committed by the State.

Costs

- 47 The costs incurred by the French, German and Italian Governments and the Commission of the European Communities, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT,

in answer to the questions referred to it by the High Court of Justice, Queen's Bench Division, Divisional Court, by order of 28 July 1993, hereby rules:

1. It is not open to a Member State, when transposing into national law Council Directive 90/531/EEC of 17 September 1990 on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors, to determine which telecommunications services are to be excluded from its scope in implementation of Article 8(1), since that power is vested in the contracting entities themselves.
2. The criterion laid down by Article 8(1) of Directive 90/531, namely that 'other entities are free to offer the same services in the same geographical area and under substantially the same conditions', is to be verified as a matter of law and of fact, having regard in particular to all the characteristics of the services concerned, the existence of alternative services, price factors, the dominance or otherwise of the contracting entity's position on the market and any legal constraints.

3. Community law does not require a Member State which, in transposing Directive 90/531 into national law, has itself determined which services of a contracting entity are to be excluded from its scope in implementation of Article 8, to compensate that entity for any loss suffered by it as a result of the error committed by the State.

Rodríguez Iglesias

Kakouris

Edward

Puissochet

Mancini

Schockweiler

Moitinho de Almeida

Gulmann

Murray

Delivered in open court in Luxembourg on 26 March 1996.

R. Grass

G. C. Rodríguez Iglesias

Registrar

President