JUDGMENT OF THE COURT
20 March 1985 *

In Case 41/83

Italian Republic, represented by Arnaldo Squillante, Head of the Department of Diplomatic Legal Affairs, acting as Agent, assisted by Giorgio Azzariti, Avvocato dello Stato, with an address for service in Luxembourg at the Italian Embassy,

applicant,

v

Commission of the European Communities, represented by its Legal Adviser, Giuliano Marenco, acting as Agent, with an address for service in Luxembourg at the office of Georgios Kremlis, a member of its Legal Department, Jean Monnet Building, Kirchberg,

defendant,

supported in its submissions by

the United Kingdom, represented by G. Dagtoglou, of the Treasury Solicitor's Department, Queen-Anne's Gate Chambers, London, with an address for service in Luxembourg at the office of J.D. Howes, acting as Agent for the Government of the United Kingdom, c/o British Embassy, 28 Boulevard Royal,

intervener,

APPLICATION for a declaration that Commission Decision No 82/861/EEC of 10 December 1982 (Official Journal, L 360, p. 36), relating to a proceeding against British Telecommunications under Article 86 of the EEC Treaty, is void,

* Language of the Case: Italian.

THE COURT

composed of: Lord Mackenzie Stuart, President, G. Bosco, O. Due and C. Kakouris (Presidents of Chambers), T. Koopmans, U. Everling, K. Bahlmann, Y. Galmot and R. Joliet, Judges,

Advocate General: M. Darmon
Registrar: H. A. Rühl, Principal Administrator

*

gives the following

JUDGMENT

(The account of the facts and issues which is contained in the complete text of the judgment is not reproduced)

Decision

1 By application lodged at the Court Registry on 15 March 1983, the Italian Republic brought an action under the first paragraph of Article 173 of the EEC Treaty for a declaration that Commission Decision No 82/861/EEC of 10 December 1982 (Official Journal, L 360, p. 36), relating to a proceeding against British Telecommunications under Article 86 of the EEC Treaty, was void.

2 On 1 October 1981 British Telecommunications, a statutory corporation established under the British Telecommunications Act 1981, took over the functions of the United Kingdom Post Office, set up under the Post Office Act 1969. Both of these nationalized undertakings are hereinafter referred to as 'BT'. As holder of the statutory monopoly on the running of telecommunications systems in the United Kingdom, BT has a duty to provide *inter alia* telex and telephone services. Pursuant to both the Post Office Act and the British Telecommunications Act, BT exercises rule-making powers in respect of telecommunications services in the United Kingdom for which it lays down charges and conditions by means of schemes; these are published in the London, Edinburgh and Belfast Gazettes.

* after hearing the Opinion of the Advocate General delivered at the sitting on 16 January 1985,

3 Furthermore, BT has the international status of a recognized private operating agency having a seat on one of the permanent bodies of the ITU (International Telecommunications Union), set up by the ITC (International Telecommunications Convention, United Nations Treaty Series, No 2616, p. 188), which was signed on 2 October 1947 at Atlantic City and last revised on 25 October 1973 at Malaga-Torremolinos. All the Member States of the EEC are parties to the ITC. As a private operating agency recognized as such by the United Kingdom, BT participates in the work of the CCITT (International Telegraph and Telephone Consultative Committee), together with the national administrations of all the signatories to the ITU which are entitled to a seat there.

4 The CCITT issues recommendations on operating and tariff questions regarding telegraphy and telephony, such recommendations being adopted by virtue of the provisions of the ITC itself and the Telegraph and Telephone Regulations (the Final Acts of the World Administrative Telegraph and Telephone Conference held by the ITU in Geneva in 1973). Those regulations supplement the provisions of the ITC pursuant to Article 82 thereof, and govern the use of telecommunications.

5 Under Article 6 (3) of the Telegraph Regulations of 11 April 1973,

'Administrations [or recognized private operating agency(ies)] shall undertake to stop, at their respective offices, the acceptance, transmission and delivery of telegrams addressed to telegraphic re-forwarding agencies and other organizations set up to forward telegrams on behalf of third parties so as to evade full payment of the charges due for the complete route. ...'

6 On the basis of and pursuant to that provision, the CCITT adopted in October 1976 Recommendation F 60, Section 3.5.2. of which provides as follows:

'Administrations and recognized private operating agencies shall refuse to make the telex service available to a telegraph forwarding agency which is known to be organized for the purpose of sending or receiving telegraphs for retransmission by telegraphy with a view to evading the full charges due for the complete route.'

7 In reliance on those provisions BT started a campaign against the development, on United Kingdom territory, of private message-forwarding agencies. Those agencies

offered the general public a new service whereby a large volume of messages could be received and forwarded on behalf of third parties at prices which were appreciably lower than those charged under the tariffs for the conventional use of telecommunication lines and systems.

8 Availing itself of the rule-making powers conferred on it by statute, BT adopted, in the first instance, Schemes T7/1975 and T1/1976. Those schemes, whilst leaving subscribers free to use their installations for forwarding or receiving messages on behalf of third parties, nevertheless provided, in Paragraphs 43 (2) (b) (iii) and 70 (2) (b) (iii), that whenever a subscriber relayed a telex message which both originated from, and was intended for delivery in, a foreign country he could not apply a scale of charges which would have the result of enabling the originator of the message to send it more cheaply than if he had forwarded it directly. It is common ground between the parties, however, that BT never actually enforced those provisions.

9 BT subsequently supplemented those schemes by adopting Scheme T1/1978, which came into operation on 21 January 1978. Paragraphs 44 (2) (a) and 70 (2) (b) thereof prohibited forwarding agencies from providing international services for their customers whereby:

(a) messages in data form were sent or received internationally by telephone and then converted into telecommunication messages for reception in telex, facsimile, written or other visual form; or

(b) telex messages were forwarded in transit between places outside the United Kingdom and the Isle of Man; or

(c) telex messages were sent or received via other message-forwarding agencies.

The above provisions of Scheme T1/1978 were incorporated in their entirety into a new 1981 scheme, which revoked and replaced all previous schemes.

10 By Decision No 82/861/EEC of 10 December 1982 the Commission held that the aforesaid schemes constituted infringements of Article 86 of the Treaty, and required BT to bring them to an end — in so far as it had not already done so — within two months of notification of the decision.

11 In its statement of the reasons on which the decision is based, the Commission claims that the restrictions imposed by BT and the sanctions which may be incurred by their infringement, namely the cutting-off or disconnection of the apparatus provided, (a) prevent message-forwarding agencies from offering certain services, to the detriment of their customers operating in other Member States, (b) subject the use of telephone and telex equipment to obligations unrelated to the provision of telephone or telex services, and (c) place the agencies at a competitive disadvantage *vis-à-vis* the national telecommunications authorities and agencies in other Member States not bound by such rules.

12 Notwithstanding the infringements recorded, the Commission considered that, in view of the special circumstances of the case, in particular the duty to observe international commitments and the fact that BT had not penalized infringements of the restrictions by disconnecting the facilities of the message-forwarding agencies, no fine should be imposed on it.

13 In support of its claim that the Commission decision should be declared void, the Italian Republic denies, in the first place, that the disputed schemes were in law open to appraisal in relation to Article 86 of the EEC Treaty. In that connection it argues, first, that the rule-making activities of a body governed by public law may not be regarded as the activities of an undertaking for the purposes of Article 86. Secondly, it argues that, since BT holds a statutory monopoly, it is exempted by Article 222 of the Treaty from the application of the Community rules on competition.

14 In the second place, the Italian Republic maintains that the schemes at issue may not in law be regarded as contrary to Article 86 inasmuch as, first, they are intended to counter unfair practices on the part of private forwarding agencies, secondly, the Community rules on competition cannot apply, except within certain limits, to BT as a public undertaking for the purposes of Article 90 (2) of the Treaty, and lastly, the ICT provisions mentioned above required BT to adopt the measures complained of.

15 The Italian Republic concludes by maintaining that the contested decision does not contain an adequate statement of reasons.

I — Submissions to the effect that BT's schemes are not open to appraisal for their compatibility with Article 86 of the Treaty

1. *The applicability of the Community rules on competition in the light of the activities covered by the decision at issue*

16 The Italian Republic argues that Article 86 of the Treaty applies solely to the activities of business concerns carried out under private law, and not to rule-making activities carried out pursuant to a statute by a public body functioning in conformity with conditions laid down by central government. Inasmuch as the contested decision is directed, not to BT's conduct in its capacity as a body responsible for the operation of certain equipment or as a supplier of telecommunications services to users, but rather to its rule-making activities under the Post Office Act 1969 and the British Telecommunications Act 1981, the applicant takes the view that the Commission has misapplied Article 86. The rule-making activities complained of can, at most, provide the basis for an action against the United Kingdom under Articles 90 or 169 of the Treaty.

17 The Commission, supported in its conclusions and arguments by the United Kingdom, contends that the provision of telecommunications services is a business activity. Although United Kingdom statute law empowered BT to have recourse to schemes, it did so solely for the purpose of establishing the charges and conditions subject to which such services are offered. The schemes at issue therefore perform the same function as contractual terms, and were freely adopted by BT pursuant to the powers vested in it and without any intervention on the part of the United Kingdom authorities. Even if the United Kingdom could be held responsible in these circumstances, that would have the effect, at most, of diminishing the undertaking's responsibility for the purposes of calculating the fine, but would not prevent the Community rules on competition from being applied to it.

18 It should be noted in the first place that the applicant does not dispute that, despite BT's status as a nationalized industry, its management of public telecommunications equipment and its placing of such equipment at the disposal of users on payment of a fee do indeed amount to a business activity which as such is subject to the obligations imposed by Article 86 of the Treaty.

19 In the second place it should be observed that, by virtue of Section 28 of the Post Office Act 1969 and then of Section 21 of the British Telecommunications Act 1981, the power conferred on BT to introduce schemes has been strictly limited to laying down provisions relating to the scale of charges and other terms and conditions under which it provides services for users. In the light of the wording of those provisions it must further be acknowledged that the United Kingdom legislature in no way predetermined the content of the schemes, which is freely determined by BT.

20 In those circumstances, the schemes referred to by the contested decision must be regarded as an integral part of BT's business activity. The submission to the effect that it was not in law open to the Commission to appraise them for their compatibility with Article 86 of the Treaty must therefore be rejected.

2. *The question whether the Community rules on competition are applicable in view of the monopoly held by BT*

21 The applicant argues that, by virtue of Article 222 of the Treaty, which provides that the Treaty 'shall in no way prejudice the rules in Member States governing the system of property ownership', Member States are free to determine, in their internal systems, the activities which are reserved to the public sector and to create national monopolies. Thus BT is entitled to preserve its monopoly by preventing the operation of private agencies wishing to provide services covered by that monopoly. By condemning the schemes adopted by BT in that regard as being incompatible with Article 86, the Commission therefore infringed Article 222 of the Treaty.

22 It is apparent from the documents before the Court that, whilst BT has a statutory monopoly, subject to certain exceptions with regard to the management of telecommunication networks and to making them available to users, it holds no monopoly over the provision of ancillary services such as the retransmission of messages on behalf of third parties. At all events, it must be observed that the schemes adopted by BT are not designed to suppress any private agencies which may be created in contravention of its monopoly but seek solely to alter the conditions in which such agencies operate. Accordingly, Article 222 of the Treaty did not prevent the Commission from appraising the schemes in question for their compatibility with Article 86 thereof.

23 The submission based on infringement of Article 222 of the Treaty must therefore be rejected.

II — Submissions to the effect that BT's schemes are not contrary to Article 86 of the Treaty

1. *The claim that BT's schemes were consistent with the need to prevent the improper use of telecommunications equipment by private forwarding agencies*

24 The Italian Republic has submitted, both in its pleadings and in its oral argument before the Court, that the private message-forwarding agencies established on United Kingdom territory abuse the public telecommunication network. It maintains that such abuse resides, in the first place, in the abnormal utilization of

point-to-point circuits, that is to say, public circuits hired out to individuals for their exclusive use, at a fixed tariff determined by the number of messages normally transmitted by that category of user. By transmitting messages on behalf of third parties via such circuits, the agencies evade the normal tariff terms. The agencies further abuse the public network, according to the Italian Government, by using special equipment which, with the aid of computer techniques, enable a large number of messages to be forwarded in a very short time. Those practices are especially harmful to the proper running of the international telecommunications system because they use the lines carrying the heaviest traffic. BT could therefore, without infringing Article 86 of the Treaty, adopt the measures needed to put an end to such unlawful activities.

25 The Commission and the United Kingdom deny that the forwarding agencies make use of point-to-point circuits. The fact that such agencies employ new techniques and introduce a modicum of competition into international telecommunications traffic cannot, in itself, constitute an abuse.

26 In that connection, it is sufficient to note that neither the documents before the Court nor the oral argument presented to it have provided any confirmation that the message-forwarding agencies established in the United Kingdom abuse the public telecommunication networks. In the first place it has not been shown that such agencies use point-to-point circuits for the purpose of retransmitting messages on behalf of third parties. In the second place the employment of new technology which accelerates the transmission of messages constitutes technical progress in conformity with the public interest and cannot be regarded *per se* as an abuse. The Italian Republic has not, moreover, claimed that the forwarding agencies are attempting to evade payment of the charges covering the periods during which they actually use the public network.

27 In those circumstances, the submission to the effect that the schemes at issue are justified by abuses on the part of the private forwarding agencies must be rejected.

2. *The claim that the measures adopted by BT are covered by the provisions of Article 90 (2) of the Treaty derogating from the rules on competition and applying for the benefit of undertakings entrusted with the operation of services of general economic interest*

28 According to the applicant, the Commission disregarded the terms of the Treaty in so far as it took the view that Article 90 (2) was inapplicable to the present case.

29 Before considering the merits of that submission it must be observed that the Commission states that it has doubts as to whether the applicant is entitled to rely on it. Article 90 (2) of the Treaty, whose purpose is to safeguard the tasks which a Member State sees fit to entrust to a specified body, presupposes, according to the Commission, a situation in which conflicting interests are delicately poised and which involves facts and appraisals which are peculiar to the Member State in question and extraneous to other Member States which bear no responsibility for them and therefore have no interest in defending a position in regard to them.

30 It should be borne in mind in this regard that, pursuant to the first paragraph of Article 173 of the Treaty, Member States may bring actions against any measure adopted by the Commission in the form of a regulation or an individual decision, and may, in support of their claims, plead *inter alia* the infringement of any stipulation in the Treaty. It must further be observed that the application of Article 90 (2) of the Treaty is not left to the discretion of the Member State, which has entrusted an undertaking with the operation of a service of general economic interest. Article 90 (3) assigns to the Commission the task of monitoring such matters, under the supervision of the Court. It follows that Article 90 (2) of the Treaty ranks among those provisions whose infringement may be pleaded by any Member State in support of an action to have a measure declared void.

31 The Italian Republic contends that, by declaring that the schemes which BT adopted are contrary to Community law, the Commission is placing in jeopardy the performance by BT of the tasks entrusted to it.

32 The first argument adduced by the applicant is that the activities of private message-forwarding agencies cause economic damage to the public telecommunications service in the United Kindom.

33 It should be observed that, whilst the speed of message-transmission made possible by technological advances undoubtedly leads to some decrease in revenue for BT, the presence in the United Kingdom of private forwarding agencies attracts to the British public network, as the applicant itself observes, a certain volume of international messages and the revenue which goes with it. The Italian Republic has totally failed to demonstrate that the results of the activities of those agencies in the United Kingdom were, taken as a whole, unfavourable to BT, or that the Commission's censure of the schemes at issue put the performance of the particular tasks entrusted to BT in jeopardy from the economic point of view.

34 The Italian Republic puts forward a second argument based on the need for a system of world-wide cooperation as instituted by the ITU, in order to ensure the

proper running of international telecommunications services, and on the legitimate expectation of other national administrations that the international rules for the time being in force which are designed to prevent the activities of private message-forwarding agencies will be complied with. By preventing BT from honouring to the full the obligations of such international cooperation, the contested decision again threatens to jeopardize the performance of the particular tasks entrusted to it as a nationalized industry.

35 In reality, the question raised by that argument is whether or not the ITC or the law derived from it required BT to adopt the measures at issue. It is precisely that question which is covered by the third submission made by the Italian Republic which is designed to show that BT was not, in the circumstances, obliged to comply with the Community rules on competition. It must therefore be considered below.

3. *The claim that the ITC and the law derived from it required BT to prevent — as it did — the activities of private forwarding agencies operating in the United Kingdom*

36 The Italian Republic maintains that the Commission disregarded the terms of Article 234 of the Treaty. Article 234 resolves any conflict between Community law and the pre-existing rules of international law, by giving the latter precedence over the former. The applicant claims that the provisions of the ITC and its administrative regulations have always forbidden national administrations to allow the re-routing of the international traffic in telegraph or telephone messages when such re-routing is caused by the attempt of private forwarding agencies to evade the full charges due for the complete route. By virtue of Article 6.3 of the Telegraph Regulations of 1973, on the one hand, and CCITT Recommendation F 60, on the other, BT was obliged to adopt the schemes to which the Commission objects.

37 The Commission and the United Kingdom state that the provisions at issue are designed solely to put an end to a practice whereby communications evade payment of the full charges due for the complete route, and not to prevent a message from passing via an intermediate country merely on the ground that it thereby incurs a lower charge. The schemes adopted by BT can therefore find no justification in those provisions.

38 The Commission further argues that Article 234 of the Treaty is not applicable because the ITC was revised at Malaga-Torremolinos on 25 October 1973, that is, on a date subsequent to the United Kingdom's accession to the Communities. The arguments put forward by the applicant on the similarity of the provisions in force prior to that date are, the Commission alleges, irrelevant, because members of the ITU recover their freedom of action and enter into a fresh commitment whenever a revision occurs. Even on the supposition that there are international rules predating the EEC Treaty which demand the course of action for which BT was

criticized, Article 234 does not, however, override the prohibition under Article 86 except in so far as compliance therewith would prevent a Member State from fulfilling its obligations towards non-member countries.

39 The United Kingdom states that it does not share the view of the Commission on the revision, subsequent to the accession of a Member State to the Communities, of an international treaty concluded before the EEC Treaty. It contends for its part that, as is clear from the judgment of the Court of 27 February 1962 (Case 10/61 *Commission* v *Italy* [1962] ECR 1), by virtue of Article 234 of the Treaty, Member States waive all rights accruing under an earlier treaty which are contrary to Community rules. Inasmuch as BT drew no distinction between the international and the Community obligations of the United Kingdom and consequently failed to confine the effects of its schemes to those activities of forwarding agencies which adversely affect comparable activities in non-member countries, those schemes do indeed infringe Article 86 of the Treaty.

40 Without there being any need to rule on the point whether the aforesaid provisions of Article 6.3 of the Telegraph Regulations of 1973 or of CCITT Recommendation F 60 were or were not binding on BT, it is sufficient to note that they differ in their purpose and content from the BT schemes to which the Commission objected.

41 It follows from the very wording of Article 6.3 of the Telegraph Regulations and of CCITT Recommendation F 60 that their sole purpose is to prevent the activities of message-forwarding agencies which are 'set up' or 'known to be organized' with a view to evading the full charges due for the complete route. The measures envisaged by those provisions can therefore affect only those agencies which, by the use of improper means, attempt to avoid payment of the full charges due in respect of certain messages.

42 Whenever a Member State, or a recognized private operating agency to which a Member State has entrusted the operation of telecommunications services, permits transmissions which are not improper in the sense described above and are therefore not prohibited by the aforesaid provisions, there can be no question of a breach by the State concerned of commitments undertaken at international level.

43 It follows from the foregoing that the schemes adopted by BT had a different purpose from the one pursued by the aforesaid provisions of the Telegraph Regulations and by the CCITT recommendation and were concerned with private message-forwarding agencies whose activities were in no way improper.

44 In those circumstances, the submission to the effect that the ICT and the law derived from it placed BT under an obligation to adopt the schemes at issue must in any event be rejected.

III — The submission that the statement of reasons given for the decision at issue is inadequate

45 The Italian Republic argues that the obligation under Article 190 of the Treaty to state the reasons on which decisions are based was infringed, as the Commission failed to give the reasons for which it had taken the view that:

(a) BT's statutory monopoly was contrary to Community law;

(b) the exercise of rule-making powers could be equated with a business activity;

(c) Community rules on competition took precedence over pre-existing international rules.

46 First, it should be borne in mind that, according to a consistent line of decisions of the Court, the statement of the reasons on which a decision having adverse effect is based must enable the Court to review the legality of the decision and to provide the party concerned with details sufficient to allow that party to ascertain whether or not the decision is well-founded. The requirement of a statement of reasons must be viewed in the context of the circumstances of the case, and in particular the content of the measure in question, the nature of the reasons relied on and the interest which addressees, or other persons to whom the measure is of direct and individual concern, within the meaning of the second paragraph of Article 173 of the Treaty, may have in obtaining explanations.

47 Secondly, it should be observed that the contested decision in no way disputes the compatibility of BT's statutory monopoly with Community law. No reasons had therefore to be given by the Commission on that point.

48 Lastly, with regard to the other two points disputed by the Italian Republic, the recitals in the preamble to the contested decision show that the Commission noted that BT, as a statutory corporation, was an economic entity carrying on activities of an economic nature and was, as such, an undertaking within the meaning of Article 86 of the Treaty. The Commission further noted that, whilst it accepted BT's argument that international cooperation and compliance with international

commitments were essential to the efficient provision of international communication services, such cooperation could not go so far as to authorize an infringement of the competition rules under the Treaty.

49 The statement of reasons satisfies the requirements of Article 190 of the Treaty, inasmuch as it enables the Court to exercise its power of review and makes it possible for the parties concerned effectively to convey their point of view on the correctness and the relevance of the facts and circumstances alleged.

50 In the circumstances, the submission that the statement of reasons is inadequate must be rejected.

51 It follows from all the foregoing considerations that the application of the Italian Republic must be dismissed.

Costs

52 Under Article 69 (2) of the Rules of Procedure the unsuccessful party is to be ordered to pay the costs. Since the Italian Republic has failed in its submissions, it must be ordered to pay the costs.

On those grounds,

THE COURT

hereby:

(1) Dismisses the application;

(2) Orders the Italian Republic to pay the costs.

Mackenzie Stuart Bosco Due Kakouris

Koopmans Everling Bahlmann Galmot Joliet

Delivered in open court in Luxembourg on 20 March 1985.

P. Heim
Registrar

A. J. Mackenzie Stuart
President