OPINION OF ADVOCATE GENERAL TESAURO

delivered on 28 November 1995 *

1. The questions referred to the Court by the Queen's Bench Division concern 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 [1] ('the directive').

In particular, the national court seeks to ascertain the proper interpretation of the provision in question and, in the event that the national legislature transposed the directive incorrectly, whether the conditions are fulfilled for the undertaking which suffered injury to claim compensation from the State in respect of the damage and loss sustained. [2]

Community and national legislation

2. According to the 13th recital in the preamble to the directive, the latter does not apply 'to activities of those entities which either fall outside the sectors of water, energy and transport services or outside the telecommunications sector, or which fall within those sectors but nevertheless are directly exposed to competitive forces in markets to which entry is unrestricted'.

The provision whose interpretation is sought, that is, Article 8(1), constitutes in fact a derogation from the provisions of the directive, exempting from its scope contracts relating to purchases intended to enable telecommunications services to be supplied, provided there is competition in the sector in question. In particular, Article 8 provides:

'1. This directive shall not apply to contracts which contracting entities exercising an activity described in Article 2(2)(d) 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.

* Original language: Italian.

1 — OJ 1990 L 297, p. 1.

2 — In the latter respect, the present case is linked therefore to Joined Cases C-46/93 and C-48/93 *Brasserie du Pêcheur and Factortame III*, as well as to Joined Cases C-178/94, C-179/94, C-188/94, C-189/94 and C-190/94, in which I am also delivering my Opinion today.

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.'

3. Article 2(2)(d) includes, among the activities which fall within the scope of the directive, the 'provision or operation of public telecommunications networks or the provision of one or more public telecommunications services'. According to Article 2(1)(b), the directive applies also 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) then specifies that, for the purpose of applying paragraph 1(b), a contracting entity enjoys 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'. According to Article 2(6), 'the contracting entities listed in Annexes I to X shall fulfil the criteria set out above'. Annex X, on the 'Operation of telecommunications networks or provision of telecommunications services' as regards the United Kingdom, mentions, among others, British Telecommunications plc ('the applicant'), Mercury Communications Ltd ('Mercury') and City of Kingston upon Hull ('Hull plc').

Lastly, I would observe that, according to Article 33(1)(d), contracting entities are to keep on each contract appropriate information to permit them at a later date to justify decisions taken in connection with, *inter alia*, non-application of Titles II, III and IV (provisions on the criteria and procedures to be observed when awarding contracts), in accordance with the derogations provided for in Title I, which includes, so far as is relevant here, the derogation in Article 8(1).

4. The United Kingdom implemented the directive by means of the Utilities Supply and Works Contracts Regulations 1992. In particular, the provisions of the directive restricting its application, as stated in the 13th recital in the preamble thereto, to cases involving the award of contracts intended exclusively to enable the provider to exercise one of the activities listed in the directive, are implemented by Regulations 5 and 6(a) of the national legislation concerned.

Regulation 7(1), which is intended to give effect to Article 8(1) of the directive, concerns, on the other hand, the exclusions specifically regarding the telecommunications sector and is thus the provision disputed by the applicant. It provides: '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'.

Schedule 2 is in two parts. Part A concerns all public telecommunications operators other than the applicant and Hull plc. As regards those operators, the services excluded from the scope of the Regulations are specifically 'all public telecommunications services'. Part B, on the other hand, concerns exclusively the applicant and Hull plc, in respect of which the services referred to are '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'.

Regulation 7(2) provides, moreover, that all the utilities specified in Schedule 2 when requested are to 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. That provision thus implements Article 8(2) of the directive.

Finally, I would observe that, pursuant to Article 33 of the directive, Regulation 25(1) provides that when a utility decides not to apply the provisions on exclusions contained in, *inter alia*, Regulation 7, it is required to keep appropriate information sufficient to justify that decision as regards contracts awarded according to procedures other than those provided for by the procurement regime.

Facts of the case and questions submitted for a preliminary ruling

5. The applicant is a company limited by shares set up on 1 April 1984 by the British Telecommunications Act 1984. Under that Act, the property, together with all the rights and obligations of the predecessor public corporation, also known as British Telecommunications, were transferred to the applicant. Under the British Telecommunications Act 1981, British Telecommunications had in turn succeeded the Post Office which had, until then, held the exclusive monopoly on the management of the telecommunications systems.

The British Telecommunications Act 1984 provides that any person intending to run a telecommunications system within the United Kingdom following the abolition of the monopoly is required to obtain a licence which must specify exhaustively the activities which he is authorized to exercise. Pursuant to that provision, the Secretary of State for Trade and Industry granted to the applicant in June 1984 a licence for 25 years. That licence, whereby the applicant is designated as a 'public telecommunications operator', authorizes it to run public telecommunications systems throughout the United Kingdom, but with limitations in relation to the geographical area in which Hull plc is licensed to operate. In particular, the applicant is required to provide voice telephony services to anyone who requires them, irrespective of the fact that demand may be insufficient to cover the costs of providing them. Moreover, the applicant, uniquely among licensees, is subject to regulation in respect of changes in the prices charged for its services ('price cap'). Finally, it should be noted that the State had gradually sold off by July 1993 its shareholding in the applicant.

6. The considerable opening up of the market made possible by the British Telecommunications Act 1984 has led to the granting of more than 600 licences authorizing various activities in the sector and to the designation of some 110 public telecommunications operators. The content of the licences, however, varied considerably. In the field of fixed-link telecommunications services (which includes voice telephony between terminals which are not mobile), the United Kingdom granted the appropriate licences only to the applicant and Mercury which, in particular, had been authorized to interconnect with the telecommunications systems of the applicant. This gave rise to a duopoly specifically in the fixed-link sector.

The duopoly in that sector was abandoned in the early 1990s, giving way to a policy of open competition. Accordingly, all licence applications made by private undertakings which satisfy objective and transparent criteria are considered against a general presumption in favour of allowing them unless there are 'specific reasons' to refuse them. In order to ensure the proper functioning of such a complex system in which numerous licensed operators are active, the 1984 Act imposed an obligation on public telecommunications operators to agree to interconnect their network with other operators' systems on request. This allows the customers of an operator to have access to the networks run by other operators and thus, ultimately, to communicate with users who benefit from the services provided by those operators.

7. The national legislation implementing the directive, as stated above, exempts from the obligation to comply with the directive itself,

so far as concerns contracts intended exclusively to enable the provision of telecommunications services, almost all the operators in the sector, including Mercury, which is also mentioned in Annex X to the directive. On the other hand, only the applicant and Hull plc remain subject to the provisions of the directive, although only so far as concerns basic voice telephony services, basic data transmission services, the provision of private leased circuits and maritime services.

It is those implementing provisions which the applicant has challenged in proceedings before the national court. The applicant maintains that the United Kingdom should not itself have determined which services and operators were excluded from the scope of the directive, since, according to Article 8(1) thereof, that is a matter for the contracting entities themselves. In its form of order, the applicant also seeks compensation for the losses it claims to have suffered by reason of the incorrect transposition of the provision in question.

8. In order to resolve the dispute before it, the national court therefore considered it appropriate to refer to the Court for a preliminary ruling the following questions:

'1. On the proper interpretation of Council Directive 90/531/EEC, does it fall within the discretion accorded to a Member State by Article 189 of the EEC Treaty, when implementing Article 8(1) of the directive, itself to identify the telecommunications 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/EEC 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/EEC, 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

9. The first question seeks to ascertain whether, when transposing a directive into national law, the Member States are authorized, bearing in mind the discretion which they enjoy under Article 189 of the Treaty, to define and identify the telecommunications services which under Article 8(1) of the directive may be excluded therefrom, subject to certain conditions, or whether such a decision is a matter for the contracting entities themselves.

To that end, it is appropriate first of all to refer to the actual wording of the provision in question, to the context in which it is set and to the rationale underlying it.

10. There is nothing in the literal wording of Article 8(1) of the directive that would appear to support the argument that the Member States themselves have the right to determine which services and operators are excluded from the scope of the directive. The provision in question merely excludes from the scope of the directive the contracts which the contracting entities award for purchases intended exclusively to enable them to provide one or more telecommunications services, provided that other entities are free to offer the same services under the same conditions.

The absence of any reference to the Member States would thus seem to suggest that it is a matter for the contracting entities themselves, as the only ones mentioned in the provision, to decide which contracts are excluded. Such a conclusion is supported, at least at first sight, by the fact that other provisions of the directive, also included in Title I thereof and thus relating to authorized derogations, in fact make express provision for the role entrusted to the Member States in defining the contracts which are covered by the derogations concerned. [3]

11. Furthermore, according to Article 8(2), the contracting entities are entrusted with the task of notifying the Commission, at its request, of any services which 'they regard as covered by the exclusion referred to in paragraph 1'. The Commission then publishes in the C Series of the *Official Journal of the European Communities*, if only for information, the list of services 'which it considers to be covered by this exclusion'.

If, as claimed by the United Kingdom, it were for the Member States to decide which services are, by virtue of Article 8(1), to be regarded as excluded from the scope of the directive, it would not be easy to understand why Article 8(2) should require the contracting entities, and not the States, to notify the services considered to be excluded. If that

3 — See, in particular, Articles 3 and 10.

provision is not to be seen as utterly meaningless, Article 8(2) must be acknowledged to have a purpose to the extent that it is the contracting entities themselves which are to decide which services provided by them are of such a kind as to be covered by the exclusion provided for in Article 8(1).

12. That point of view is further confirmed by Article 33 of the directive, according to which, I would recall, the contracting entities are to keep on each contract 'appropriate information ... 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'.

It is quite clear from the abovementioned provision that the intention of the Community legislature was to address the contracting entities themselves, through national legislation, assigning to them the responsibility for the exclusions decided on the basis of Article 8(1) of the directive, as well as imposing on them the burden of justifying those exclusions.

13. That said, I would point out that it is settled case-law that the freedom which the third paragraph of Article 189 leaves to Member States to choose the ways and means of ensuring that the directive is implemented 'does not affect the obligation imposed on all the Member States to which the directive is addressed, to adopt, in their national legal systems, all the measures necessary to ensure that the directive is fully effective, in accordance with the objective which it pursues'. [4] This means that the Member States are required to adopt all the measures necessary to ensure that the provisions of the directive are fully effective and thus to guarantee the outcome which it prescribes. Furthermore, as the Court has itself held, the provisions of a directive must be implemented 'with unquestionable binding force ... precision and clarity ... in order to satisfy the requirement of legal certainty'. [5]

Clearly those statements mean, first, that the discretion accorded to the Member States when transposing a directive into national law may not in any event be used in such a way as to jeopardize the objective pursued by that directive; secondly, that what matters is precisely the result pursued, so that the transposition of a directive must be held to be correct where, although its provisions are not slavishly reproduced in the national implementing legislation, [6] it none the less enables the objective pursued by the directive to be attained.

4 — Judgment in Case 14/83 *Von Colson* [1984] ECR 1891, paragraph 15.

5 — Judgment in Case C-59/89 *Commission* v *Germany* [1991] ECR I-2607, paragraph 24.

6 — See, for example, the judgment in Case 363/85 *Commission* v *Italy* [1987] ECR 1733.

14. The implications for the present case are that, although the literal wording of the provision in question, as well as the context in which it is set, lead to the conclusion that it is for the contracting entities themselves to identify which services provided by them are to be regarded as excluded from the scope of the directive, it still remains to be verified whether the implementing measures adopted by the United Kingdom are in any event such as to bring about the result sought by the directive, in particular by Article 8(1) thereof.

I consider that the answer to that question cannot but be in the negative. The preliminary definition of 'excluded' services, in the terms set out above, is in my view such as to conflict with the rationale underlying the provision in question, essentially because such an a priori determination, by reflecting the situation which exists in a Member State at a given moment, takes no account of any potential development in the sector in question or of the fact that the excluded services may vary in relation to a single operator. At the same time, such an approach prevents the Commission from exercising the supervision with which the directive itself has entrusted it in the matter.

15. Although the contracting entities communicate to the Commission, at its request, the contracts which they consider to be excluded and the Commission itself publishes them for information, it is equally true that the list so published includes only those services which the Commission itself 'considers [to be] covered by this exclusion'. This means that it is for that institution to verify whether the services notified by the contracting entities in fact meet the criteria laid down in Article 8(1) in order to be covered by the exclusion.

However, it is only too clear that the transposition of the directive effected by the United Kingdom prevents the Commission from carrying out such verification, since the lists notified to it by the contracting entities through the competent national authorities [7] will perforce coincide with those under Schedule 2 of the national legislation in question. The supervisory role accorded to the Commission by Article 8(2) of the directive is therefore disregarded in the case of operators and services in the United Kingdom.

16. However, in defending the way in which it transposed the directive into domestic law, the United Kingdom maintained that it would not have been appropriate to leave to the contracting entities themselves the power to identify the contracts covered by the exclusion inasmuch as this would, in all probability, have led to conflicting assessments in similar cases and would inevitably have jeopardized the requirement of legal certainty.

7 — See Regulation 7(2) of the national implementing legislation.

In this connection, I would merely observe that the operation of the system envisaged by the directive, as interpreted herein, is sufficiently guaranteed by the supervisory role which the directive itself entrusts to the Commission, also and above all as regards the possible abuses to which the United Kingdom refers. Moreover, in so far as the exclusion is decided upon by the contracting entities themselves rather than by the Member States, it will be possible for any challenge to be asserted in accordance with the national legislation adopted to implement Directive 92/13/EEC [8] on the remedies available. That directive, according to Article 1 thereof, applies exclusively to 'decisions taken by contracting entities'.

17. Finally, I can but observe that the interpretation thus far provided of Article 8(1) of the directive shows that it is a provision which confers on individuals, in this case on the contracting entities, rights upon which they may rely directly in proceedings before the national courts; in other words, it is a provision with direct effect. From that point of view, it must be acknowledged that a preliminary and detailed definition of the services excluded, as applied by the national legislature, is necessarily contrary to the outcome pursued by the directive itself.

8 — 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).

In conclusion, I am of the view that Article 189 of the Treaty requires the Member States to implement Article 8(1) of the directive in such a way that the contracting entities themselves are authorized to apply the criteria laid down in that provision and therefore to establish which telecommunications services provided by them are to be excluded from the scope of the directive itself.

Question 2

18. Question 2(a), referred by the national court, asks whether 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) should be interpreted as meaning that the freedom which other contracting entities enjoy and the conditions in question are of a legal or regulatory nature.

Essentially, the question is whether, in order to come within the exclusion in Article 8(1) of the directive, the freedom 'to offer the same services in the same geographical area' and the existence of 'substantially the same conditions' are to be established only *de jure*, as the applicant contends, or also *de facto*.

19. It need hardly be stated that, in the former case, it would suffice for statutory or regulatory provisions to guarantee the possibility of freedom of competition in the sector concerned. In other words, provisions which prevent freedom of competition, whether by conferring special or exclusive rights or by rendering access to the market itself either impossible or difficult in any other way, would have to be removed wherever they exist.

That is the applicant's argument, in support of which it claims that the directive is addressed not only to the public authorities and the public undertakings operating in the sectors covered by the directive, but also to those bodies which in any event enjoy, in respect of their activities, special or exclusive rights granted by the competent authorities of the Member States. The rationale behind that extension of the directive is in fact based, according to the applicant, on the assumption that the conferral of such rights entails the closure of the market to competition, creating a 'reserved' market. It follows — in the applicant's view — that where domestic legislation has been brought into force to remove such special or exclusive rights, as was the case in the United Kingdom as a result of the British Telecommunications Act 1984, there is no longer any reason to apply the directive by virtue of the exclusion under Article 8(1) thereof. The relevant market is not 'reserved', within the meaning of Article 2(3) of the directive, but is a liberalized market, that is, open to competition from a variety of operators.

20. I cannot endorse that view. First, it is by no means apparent from its actual wording that the provision in question is restricted to the obstacles resulting from statutory or regulatory provisions. The freedom of the other contracting entities to be able to offer the same services under substantially the same conditions is set out in general terms. Nor could it be otherwise, taking into account the rationale behind the provision in question and the system considered as a whole. Moreover, the 13th recital in the preamble to the directive, referred to earlier, expressly states that exclusion from the scope of the directive is subject to the condition that the activities of the entities in question should be '*directly exposed to competitive forces in markets to which entry is unrestricted*'. [9]

In short, it is certainly not sufficient for access to the market not to be excluded by law; there should also be genuine competition. The criteria mentioned in Article 8(1) of the directive must therefore be interpreted as meaning that they must be satisfied not only *de jure* but also *de facto*. The first condition may be considered to have been met where entities other than the contracting entity concerned are authorized to operate on the market in the services in question, access to which is not restricted by law. The second, on the other hand, may be regarded as having been satisfied where the entities in question are not only formally authorized but also *actually* able to provide the services

9 — Emphasis added.

concerned under the same conditions as the contracting entity.

21. In the result, the words at issue are to be interpreted as referring to a number of technical and economic as well as legal factors. The 'freedom' to offer services must be actual and not potential, that is, possible only in theory. In the latter case, there would still be only one person, the contracting entity, actually operating in the relevant market.

It is therefore for the contracting entity, if it considers that it should be exempted from the application of the directive, to establish, on the basis of Articles 8 and 33 of the directive, that other persons are in a position to pursue the same activities under 'substantially the same conditions'.

22. By Questions 2(b) and (c), the national court seeks to ascertain what factors are to be taken into account when assessing whether the telecommunications market is in fact competitive in respect of a particular service.

In particular, the national court asks whether, in the event of its being necessary to assess the state of the market also on the basis of factual considerations, any significance attaches to that end to the dominant position which the contracting entity might have on the market for a particular telecommunications service, what form that dominant position should take in order to be conclusive for these purposes and, finally, whether the fact that the contracting entity is subject to special regulatory constraints is of any relevance.

23. First of all, the applicant denies that it occupies a dominant position on the market, [10] and submits particulars intended to confirm that there is genuine competition in many areas of the sector concerned. Secondly, it rejects the view that the mere fact of occupying a dominant position is relevant for the purposes of the directive on public procurement, whilst denying that the existence of a dominant position can be proven simply by means of an analysis of market shares.

In the applicant's opinion, other factors should instead be taken into consideration when assessing its position on the market, in particular the statutory constraints by which,

10 — The United Kingdom takes the opposite view. According to the observations submitted by the French Government, which have not been contested, it appears, moreover, that the fixed-link market was shared out as follows: 90% to the applicant, 7% to Mercury and 3% to the other operators.

unlike the majority of the other licensees, it is bound. [11]

24. I believe that, in these proceedings, the Court has neither the jurisdiction nor the means to assess whether, in the present case, all the elements of fact and law are present for the derogation laid down in Article 8(1) of the directive to be fully applied. That is a task for the national court and, in most cases, corresponds exactly to the examination with which the provision in question entrusts the contracting entities and, ultimately, the Commission in its supervisory role.

Suffice it to observe here, therefore, that the decision as to whether or not certain services may be covered by the exclusion, in compliance with the conditions (of fact and law) laid down in Article 8(1) of the directive, can only be made on a case-by-case basis, having regard in particular to all the characteristics of the services concerned, the existence of alternative services, the price factor, the market position of competitors, the existence of legislative constraints of the kind described above, and any other condition which may be regarded as relevant in practice.

Question 3

25. The third question, itself subdivided into three parts, essentially seeks a ruling from the Court as to the role of the national court where the latter is called upon to verify that the national authorities have properly applied the criteria referred to in Article 8(1) of the directive, in particular in the event of a dispute between a contracting entity and the national authorities concerning the correct application of the criteria for exclusion laid down in the provision in question, and in the event of the national court itself reaching the conclusion that those criteria are such as to preclude the contracting entity from ascertaining whether or not a particular service is covered by the exclusion.

It is clear that the national court submitted this question in the event of the Court answering Question 1 in the affirmative, that is, in the event of its upholding the view that the Member States may themselves designate which services are to be regarded as excluded from the scope of the directive under Article 8(1) thereof. Having regard to the conclusion

11 — As clearly stated in the order for reference, the applicant is under an obligation to guarantee interconnection to its own networks on request. Furthermore, the applicant has a universal service obligation, that is, to provide telephony services throughout the United Kingdom even if demand is not sufficient to cover the costs. Finally, uniquely among all licensees, it is required to respect the 'price cap' rule, according to which the applicant may not change its prices except in the cases and within the limits prescribed by law.

which I have arrived at in that respect, there is no need to answer this question.

Question 4

26. The fourth question again raises before the Court the problem of the liability of and the obligation incumbent on the State to compensate individuals for loss or damage caused by a breach of Community law, a problem which is central to *Brasserie du Pêcheur and Factortame III* [12] and *Dillenkofer and Others*, [13] in which I will be delivering my Opinion today. In the former case, I would observe, the infringement with which the Member State is charged is applying national legislation contrary to the provisions of the Treaty; the latter case, on the other hand, like *Francovich*, [14] concerns failure to transpose a directive within the period laid down for that purpose.

The present case raises the same problem once again but in relation to the situation where a directive has been transposed into national law incorrectly, albeit in due time. [15] The applicant seeks reparation for the loss and damage which it claims to have suffered as a result of the incorrect transposition of Article 8(1) of the directive. Such loss and damage is equated by the applicant with the additional costs incurred in complying with the (incorrect) national legislation implementing the directive, which, moreover, allegedly prevented it from concluding profitable transactions, and with the disadvantages suffered in commercial and competitive terms because of the requirement, which is not applicable to the other operators in the sector, to publish in the Official Journal its procurement plans and contracts. [16]

27. Even in these circumstances, as in those noted in the preceding section, the starting point cannot be other than the *Francovich* judgment, in which the Court, it is worth bearing in mind, laid down that the State was under an obligation to make reparation for failure to transpose a directive, specifying the

12 — Joined Cases C-46/93 and C-48/93.

13 — Joined Cases C-178/94, C-179/94, C-188/94, C-189/94 and C-190/94.

14 — Joined Cases C-6/90 and C-9/90 *Francovich* [1991] ECR I-5357.

15 — In contrast with Case C-48/93 (*Factortame III*) in which the infringement of Community law is attributable to the legislature, in the present case the legislation implementing the directive is an act of the executive. However, even in those circumstances, the extremely stringent conditions laid down in English case-law in respect of State liability for legislative action make recognition of the right to reparation for individuals who have suffered loss and damage as a result of a breach of Community law extremely difficult. For a basic overview of the national case-law in the field of State liability for the legislative activities of the public authorities, in particular so far as concerns the various cases in which reparation is granted under the English legal system, see point 7 of my Opinion in the abovementioned case.

16 — The applicant also applied to the national court for interim relief in the form of an order suspending the application of the disputed national provisions, which was refused.

conditions which must be satisfied, in such a case, in order for a right to reparation to arise in favour of individuals.

In the present case, therefore, it is necessary to establish whether: (a) the principle of State liability extends to the timeous but incorrect transposition of a directive; (b) the conditions laid down by the Court in *Francovich* are sufficient to impose on the State an obligation to make reparation even in circumstances such as those of this case, or whether there must be something more; and (c) the conditions have been satisfied in this case.

28. Since I have fully discussed some of the abovementioned issues in my Opinion in Joined Cases C-46/93 (*Brasserie du Pêcheur*) and C-48/93 (*Factortame III*), I consider it appropriate to refer, for the details where necessary, to that Opinion. I will therefore restrict myself in the present case to a few summary observations of a general nature, dwelling more specifically upon only those aspects which are of particular relevance to the case under consideration.

29. First, I would observe that the obligation to make reparation for damage and loss cannot be restricted to the situation where a directive has not been implemented, but extends to the situation where, as in the present case, the damage sustained by an individual stems from the application of national legislation implementing a directive which proves to be incorrect and which therefore could well have been, as such, directly challenged before the national courts. In other words, the fact that an individual may in such a case secure protection of the right asserted before the national court is not *per se* such as to preclude any possibility of protection in respect of his financial interests. [17]

In that regard, I would point out, in particular, that in its ruling in *Francovich* [18] the Court, recalling the fundamental characteristics of the Community system, arrived at the conclusion that 'the principle whereby a State must be liable 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' (paragraph 35). This is clearly a general affirmation of principle which holds good for any situation in which Community law is infringed and not merely where there has been a failure to implement a directive. [19] As far as failure to implement a directive is concerned, the Court merely stated that the right to reparation is particularly indispensable, precisely because otherwise the individual would be deprived of any protection, contrary to the rights conferred on him by the directive. However, this affirmation does not preclude liability in damages for injury caused by breaches of other types, particularly since the Court itself went

17 — On those aspects, see points 23 to 34 of the Opinion in Case C-46/93 (*Brasserie du Pêcheur*) and C-48/93 (*Factortame III*).

18 — As regards specific references concerning the *Francovich* case, the basis and scope of the principle of the liability and the obligation to make reparation of the Member State in default, as they appear from that ruling, I would refer to my Opinion in Joined Cases C-46/93 (*Brasserie du Pêcheur*) and C-48/93 (*Factortame III*), in particular points 15 to 22.

19 — See, in particular, paragraphs 33, 35 and 37 of the judgment.

on to hold that the conditions under which liability gives rise to a right to reparation depend on the *nature of the breach of Community law* giving rise to the loss and damage (paragraph 38).

30. On the other hand, as emphasized in the Opinion in *Brasserie du Pêcheur and Factortame III*, annulment of an unlawful measure or setting aside a law which is inconsistent with a superior parameter of legality may at times not be enough. In order to render the protection real and effective, it may be necessary to bring back into balance also the financial content of the right which has been impaired and hence to ensure that the damage is made good.

The principle of the State's financial liability must be applied as a remedy which is both alternative and additional to substantive protection; consequently, it must be applied in the event of infringements both of provisions without direct effect, that is to say provisions which may not be directly relied upon before the national courts, and of provisions which may be so relied upon. [20] This is also true, of course, where, as in this case, a directive has been incorrectly implemented.

20 — To the same effect, moreover, the Court stated in its judgment in Case C-188/89 *Foster* [1990] ECR I-3313, paragraph 22, that Article 5(1) of Directive 76/207/EEC, a provision with direct effect, 'may be relied upon in a claim for damages against a body' entrusted with the task of providing a public service.

31. With regard to the conditions determining the financial liability of the State, it is worth noting first of all that, as pointed out in the aforementioned Opinion, in order for protection in damages to be assured in all the Member States in at least a homogeneous — if not exactly uniform — manner, it is vital that it should be Community law itself which lays down the minimum conditions determining the right to compensation, in particular the criteria by which those conditions are established, and the 'Community' limits imposed on the 'national' conditions relating to compensation, be they procedural or otherwise.

This, moreover, was the solution adopted by the Court in *Francovich*, albeit with some particular features connected with the case at issue. There is no ground for considering that that solution should apply only in the event of failure to implement a directive and not to the infringement of provisions with direct effect or to the incorrect transposition of a directive.

32. In *Francovich*, I would recall, the liability of the State was recognized by the Court, subject to finding that the following three conditions were met: 'First, the purpose of the directive must be to grant rights to individuals. Second, it must be possible to identify the content of those rights on the basis of the provisions of the directive. Finally, there must be a causal link between the breach of the State's obligation and the

damage suffered.' [21] The Court, moreover, made it clear that such conditions are 'sufficient to give rise to a right on the part of individuals to obtain reparation, a right founded directly on Community law'. [22] The Member State responsible for the failure to transpose a directive is therefore required in any event, provided the conditions laid down by the Court are satisfied, to make reparation for the damage and loss sustained by an individual.

Must that conclusion also apply to the circumstances of the present case, where the issue is not the failure to transpose a directive within the period laid down for that purpose, but that it has been incorrectly transposed? In other words, are the *conditions sufficient* to give rise to the obligation on the part of the Member State in default to pay compensation the same, or are they instead different, in the two situations in question?

33. In that regard, widely divergent replies have been given in the course of these proceedings. According to most of the intervening Governments, the conditions laid down by the Court in *Francovich* are not sufficient to establish liability on the part of the State. Instead, the conditions which ought to be satisfied should be the same as those applied in the field of non-contractual liability of the Community institutions: [23] alternatively, State liability should be firmly linked to the requirement of fault.

The Commission has taken a different view, according to which the conditions laid down by the Court in *Francovich* are sufficient, since Article 189 of the EEC Treaty draws no distinction between non-implementation and incorrect implementation of a directive. In other words, in the Commission's view, the crux of the matter in both cases is that the Member State has failed to comply with its obligation to achieve the result prescribed by the directive.

34. Let me say at once that I cannot endorse that position. Nor does it strike me as consistent with the view taken by that institution in Joined Cases C-46/93 and C-48/93. In those cases, I would recall, the Commission suggested that the same restrictive conditions as those laid down by the Court in its case-law concerning Article 215 should be applied as a minimum standard.

21 — However, the three conditions in question, which the Court identified in *Francovich* (paragraph 40), are set out here verbatim in the form in which they were stressed and summarized by the Court in Case C-91/92 *Faccini Dori* v *Recreb* [1994] ECR I-3325, paragraph 27. See, moreover, the judgment in Case C-334/92 *Wagner Miret* [1993] ECR I-6911, paragraphs 22 and 23. In the latter case, although the directive in question, the same one as in *Francovich*, had been transposed into national law, the problem concerned the failure, in the relevant national provisions, to take account of a specific category of workers, in respect of whom, therefore, the directive had not been implemented.

22 — Judgment in *Francovich*, cited above, paragraph 41.

23 — The judgments in question, or rather the criteria developed therein by the Court, are discussed, in so far as is relevant, in points 61 to 69 of the Opinion in Joined Cases C-46/93 *Brasserie du Pêcheur* and C-48/93 *Factortame III*.

While it is true that the directive imposes an obligation as to the result to be achieved, leaving to the State a margin of discretion only as to the method and the means of ensuring its implementation, it is equally true, in my view, that this is a characteristic shared by many Community provisions, whether forming part of the Treaty or otherwise. I do not believe, for instance, that it is possible to deny that Article 30 of the Treaty imposes on the Member States an obligation as to the result to be achieved; yet the position of the Commission in that respect is that, in order for there to be an obligation incumbent upon the State to pay compensation, there must not only be a breach, but it must also be a serious and manifest breach.

35. Accordingly, the problem cannot be resolved exclusively on the basis of the type of obligation laid down, in particular whether or not it is an obligation as to the result. Instead, in my view, it must be acknowledged that a decisive factor, for the purpose of setting a limit to the possibility of translating unlawfulness into liability, is not only the discretion which the States may enjoy in the sector concerned but also the greater or lesser degree of precision of the obligation imposed and ultimately the possibility of identifying with a sufficient degree of precision the content of the right asserted by an individual in a particular situation. Those factors, as I have made abundantly clear in my Opinion in *Brasserie du Pêcheur and Factortame III*, [24] are the characteristic features of a manifest and serious breach. On the other hand, for the purpose of establishing the liability of a Member State in default, no importance attaches to fault viewed as a subjective component of the unlawful conduct imputed to the State itself. [25]

Seen in those terms, the fact that there is no discernible clarification in the ruling in *Francovich* as regards the criteria by which to define the unlawfulness of the conduct of the party causing the damage does not in any way imply that every breach of Community law affecting the financial interests of an individual occupying a legal position claimed under the Community provision infringed entails *per se* and automatically a right to reparation. [26] Instead, put far more simply, in that case there was a manifest and serious breach.

36. More generally, as already stated in the Opinion in *Brasserie du Pêcheur and Factortame III*, [27] there can be considered to have been a manifest and serious breach where:

(a) obligations whose content is clear and precise in every respect have not been complied with;

24 — See, in particular, points 74 to 84.

25 — See, to the same effect, points 85 to 90 ibid.

26 — See, in particular, points 55 to 60 of the Opinion in Joined Cases C-46/93 *Brasserie du Pêcheur* and C-48/93 *Factortame III*, and point 28 of the Opinion in Joined Cases C-178/94, C-179/94, C-188/94, C-189/94 and C-190/94 *Dillenkofer and Others*.

27 — See, in particular, point 84 of that Opinion.

(b) the Court's case-law has provided sufficient clarification, either by an interpretation given in a preliminary ruling or by means of a judgment pursuant to Article 169, of doubtful legal situations which are identical or, in any event, similar to that at issue;

(c) the national authorities' interpretation of the relevant Community provisions in their legislative activity (or inactivity) is manifestly wrong.

37. As regards the situation at issue here, it seems to me that there can be no doubt, taking into account the interpretation of Article 8(1) of the directive, that the implementation thereof in the national legal system by the Member State concerned cannot be regarded as manifestly incorrect. The fact that the United Kingdom itself determined which services were excluded from the scope of the directive, by virtue of a provision (Article 8(1)) whose content is far from being clear and unequivocal, leads me therefore to the conclusion that in the present case there has been no manifest and serious breach.

In that respect *Francovich* was undoubtedly different. The Member State concerned had not transposed the directive in question into national law within the prescribed period, in regard to which it clearly had no discretion at all. It is precisely that aspect which rendered the infringement *per se* a serious and manifest breach. [28]

38. As to the fact, also highlighted in these proceedings, that such an approach would ultimately 'encourage' timeous though totally incorrect implementation, it is sufficient to observe that the solution proposed here is such as to prevent abuses, which are unlikely moreover, on the part of the Member States. The fact remains that manifestly incorrect transposition or, to put it another way, clear and unambiguous provisions transposed incorrectly, should be regarded as constituting a manifest and serious breach of such a kind, therefore, as to render the Member State concerned financially liable.

Subject to an appropriate assessment by the national court on the basis of the criteria set out herein, I conclude that infringement of Article 8(1) of the directive, in the terms set out above, does not constitute a manifest and serious breach and is therefore not of such a kind as to render the Member State concerned financially liable *vis-à-vis* the contracting entity for any damage and loss which it may have sustained as a result of the incorrect implementation of the provision in question.

28 — See, in that regard, point 81 of the Opinion in *Brasserie du Pêcheur and Factortame III*, and the Opinion in *Dillenkofer and Others*, which correspond, in so far as is relevant here, to the situation in *Francovich*.

Conclusion

39. In the light of the foregoing considerations, therefore, I propose that the questions referred to the Court by the national court should be answered as follows:

(1) Article 8(1) of Directive 90/531/EEC must be interpreted as meaning that the determination of the telecommunications services, provided by each contracting entity, in respect of which the exclusion envisaged in that article does or does not apply must be made by the contracting entities themselves.

(2) 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) of Directive 90/531/EEC are to be interpreted as meaning that the entities concerned must be not only formally authorized to operate on the market in the services concerned, access to which is not restricted by law, but must actually be able to provide those services under the same conditions as the contracting entity.

The decision as to whether or not certain services may be covered by the exclusion, in compliance with the conditions of fact and law laid down in Article 8(1) of Directive 90/531/EEC, must have regard to all the characteristics of the services concerned, the existence of alternative services, the price factor, the market position of competitors and the existence of any legislative constraints.

(3) The Member State concerned is not required to make reparation for any loss or damage which a contracting entity may have suffered as a result of the incorrect implementation of Article 8(1) of Directive 90/531/EEC, since in the present case the infringement may not be characterized as a manifest and serious breach.