COMMISSION
OF THE EUROPEAN
COMMUNITIES

Brussels, 15 March 1991

Directorate-General
for internal market and industrial affairs

CCO/91/19 (Rev. 1)

Comité consultatif pour
l'ouverture des marchés publics

Advisory Committee on the
Opening-up of Public Procurement

Beratender Ausschuß für die Öffnung
des öffentlichen Auftragswesens

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JURISPRUDENCE

OF THE EUROPEAN COURT OF JUSTICE

ON THE APPLICATION

OF THE DIRECTIVES

ON PUBLIC PROCUREMENT

* * * * * * * * * *

EDITION: MARCH 1991

Rue de la Loi 200, B - 1049 Brussels.
Telephone: direct line 23 . . . . . standard 235 11 11 Telex: COMEU B 21877 Telegraphic address: COMEUR Brussels

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JURISPRUDENCE OF THE EUROPEAN COURT OF JUSTICE ON THE APPLICATION OF THE DIRECTIVES ON PUBLIC PROCUREMENT

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of 13 July 1961 in Joined Cases 2 and 3/60 *Niederrheinsche Bergwerke AG* v *High Authority* [1961] ECR 133; judgment of 23 April 1956 in Joined Cases 7 and 9/54 *Industries Sidérurgiques Luxembourgeoises* v *High Authority* [1956] ECR 175; judgment of 14 December 1962 in Joined Cases 46 and 47/59 *Meroni* v *High Authority* [1962] ECR 411; judgment of 2 July 1974 in Case 175/73 *Union Syndicale, Massa and Kortner* v *Council* [1974] ECR 917). I have no doubt that this is such a case, for which, if I am right, there are no precedents and which the Commission itself, in the oral procedure, described as "a case involving exceptional legal difficulties". I think therefore it appropriate to make an order that the parties should bear their own costs.

4. In conclusion, therefore, I propose that the Court should declare that the action has lost its purpose and that the parties should bear their own costs.

SA Transporoute et Travaux v Minister of Public Works (reference for a preliminary ruling from the Conseil d'État of the Grand Duchy of Luxembourg)

(Freedom to provide services — Directives on public works contracts)

Case 76/81

1. Freedom to provide services — Coordination of procedures for the award of public works contracts — Proof of tenderer's good standing and qualifications — Requirement of an establishment permit — Not permissible

(EEC Treaty, Art. 59; Council Directive 71/305, Arts. 23 to 26)

2. Freedom to provide services — Coordination of procedures for the award of public works contracts — Abnormally low tender — Obligations of the authority awarding the contract

(Council Directive 71/305, Art. 29 (5))

1. Council Directive 71/305 must be interpreted as precluding a Member State from requiring a tenderer in another Member State to furnish proof by any means, for example by an establishment permit, other than those prescribed in Articles 23 to 26 of that directive, that he satisfies the criteria laid down in those provisions and relating to his good standing and qualification.

The result of that interpretation of the directive is also in conformity with the scheme of the Treaty provisions concerning the provision of services. To make the provision of services in one Member State by a contractor established in another Member State conditional upon the possession of an establishment permit in the first State would be to deprive Article 59 of the Treaty of all effectiveness, the purpose of that article being precisely to abolish restrictions on the freedom to provide services by persons who

1 — Language of the Case: French

are not established in the State in which the service is to be provided.

2. When in the opinion of the authority awarding a public works contract a tenderer's offer is obviously abnormally low in relation to the transaction Article 29 (5) of Directive 71/305 requires the authority to seek from the tenderer, before coming to a decision as to the award of the contract, an explanation of his prices or to inform the tenderer which of his tenders appear to be abnormal, and to allow him a reasonable time within which to submit further details.

In Case 76/81

REFERENCE to the Court under Article 177 of the EEC Treaty by the Comité du Contentieux du Conseil d'État [Judicial Committee of the State Council] of the Grand Duchy of Luxembourg for a preliminary ruling in the action pending before that tribunal between

SA TRANSPOROUTE ET TRAVAUX, Brussels,

and

THE MINISTER OF PUBLIC WORKS, Grand Duchy of Luxembourg,

on the interpretation of Council Directive 71/304 of 26 July 1971 concerning the abolition of restrictions on freedom to provide services in respect of public works contracts and on the award of public works contracts to contractors acting through agencies or branches, and Council Directive 71/305, of the same date, concerning the coordination of procedures for the award of public works contracts (Official Journal, English Special Edition 1971 (II), p. 678 and p. 682),

THE COURT

composed of: G. Bosco, President of the First Chamber, acting as President, A. Touffait (President of the Third Chamber), P. Pescatore, Lord Mackenzie Stuart, A. O'Keeffe, T. Koopmans, U. Everling, A. Chloros and F. Grévisse, Judges,

Advocate General: G. Reischl
Registrar: A. Van Houtte

gives the following

JUDGMENT

Facts and Issues

The judgment making the reference and the observations submitted pursuant to Article 20 of the Protocol on the Statute of the Court of Justice of the EEC may be summarized as follows:

I — Facts and procedure

In response to a notice of invitation to tender issued on 2 March 1979 by the Administration des Ponts et Chaussées [Bridges and Highways Authority] of the Grand Duchy of Luxembourg concerning a section of the Arlon motorway SA Transporoute et Travaux (hereinafter referred to as "Transporoute"), a company incorporated under Belgian law, submitted the lowest tender.

The tender was rejected by the Minister of Public Works of the Grand Duchy of Luxembourg for the following reasons:

1. Transporoute was not in possession of the Government establishment permit provided for in Article 1 of the Réglement Grand-Ducal [Grand-Ducal Regulation] of 6 November 1974 on (1) the drawing up of a list of the general specifications applicable to public works and supply contracts for the State; (2) the determination of the powers and *modus operandi* of the adjudication panel for tenders (Mémorial [Gazette] A, 1974 p. 1660 *et seq.*)

2. Some of the prices in Transporoute's tender were considered to be abnormally low within the meaning of the fifth and sixth paragraphs of Article 32 of the Grand-Ducal Regulation of 6 November 1974.

As a result the Minister of Public Works of the Grand Duchy of Luxembourg awarded the contract to a consortium of Luxembourg contractors whose tender was considered as being economically the most advantageous.

Transporoute sought to have the decision annulled by the Comité du Contentieux du Conseil d'État [Judicial Committee of the State Council]. In support of its application it pleaded infringement of the provisions of Council Directive 71/305, in particular Articles 24 and 29 (5) thereof. Article 24 provides that:

"Any contractor wishing to take part in a public works contract may be requested to prove his enrolment in the professional or trade register under the conditions laid down by the laws of the Community country in which he is established: in Belgium, the *registre du commerce — Handelsregister;* in Germany, the *Handelsregister* and the *Handwerksrolle;* in France, the *registre du commerce* and the *répertoire des métiers;* in Italy, the *Registro della Camera di commercio, industria, agricoltura e artigianato* and the *Registro delle commissioni provinciali per l'artigianato;* in Luxembourg, the *registre aux firmes* and the *rôle de la Chambre des métiers;* in the Netherlands, the *Handelsregister.*"

Article 29 (5) provides:

"If, for a given contract, tenders are obviously abnormally low in relation to

the transaction, the authority awarding contracts shall examine the details of the tenders before deciding to whom it will award the contract. The result of this examination shall be taken into account.

For this purpose it shall request the tenderer to furnish the necessary explanations and, where appropriate, it shall indicate which parts it finds unacceptable.

If the documents relating to the contract provide for its award at the lowest price tendered, the authority awarding contracts must justify to the Advisory Committee set up by the Council Decision of 26 July 1971 the rejection of tenders which it considers to be too low."

In the course of those proceedings, by judgment of 11 March 1981, the Comité du Contentieux of the Conseil d'État of the Grand Duchy of Luxembourg referred the following questions to the Court of Justice for a preliminary ruling:

"1. Is it contrary to the provisions of Directives 71/304/EEC and 71/305/EEC of 26 July 1971, in particular those of Article 24 of Directive 71/305, for the authority awarding the contract to require as a condition for the award of a public works contract to a tenderer established in another Member State that in addition to being properly enrolled in the professional or trade register of the country in which he is established the tenderer must be in possession of an establishment permit issued by the Government of the Member State in which the contract is awarded?

2. Do the provisions of Article 29 (5) of Directive 71/305/EEC require the authority awardig the contract to request the tenderer whose tenders, in the authority's opinion, are obviously abnormally low in relation to the transaction, to furnish explanations for those prices before investigating their composition and deciding to whom it will award the contract, or do they in such circumstances allow the authority awarding the contract to decide whether it is necessary to request such explanations?"

The judgment making the reference was lodged at the Court Registry on 7 April 1981.

The plaintiff in the main action having been declared insolvent by the Tribunal de Commerce [Commercial Court] Brussels, on 30 April 1981, its liquidators were given leave to continue the main action by an interlocutory order of the Comité du Contentieux dated 21 October 1981.

Pursuant to Article 20 of the Protocol on the Statute of the Court of Justice of the EEC observations were submitted by the liquidators of SA Transporoute et Travaux, the company in liquidation, represented by Y. Hannequart of the Liège Bar; by the defendant in the main action, represented by J. Welter of the Luxembourg Bar; by the Commission of the European Communities, represented by R. Wägenbaur, Legal Adviser, acting as Agent; by the Government of the Italian Republic, represented by its Agent, A. Squillante, and by G. Ferri, State Advocate; and by the Belgian Government, represented by its Agent, W. Collins, Director of Administration.

On hearing the report of the Judge-Rapporteur and the views of the Advocate General the Court decided to open the oral procedure without any preparatory inquiry.

I — Written observations submitted pursuant to Article 20 of the Protocol on the Statute of the Court of Justice of the EEC

A — *Observations submitted by the plaintiff in the main action*

The plaintiff in the main action considers that the requirement of a "Government establishment permit" under the rules in force in the Grand Duchy imposes on undertakings from other Member States a condition over and above those laid down in Articles 23 to 26 of Directive 71/305. This constitutes an infringement of Article 28 (4) of that directive, according to which only the conditions provided for under Articles 23 to 26 may be imposed.

As those provisions are, according to the plaintiff, directly and immediately applicable the national court is bound, in view of the fact that they take precedence over national law, to give to them full effect by refraining, where necessary, from applying conflicting provisions of national law.

As regards Article 29 (5) of Directive 71/305, a literal interpretation of that provision leaves no room for doubt. Before rejecting tenders which are abnormally low the authority awarding the contracts must request the tenderer to furnish the necessary explanations. Failure to comply with that obligation means that the decision of the contracting authority contains a defect of substance for which that authority is liable. In any event the Belgian Conseil d'État [State Council] held that this was so in a judgment of 27 June 1980 (No 10.475, *SA SHV Belgium* v *La Maison Idéale et Société Nationale du Logement*).

B — *Observation of the defendant in the main action*

The defendant in the main action points out that the contested national provision does not distinguish between tenderers on the basis of their nationality. The "establishment permit", which is governed by the rules laid down in the Law of 2 June 1962 establishing the requirements for admission to and the exercise of certain professions and trades and those relating to the establishment and operation of undertakings (Consolidated text of 1 November 1975, Mémorial [Gazette] A 1975 p. 1521 *et seq.*), is intended to guarantee a sound basis for the activities for which it is required by making the grant of a permit subject to proof of the qualifications and good standing of those who obtain it. That requirement complies with Article 3 of Directive 71/304. More particularly, it does not constitute an obstacle for nationals from the other Member States. The permit is issued on a simple written request accompanied by documents showing proof of professional or trade qualifications (copies of degree certificates and course diplomas) and good standing in the profession or trade (extract from judicial records and attestations as to integrity). If the application is made on behalf of a company the documents must relate to those who run it. In addition an administrative charge of LFR 500 is payable.

The time required for obtaining such a permit is from two to three weeks and may be reduced in cases of urgency. It is possible, moreover, to submit an advance application, and in any case where public works contracts are concerned the

permit is required when the award is made, that is to say, several weeks after the opening of tenders, which itself takes place a number of weeks after publication of the notice of invitation to tender. The Luxembourg legislation on establishment permits should be considered, according to the defendant in the main action, as a "loi de police et de sûreté" [Law embodying a series of regulatory and safeguard measures in a particular field] and more particularly as a "loi de police économique" [Law embodysing economic regulatory measures]. The abolition of the requirement concerning establishment permits for undertakings established in other Member States would not only have the effect of substituting the judgment of the authorities in another country for that of the national authorities, but would, moreover, have the effect of replacing the territoriality of the "lois de police" in this field by individuality. That would be to open the door to discrimination on the pretext of fighting it. Since some infringements of the Law of 2 June 1962 carry penal sanctions any distributive or selective application of that Law would, moreover, render inoperative the principle of equality before the criminal law.

The purpose of Directive 71/305 is to bring about the harmonization only of the basic rules concerning public works contracts.

Procedure, including any requirements as to permits, remains the concern of the individual Member State. That is expressly confirmed by Article 2 of the directive which states that "in awarding public works contracts, the authorities awarding contracts shall apply their national procedures adapted to the provisions of this Directive".

Furthermore, the establishment permit constitutes the equivalent of the list of recognized contractors referred to in Article 28 of the directive. In any event by recognizing the right to require registration in such a list the directive necessarily and by implication acknowledges that the formalities described in Article 23 *et seq.*, in particular Article 24, are not listed exhaustively.

As to the duty laid down in Article 29 (5) of Directive 71/305 to seek explanations before rejecting a tender which is abnormally low, the defendant in the main action claims that there is no such duty when, as in the present case, the tender bears no relation to reality.

In such circumstances it would be pointless to ask for any explanation.

C — Observations submitted by the Commission

The first observation made by the Commission is that the Conseil d'Etat has not considered whether the directive has direct effect and thus appears to acknowledge that it has such effect. There is no need therefore for the Court to go into that question, which the Commission considers to be settled in any case by the case-law.

As regards the first question, the Commission discusses in turn whether the requirement of a "Government establishment permit" is compatible with the general scheme of Directive 71/305, whether that requirement may be considered to be a "restriction" within the meaning of Article 59 of the Treaty and Directive 71/304 and, lastly, the effect which should be given to Articles 24 and 28 of Directive 71/305 in the context of the proceedings pending before the Luxembourg Conseil d'État.

On the subject of the compatibility of the permit requirement with Directive 71/305 the Commission takes the view that the requirement is additional to those mentioned in the directive, whereas both the general logic of Articles 20 to 28 and certain indications in the text, especially in Articles 20, 23 and 27, indicate that the list of forms of proof (documents, statements etc.) which undertakings may be required to furnish is an exhaustive one. It therefore concludes that the Government establishment permit required by the Luxembourg Minister of Public Works is incompatible with the provisions of Directive 71/305.

As to whether there may be said to be a "restriction" within the meaning of Article 59 of the Treaty and Directive 71/304, the Commission refers to Article 3 (1) of Directive 71/304 which includes under "restrictions" those "practices which, although applicable irrespective of nationality, none the less hinder exclusively or prinicpally the professional or trade activities of nationals of other Member States". In the Commission's view the requirement of a "Government establishment permit" is precisely the kind of restriction envisaged by that definition. It contends that contractors established in Luxembourg pursue their professional and trade activities covered by such a permit whereas those not established in the country, and that means principally foreign contractors, must apply for the permit even if they wish to participate only once in a public works contract in that State.

Lastly, the Commission's opinion as to the scope of Articles 24 and 28 of Directive 71/305 is that Article 24 is intended to enable the authorities in the country where the service is provided to ensure that the undertaking is enrolled on the professional or trade register in the country in which it is established, and is not relevant in the context of this case. In the case of Article 28, however, the Commission points out that the purpose of that article is to bring about some measure of coordination between the national provisions concerning "official lists of recognized contractors" and that such lists are to constitute, for the authorities of other Member States awarding contracts, a presumption of suitability in relation to certain criteria for selection on a qualitative basis contained in Article 23 of the directive, which broadly corresponds to what is known as the "good standing" of an undertaking.

Since obtaining the Government establishment permit required in the Grand Duchy depends solely on evidence of the good standing of the undertaking it is apparent that in fact the establishment permit has the same function as the certificate of registration referred to in Article 28 of Directive 71/305. In the view of the Commission this confirms that the requirement of such a permit constitutes a prohibited restriction.

The Commission considers that there can be no reason for doubt so far as the second question is concerned. Article 29 (5) requires the authority awarding contracts to request explanations before it rejects a tender which is abnormally low.

In conclusion the Commission suggests that the Court reply to the questions referred to it as follows:

1. Directive 71/305/EEC must be interpreted as meaning that it is incompatible with the directive to require a contractor established in another Member State to produce, in

order to be admitted to participate in public works contracts, a certificate or other document not provided for by the directive.

2. Article 29 (5) of Directive 71/305/EEC must be interpreted as meaning that if the authority awarding contracts considers the tenders for a public works contract to be clearly abnormally low it has a duty to request the tenderer to furnish explanations of his prices.

D — Observations submitted by the Belgian Government

The Belgian Government's view on the first question is that, although it is not aware of the precise scope of the Government establishment permit provided for under Luxembourg legislation, if such a permit is intended to constitute evidence of enrolment on the trade register it is contrary to Article 24 of Directive 71/305. Similary, if it is intended to provide evidence of technical ability, it is contrary to Article 26 of the directive. If, by contrast, it is intended to establish the undertaking's economic and financial standing, it might perhaps be considered to be one of the "other" refeçences mentioned in Article 25 of the directive.

As to the second question, the Belgian Government is of the opinion that Article 29 (5) of Directive 71/305 makes it the duty of the administration to seek explanations from tenderers where prices are not normal.

E — Observations submitted by the Italian Government

As to the first question, the Italian Government takes the view that the conditions laid down in Articles 23 to 26 of Directive 71/305 are listed exhaustively save in so far as evidence of financial and economic standing and technical ability on the part of the contractor wishing to participate in the public works contract is concerned. That is apparent both from the purpose of the directive and from the wording of Articles 27 and 28 (4) thereof. Therefore the requirement of an establishment permit is incompatible with Directive 71/305 even if the permit is also required of contractors who are nationals of that State.

As to the second question, the Italian Government considers that Article 29 (5) of Directive 71/305 imposes on the authorities awarding contracts a duty to request explanations from any tenderer who submits an abnormally low tender before the tender is rejected.

III — Oral procedure

At the sitting on 17 November 1981 oral argument was presented by the followings: Y. Hannequart, of the Liège Bar, for SA Transporoute et Travaux; Jean Welter, of the Luxembourg Bar, for the Minister of Public Works of the Grand Duchy of Luxembourg; G. Ferri, Avvocato dello Stato [State Advocate], for the Government of the Italian Republic; and R. Wägenbaur, Legal Adviser acting as Agent, for the Commission of the European Communities.

The Advocate General delivered his opinion at the sitting on 13 January 1982.

Decision

By judgment of 11 March 1981 which was received at the Court on 7 April 1981 the Comité du Contentieux du Conseil d'État [Judicial Committee of the State Council] of the Grand Duchy of Luxembourg referred to the Court for a preliminary ruling under Article 177 of the EEC Treaty two questions concerning the interpretation of Council Directives 71/304 and 71/305 of 26 July 1971 concerning, respectively, the abolition of restrictions on freedom to provide services in respect of public works contracts and on the award of public works contracts to contractors acting through agencies or branches (Official Journal, English Special Edition 1971 (II), p. 678), and the coordination of procedures for the award of public works contracts (*idem*, p. 682).

The questions arose in the course of a dispute the origin of which lay in a notice of invitation to tender issued by the Administration des Ponts et Chaussées [Bridges and Highways Authority] of the Grand Duchy of Luxembourg, in response to which SA. Transporoute et Travaux (hereinafter referred to as "Transporoute"), a company incorporated under Belgian law, had submitted the lowest tender.

The tender was rejected by the Minister of Public Works because Transporoute was not in possession of the Government establishment permit required by Article 1 of the Règlement Grand-Ducal [Grand-Ducal Regulation] of 6 November 1974 (Mémorial [Gazette] A, 1974, p. 1662 *et seq.*) and because the prices in Transporoute's tender were considered by the Minister of Public Works to be abnormally low within the meaning of the fifth and sixth paragraphs of Article 32 of that regulation. As a result, the Minister of Public Works of the Grand Duchy of Luxembourg awarded the contract to a consortium of Luxembourg contractors whose tender was considered to be economically the most advantageous.

Transporoute brought an action before the Conseil d'État for the annulment of the decision. In support of its application it contended *inter alia* that the

reasons given for rejecting its tender amounted to an infringement of Council Directive 71/305, in particular Articles 24 and 29 (5) thereof.

5 Considering that the dispute thus raised questions concerning the interpretation of Community law, the Conseil d'État referred to the Court for a preliminary ruling two questions concerning the interpretation of Council Directives 71/304 and 71/305.

First question

6 The first question asks whether it is contrary to the provisions of Council Directives 71/304 and 71/305, in particular those of Article 24 of Directive 71/305, for the authority awarding the contract to require as a condition for the award of a public works contract to a tenderer established in another Member State that in addition to being properly enrolled in the professional or trade register of the country in which he is established the tenderer must be in possession of an establishment permit issued by the Government of the Member State in which the contract is awarded.

7 Directives 71/304 and 71/305 are designed to ensure freedom to provide services in the field of public works contracts. Thus the first of those directives imposes a general duty on Member States to abolish restrictions on access to, participation in and the performance of public works contracts and the second directive provides for coordination of the procedures for the award of public works contracts.

8 In regard to such coordination Chapter I of Title IV of Directive 71/305 is not limited to stating the criteria for selection on the basis of which contractors may be excluded from participation by the authority amending the contract. It also prescribes the manner in which contractors may furnish proof that they satisfy those criteria.

9 Thus Article 27 states that the authority awarding contracts may invite the contractor to supplement the certificates and documents submitted only within the limits of Articles 23 to 26 of the directive, according to which Member States may request references other than those expressly mentioned

in the directive only for the purpose of assessing the financial and economic standing of the contractors as provided for in Article 25 of the directive.

Since the establishment permit in question is intended, as the Luxembourg Government has acknowledged in its written observations, to establish not the financial and economic standing of undertakings but the qualifications and good standing of those in charge of them, and since the exception provided for in Article 25 of Directive 71/305 does not apply, the permit constitutes a means of proof which does not come within the closed category of those authorized by the directive.

The Luxembourg Government submits, however, that the grant of an establishment permit is equivalent to registration of the contractor in question in a list of recognized contractors within the meaning of Article 28 of Directive 71/305 and therefore complies with the terms of that provision.

It should be pointed out, in reply to that argument, that even if the establishment permit may be equated with registration in an official list of recognized contractors within the meaning of Article 28 of Directive 71/305, there is nothing in that provision to justify the inference that registration in such a list in the State awarding the contract may be required of contractors established in other Member States.

On the contrary, Article 28 (3) entitles contractors registered in an official list in any Member State whatever to use such registration, within the limits laid down in that provision, as an alternative means of proving before the authority of another Member State awarding contracts that they satisfy the qualitative criteria listed in Articles 23 to 26 of Directive 71/305.

It should be noted that the result of that interpretation of Directive 71/305 is in conformity with the scheme of the Treaty provisions concerning the provision of services. To make the provision of services in one Member State

by a contractor established in another Member State conditional upon the possession of an establishment permit in the first State would be to deprive Article 59 of the Treaty of all effectiveness, the purpose of that article being precisely to abolish restrictions on the freedom to provide services by persons who are not established in the State in which the service is to be provided.

15 Accordingly, the reply to the first question must be that Council Directive 71/305 must be interpreted as precluding a Member State from requiring a tenderer established in another Member State to furnish proof by any means, for example by an establishment permit, other than those prescribed in Articles 23 to 26 of that directive, that he satisfies the criteria laid down in those provisions and relating to his good standing and qualifications.

Second question

16 The second question asks whether the provisions of Article 29 (5) of Directive 71/305 require the authority awarding the contract to request a tenderer whose tenders, in the authority's opinion, are obviously abnormally low in relation to the transaction, to furnish explanations for those prices before investigating their composition and deciding to whom it will award the contract, or whether in such circumstances they allow the authority awarding the contract to decide whether it is necessary to request such explanations.

17 Article 29 (5) of Directive 71/305 provides that if a tender is obviously abnormally low the authority awarding the contract is to examine the details of the tender and, for that purpose, request the tenderer to furnish the necessary explanations. Contrary to the view expressed by the Luxembourg Government, the fact that the provision expressly empowers the awarding authority to establish whether the explanations are acceptable does not under any circumstances authorize it to decide in advance, by rejecting the tender without even seeking an explanation from the tenderer, that no acceptable explanation could be given. The aim of the provision, which is to protect tenderers against arbitrariness on the part of the authority awarding

contracts, could not be achieved if it were left to that authority to judge whether or not it was appropriate to seek explanations.

The reply to the second question must therefore be that when in the opinion of the authority awarding a public works contract a tenderer's offer is obviously abnormally low in relation to the transaction Article 29 (5) of Directive 71/305 requires the authority to seek from the tenderer, before coming to a decision as to the award of the contract, an explanation of his prices or to inform the tenderer which of his tenders appear to be abnormal, and to allow him a reasonable time within which to submit further details.

Costs

The costs incurred by the Government of the Kingdom of Belgium, the Government of the Italian Republic and the Commission of the European Communities, which have submitted observations to the Court, are not recoverable. As the proceedings are, in so far as the parties to the main action are concerned, in the nature of a step in the action before the national court, the decision as to costs is a matter for that court.

On those grounds,

THE COURT

in answer to the questions referred to it by the Comité du Contentieux of the Conseil d'État of the Grand Duchy of Luxembourg by judgment of 11 March 1981, hereby rules:

Council Directive 71/305 must be interpreted as precluding a Member State from requiring a tenderer in another Member State to furnish proof by any means, for example by an establishment permit, other than those prescribed in Articles 23 to 26 of that directive that he satisfies the criteria laid down in those provisions and relating to his good standing and qualifications.

When in the opinion of the authority awarding a public works contract a tenderer's offer is obviously abnormally low in relation to the transaction Article 29 (5) of Directive 71/305 requires the authority to seek from the tenderer, before coming to a decision as to the award of the contract, an explanation of his prices or to inform the tenderer which of his tenders appear to be abnormal, and to allow him a reasonable time within which to submit further details.

Bosco Touffait Pescatore Mackenzie Stuart O'Keeffe

Koopmans Everling Chloros Grévisse

Delivered in open court in Luxembourg on 10 February 1982.

P. Heim

Registrar

G. Bosco

President of the First Chamber, Acting as President

OPINION OF MR ADVOCATE GENERAL REISCHL DELIVERED ON 13 JANUARY 1982 [1]

Mr President,
Members of the Court,

In March 1979 the Luxembourg Administration des Ponts et Chaussées [Bridges and Highways Authority] issued a notice of invitation to tender concerning works to be carried out on the motorway to Arlon. Among the undertakings participating in this "open" procedure within the meaning of Council Directive 71/305 was SA Transporoute et Travaux (hereinafter referred to as "Transporoute"), a company established in Belgium, which apparently submitted the lowest tender. The contract was awarded by decision of the Ministre des Travaux Publics [Minister of Public Works] of 7 June 1979, not to Transporoute, but to a consortium led by a Luxembourg contractor, on the ground that its tender was the economically most advantageous one.

Transporoute contested this decision in proceedings which it brought before the Luxembourg Conseil d'État [State Council] in October 1979. Its action was principally founded on the complaint that the contested decision failed to have regard to Article 33 (3) of the *Règlement Grand-Ducal* [Grand-Ducal Regulation] of 6 November 1974 (on (1) the drawing up of a list of the general specifications applicable to public works and supply contracts for the State; (2) the determination of the powers and *modus operandi* of the adjudication panel for tenders), which stipulates that in principle the contract must be awarded to the person who has submitted the economically most advantageous tender.

In its defence the administration also referred to Article 33 of the *Règlement Grand-Ducal* according to which contracts may be awarded only to undertakings which meet the conditions laid down in Article 1 of the regulation. It pointed out that the fourth paragraph of that article provides that foreign undertakings not established in the Grand Duchy are required to fulfil the same conditions prior to the award of the contract as those applicable under Article 1 (1) to national undertakings, "subject to the operation of different provisions contained in international conventions and in particular the provisions to be applied pursuant to the Treaty of Rome". Article 1 (1) provided, however, — and this condition was not fulfilled by the plaintiff, which never made the appropriate application — that public works contracts may only be awarded to undertakings in possession of a valid establishment permit issued by the Luxembourg Government.

As against that argument the plaintiff relied on Article 24 of the above-mentioned Council Directive 71/305 concerning the coordination of procedures for the award of public works contracts, which states:

"Any contractor wishing to take part in a public works contract may be requested to prove his enrolment in the professional or trade register under the conditions laid down by the laws of the Community country in which he is established: in Belgium, the *registre du commerce — Handelsregister* . . ."

It considers that the certificate of registration issued by the Belgian authorities produced by it ought to have been accepted by the Luxembourg authorities as equivalent for the purposes of Article 1 (4) of the *Règlement Grand-Ducal* and that consequently those authorities should not have imposed any further requirements on it.

On the other hand, the defendant administration contended that the plaintiff's tender could not truthfully be considered to be economically the most advantageous one. On the contrary, it was rightly disregarded because a number of the prices stated in it were abnormally low and so unrelated to the extent of the works that, since it would have been unrealistic to expect the works to be carried out faultlessly, the tender had to be considered as inadequate within the meaning of Article 32 of the *Règlement Grand-Ducal* of 6 November 1974. The plaintiff disagrees and submits that the Luxembourg administration has disregarded Article 29 (5) of Council Directive 71/305 in that respect because it did not, as is required in the case of abnormally low tenders, request the plaintiff to furnish the necessary explanations concerning individual items in the tender and did not indicate which explanations it found unacceptable.

By judgment of 11 March 1981 the Luxembourg Conseil d'État stayed the proceedings and referred the following

1 — Translated from the German

questions for a preliminary ruling under Article 177 of the EEC Treaty:

"1. Is it contrary to the provisions of Directive 71/304/EEC and 71/305/EEC of 26 July 1971, in particular those of Article 24 of Directive 71/305, for the authority awarding the contract to require as a condition for the award of a public works contract to a tenderer established in another Member State that in addition to being properly enrolled in the professional or trade register of the country in which he is established the tenderer must be in possession of an establishment permit issued by the government of the Member State in which the contract is awarded?

2. Do the provisions of Article 29 (5) of Directive 71/305/EEC require the authority awarding the contract to request a tenderer whose tenders, in the authority's opinion, are obviously abnormally low in relation to the transaction, to furnish explanations for those prices before investigating their composition and deciding to whom it will award the contract, or do they in such circumstances allow the authority awarding the contract to decide whether it is necessary to request such explanations?"

My opinion on these questions is as follows.

1. First I must point out that the grant of an establishment permit under Luxembourg law, which is of crucial importance in the main action, and which is issued under the terms of a law of 2 June 1962, which was amended in 1964, is dependent in the case of undertakings which are not established in Luxembourg solely on an examination of what is referred to as their "good standing" (Article 6 in conjunction with Article 20 of the said law). For that purpose an extract from the "judicial record" and proof that no proceedings for a declaration of bankruptcy have been initiated are required. On the other hand there is apparently no requirement concerning proof of qualifications in the case of individuals and undertakings who are not established in Luxembourg.

2. As to the first question, which relates in particular to Council Directive 71/304 of 26 July 1971 concerning the abolition of restrictions on freedom to provide services in respect of public works contracts and on the award of public works contracts to contractors acting through agencies or branches (Official Journal, English Special Edition 1971 (II), p. 678) and to Council Directive 71/305 which I have already mentioned, and in particular to Article 24 thereof, the following considerations are to be taken into account:

(a) The main question is whether it may be implied from Council Directive 71/305, in particular from Title IV, on common rules on participation, and Chapter I thereof (criteria for qualitative selection) that the enumeration which it gives of documents and other evidence production of which may be required is exhaustive, in the sense that it is not permissible for national authorities to require further documents and evidence even if such requirements are laid down in non-discriminatory rules.

As a general point it has rightly been observed that the intention behind the directive is, by coordinating national procedures, to remove restrictions and ensure the free movement of services in the context of the award of public works contracts. Not only the spirit of the directive but also the very detailed nature of the rules which it contains make it clear that the adoption by national authorities of additional and possibly disparate requirements for access to public invitations to tender is incompatible with the directive.

Thus Article 23 of the directive prescribes in detail conditions under which undertakings may be prevented from participating. This provision also stipulates in very precise terms what is to be considered as sufficient evidence in this connection. According to Article 24 contractors wishing to tender for a public works contract may be requested to prove their enrolment in a professional or trade register subject to the conditions laid down by the laws of the Community country in which they are established. Article 25 determines the manner in which proof of the financial and economic standing of contractors wishing to participate is to be furnished. Article 26 does the same in respect of proof of technical ability. In Article 28, finally, there are provisions concerning the questions how Member States, which have official lists of recognized contractors, are to adapt them to the provisions of the directive, what effect certified registration in such a list by the competent authorities has and what evidence may be required before contractors of other Member States may be registered in such lists.

That Member States may not impose additional conditions for participation in procedures for the award of public contracts is indicated by the actual wording of the introductory provision of Article 20, which states:

"Contracts shall be awarded on the basis of the criteria laid down in Chapter 2 of this Title, after the suitability of contractors not excluded under the provisions of Article 23 has been checked by the authorities awarding contracts in accordance with the criteria of economic and financial standing and of technical knowledge or ability referred to in Articles 25 to 28."

Quite apart from the wording of Article 20 there is support for the view that the list of grounds for exclusion in Article 23 is an exhaustive one in the fact that, if this were not the case, paragraphs (2) to (4) of Article 28 would be meaningless. Those paragraphs state what evidence is to be considered sufficient and it is particularly noteworthy that it consists in every case of certificates and documents from the participant's *home country*, and not documents which he would have to obtain in the country in which the invitation to tender is issued. It is also significant that only in Article 25 (dealing with evidence of financial and economic standing, which is irrelevant for the purposes of the establishment permit under Luxembourg law) is there mention of the fact that the authorities awarding contracts must specify what references *other* than those mentioned under (a) to (c) are to be produced, whereas Article 26, which regulates the various ways in which proof of technical ability may be furnished, merely provides that the authorities awarding contracts are to specify in the notice or in the invitation to tender which of the references are to be produced. It is also particularly significant that in Article 27 authorities awarding contracts are expressly directed in regard to invitations to supplement or clarify certificates, to keep such invitations within the limits of Articles 23 to 26, and that Article 28 (4) provides, in regard to the registration of

contractors of other Member States in official lists, that no further proofs and statements may be required other than those provided for under Articles 23 to 26.

The Luxembourg Government contends that the aim of Directive 71/305 is primarily the harmonization of *substantive* rules, whereas *procedural* questions, as is apparent from the preamble and Article 2, may be determined by the Member States. The Luxembourg establishment permit must, however, as it constitutes a formal requirement, be assigned to the latter category. On the other hand, relying on the above-mentioned Article 28 of Directive 71/305, it expounds in greater detail the view that the establishment permit, which is also valid for further procedures for the award of public works contracts, is nothing more or less than the registration in a list referred to in Article 28, which precisely in the case of Luxembourg has the peculiarity that the list is composed of files which are published on a monthly basis.

However, there can be no overlooking the fact that, far from preserving national procedural provisions intact, Article 2 of Directive 71/305 on which the Luxembourg Government relies provides that in awarding public works contracts the authorities awarding contracts are to apply their national procedures *adapted* to the provisions of the directive. Furthermore, however it is classified, the establishment permit clearly belongs to the category of documents and other evidence which is the subject of the detailed provisions contained in Article 23 *et seq.* of the directive and which accordingly may no longer be considered as a matter for the Member States.

On the other hand, so far as Article 28 and the official national lists referred to therein are concerned, it is questionable whether it is in fact possible to interpret that provision as meaning that Member States may make participation in a procedure for the award of a public works contract conditional upon registration in such a list, thus making registration mandatory. In my view there are good reasons for taking the view that the provision merely creates an option (one need only consider the relevant phrase in paragraph (2): "contractors ... may"), in other words that the purpose of the provision is to simplify for interested contractors the process of producing evidence for the purposes of the directive. It is quite certain, however, that such registration may not be required if the contractor in question has already been registered in a similar list in his home country; otherwise paragraphs (2) and (3) of Article 28, determining the legal effects of certificates of registration in official lists of other Member States, would be pointless. Furthermore, it is difficult to maintain that the establishment permit is an instrument of the kind with which Article 28 is concerned. This is so not only for purely external reasons — a number of establishment permits simultaneously can hardly be described as a "list" — or because of the fact than an establishment permit is required for *all* contractors, in other words not only for those who wish to participate in an award procedure, and that Luxembourg has apparently never communicated to other Member States the information referred to in Article 28 (5). The important point is simply that the grant of an establishment permit to foreign contractors depends solely on a test of "*good standing*". There is no test of technical knowledge or ability, and therefore only specific proof of that, and of the contractor's financial and economic standing, make it possible to participate in the procedure for the award of a public works contract. Hence the establishment permit alone would not suffice.

(b) A second consideration which arises in connection with the first question relates to Article 59 of the Treaty, which according to the case-law (Case 33/74 *Johannes Henricus Maria van Binsbergen v Bestuur van de Bedrijfsvereniging voor de Metaalnijverheid*, judgment of 3 December 1974 [1974] ECR 1299) has been directly applicable since the expiry of the transitional period and requires the abolition of restrictions on the freedom to provide services. It is also connected with Directive 71/304, Articles 1 and 3 of which likewise impose an obligation to remove such restrictions. The Commission expressed the view that the requirement of an establishment permit under Luxembourg law may quite certainly be considered as constituting, for contractors established in other countries, a restriction of that kind and that therefore it is also unacceptable by virtue of the above-mentioned provisions.

That is an argument which it is hard to ignore. It is irrelevant that Article 1 of the *Règlement Grand-Ducal* referred to at the beginning of this opinion does not make any distinction on the basis of nationality and hence does not provide for discriminatory treatment within the meaning of Article 3 (1) (a) of Directive 71/304. The point is that Article 3 (1), which defines the duties of the Member States, requires not only the abolition of restrictions which are due to differences in the treatment of nationals and foreigners, but more importantly, it also covers, in subparagraph (c), restrictions "existing by reason of provisions or practices which, although applicable irrespective of nationality, none the less hinder exclusively or principally the professional or trade activities of nationals of other Member States ...". That the establishment permit at issue in this case constitutes a hindrance primarily to contractors not established in Luxembourg is, however, scarcely in doubt. They must, even to participate only once in a procedure for the award of a public works contract, procure such a document and submit themselves for the purpose to an administrative procedure conducted by a foreign authority, whereas contractors who are established in Luxembourg conduct all their normal business activities on the basis of such a permit so that in their case the restriction of its validity to two years has not the same importance which it has for foreign contractors.

Furthermore, the objection raised by the Luxembourg Government to the effect that only the fulfilment of simple, not particular obstructive formalities is required is, in my view, not a valid one. Even if one does not take the view that restrictions on the freedom to provide services are abolished irrespective of the degree of their severity, one can scarcely maintain that the burdens imposed by the requirement of an establishment permit are wholly insignificant and in no way liable to discourage foreign contractors from participating in procedures for the award of public works contracts.

(c) Finally, reference may be made to Article 28 of Directive 71/305 which concerns the official lists of recognized contractors maintained by the Member States. Paragraph (2) of that article provides that contractors registered in such lists may, for each contract, submit to the authority awarding contracts a certificate of registration issued by the competent authority. The first subparagraph of paragraph (3) provides that certified registration in such lists by the competent bodies is to constitute, for the authorities of other Member States awarding contracts, a presumption of suitability for works corresponding to the contractor's classification as regards Articles 23 (a) to (d) and (g), 23, 25 (b) and (c) and 26 (b) and (d). According to the second subparagraph of paragraph (3) information which can be deduced from registration in official lists may not be questioned. The third subparagraph of paragraph (3) provides further that the authorities of other Member States awarding contracts are to apply the above provisions only in favour of contractors who are established in the country holding the official list.

It was submitted in the course of the proceedings that such lists are in existence both in Italy and in Belgium. In the latter country registration is covered by a law of 14 July 1976 which was adapted to the provisions contained in the directive and according to which the criteria to be met are precisely those set out in the directive, namely those concerning "good standing" contained in Article 23. It was also submitted that the plaintiff in the main action was registered in such a list and had produced to the Luxembourg authorities awarding contracts a certificate of registration in accordance with Article 28 (2) of the directive.

If that is in fact the case — and it is for the court seised of the main action to inquire whether it is — then it is plain that the generally applicable (that is to say, in the absence of special factors) requirement of an establishment permit under Luxembourg law the grant of which is dependent solely on proof of the applicant's good standing is not compatible therewith. This state of affairs would be contrary to Article 28 (3) which states that certified registration in an official list constitutes a presumption that the requirements of Article 23 (a) to (d) and (g) have been met. It is, moreover, inconsistent with the second subparagraph of Article 28 (3) according to which information which can be deduced from registration in official lists may not be questioned, and which states that additional evidence may be required only with regard to the payment of social security contributions.

The plaintiff's registration in an official Belgian list and its production of the corresponding certificate under Directive 71/305 is therefore sufficient to entitle it to participate in a procedure for the award of a public works contract and accordingly there can be no question of requiring further documentary evidence, such as the Luxembourg establishment permit, covering the same aspects as the certificate.

3. The second question raised by the Luxembourg Conseil d'État refers to Article 29 (5) of Directive 71/305, which reads as follows:

"If, for a given contract, tenders are obviously abnormally low in relation to the transaction, the authority awarding the contract shall examine the details of the tenders before deciding to whom it will award the contract. The result of this examination shall be taken into account.

For this purpose it shall request the tenderer to furnish the necessary explanations and, where appropriate, it shall indicate which parts it finds unacceptable.

..."

The point to be clarified in relation to this question is whether the above provision places the authority awarding the contract under a duty to seek clarification from a tenderer whose tender is obviously abnormally low before examining the individual items in the tender and deciding to whom to award the contract or whether there is a discretion not to apply the provision if further inquiries appear to serve no useful purpose. The reason for the question is that the defendant in the main action based its assessment of the plaintiff's tender on Article 32 of the *Règlement Grand-Ducal* of 6 November 1974 whereby the above-mentioned provision of the directive was supposed to be incorporated into Luxembourg law. According to that article a tender is not to be considered if the price stated therein bears so little relationship to the works in respect of which tenders are invited "qu'il ne permet pas de s'attendre raisonnablement à une exécution impeccable" [that faultless execution of the work cannot reasonably be expected]. Apart from that it is merely provided that where a tender appears to be "suspect" or is contested by another participant the tenderer is to be required "à présenter sans retard suivant les détails de son analyse des prix d'unité suivant les éléments de calcul du prix de revient énuméré à l'article 12 sous 1 à 7 ou suivant schéma à lui communiqué par le commettant" [to submit without delay the details of his unit price analysis on the basis of the factors to be used in calculating the cost price which are set out in Article 12 (1) to (7) or on the basis of a formula communicated to him by the awarding authority]. Since those provisions clearly do not reproduce exactly the terms of Article 29 of Directive 71/305 the national court wishes to know, apparently (and rightly) on the assumption that that provision of the directive is directly applicable and takes precedence over national law, what direct effect the directive had in this regard.

In my view the very wording of the provision which has been quoted, especially the use of the indicative mood, makes it clear that the authority awarding the contract has a duty to examine the indicidual components of a tender before it makes its decisions, to seek suitable justification from the tenderer, to take the result thereof into account and to indicate which explanations are to be considered to be unacceptable. That is the view which the Belgian Conseil d'État appears to have taken with regard to a corresponding provision of Belgian law adopted in implementation of the directive (Article 25 of the Belgian Arrêté Royal of 22 April 1977). On the other hand I do not see how there could be any justification, founded, for example, on the spirit of the directive, for drawing a distinction between "normal" situations and abnormal ones in which it is not considered necessary to seek explanations on the ground that the prices contained in the tender represent a mere fraction of the usual delivery price and thus bear no relation to reality. In this respect it should be remembered that a situation which appears at first sight to be abnormal may create a different impression once the actual circumstances in which a tender is made, known often only to the tenderer, come to light. In addition, there is no doubt that a provision which lays down a duty of care and is intended to provide procedural guarantees for the protection of tenderers must be strictly interpreted. Unambiguous criteria are necessary in the interests of legal certainty and it

would therefore scarcely be acceptable if they could on occasion be ignored on the basis of such vague concepts as that of a "normal situation" or lack of relation to reality, which merely amo to converting a clear duty into discretion.

4. Accordingly I suggest that the reply to the questions referred by Luxembourg Conseil d'État for a preliminary ruling should be as follows:

(a) It is contrary to the provisions of Directives 71/304 and 71/305 for authority awarding the contract to require a tenderer established another Member State to be in possession of an establishment per issued by the government of the Member State in which the contrac to be awarded.

(b) In particular, no such establishment permit may be required if tenderer is registered in his home country in an official list within meaning of Article 28 of Directive 71/305 and produces as evidenc that certificate of registration in accordance with Article 28 (2) of directive which raises a presumption that the conditions upon which grant of an establishment permit depends have been met.

(c) Article 29 (5) of Directive 71/305 requires the authority awarding contract to request the tenderer whose tender, in the authority's opinio is obviously abnormally low in relation to the transaction, to furn explantations for his prices before investigating their composition deciding to whom the contract shall be awarded.

Chem-Tec B. H. Naujoks v Hauptzollamt Koblenz (reference for a preliminary ruling from the Bundesfinanzhof)

(Common Customs Tariff — Adhesive strip or glue)

Case 278/80

mon Customs Tariff — Tariff headings — "Prepared glues" and "Products suitable as glues" within the meaning of heading 35.06 — Concept — Adhesive paper strip of unvulcanized synthetic rubber — Inclusion — Classification of product in heading 35.06 B — Conditions — Package for sale by retail not exceeding a net weight of 1 kg — Indication specifying use — Limits

iff heading 35.06 of the Common toms Tariff must be interpreted as so including a product described as dhesive paper strip" or as "strip, unvulcanized synthetic rubber" ound on to a spool and consisting of double-sided adhesive strip and a of paper (treated with silicone) rating the adhesive strips which been rolled up and which is used uch a way that the paper strip is off and therefore does not here when the double-sided esive strip is applied.

expression "put up for sale by in packages not exceeding a net weight of 1 kg" in subheading 35.06 B is to be interpreted as meaning that the paper strip described above may be regarded as a package but that the classification of the rolls in that subheading presupposes that they are suitable for sale by retail without any additional packaging and that the net weight of the rolls, that is to say the weight of the adhesive layer, does not exceed 1 kg.

3. If the product cannot be put to any use other than that of an adhesive, the package need not, for the product to be classified in subheading 35.06 B, bear any indication as to its use.

e of the Case: German.

JUDGMENT OF THE COURT
22 SEPTEMBER 1976 [1]

Commission of the European Communities v Italian Republic

'Public works contracts'

Case 10/76

Summary

Directives — Mandatory nature — Time-limits — Compliance therewith (EEC Treaty, Article 189)

The mandatory nature of directives entails the obligation for all Member States to comply with the time-limits contained therein in order that their implementation shall be achieved uniformly within the whole Community.

In Case 10/76

COMMISSION OF THE EUROPEAN COMMUNITIES, represented by its Legal Adviser, Antonino Abate, acting as Agent, with an address for service in Luxembourg at the office of Mario Cervino, Legal Adviser of the Commission, Bâtiment CFL, place de la Gare,

applicant,

v

ITALIAN REPUBLIC, represented by its Ambassador Adolfo Maresca, acting as Agent, assisted by Ivo Maria Braguglia, Viceavvocato dello Stato, with an address for service in Luxembourg at the Italian Embassy,

defendant,

Application for a declaration that the Government of the Italian Republic has failed to fulfil its obligations under Council Directive No 71/305/EEC of 26 July 1971 concerning the coordination of procedures for the award of public works contracts (OJ, English Special Edition 1971 (II), p. 682,

1 — Language of the Case: Italian.

THE COURT

composed of: R. Lecourt, President, H. Kutscher and A. O'Keeffe, Presidents of Chambers, A. M. Donner, J. Mertens de Wilmars, P. Pescatore, M. Sørensen, A. J. Mackenzie Stuart and P. Capotorti, Judges,

Advocate General: G. Reischl
Registrar: A. Van Houtte

gives the following

JUDGMENT

Facts

The facts and the arguments put forward by the parties in the course of the written procedure may be summarized as follows:

I — Facts and procedure

1. On 26 July 1971 the Council of the European Communities adopted two Directives for attaining freedom of establishment and freedom to provide services in the matter of public works contracts. The first, No 71/304/EEC (OJ, English Special Edition 1971 (II), p. 678), implements, with regard to public works contracts, the principle of the prohibition of discrimination based on nationality in the matter of freedom to provide services. The second, No 71/305/EEC (OJ, English Special Edition 1971 (II), p. 682), provides for the coordination of national procedures for the award of public works contracts based on the following basic principles:

- Prohibition of national technical specifications having a discriminatory effect (Articles 10 and 11);
- Advertising of notices of contracts on the Community level by publication in the Official Journal of the European Communities (Article 12);
- Introduction of objective criteria for the selection of undertakings and the award of contracts by national administrations (Article 23 *et seq.*);
- Introduction of a procedure designed to ensure that these principles are observed, particularly through the intervention of the Advisory Committee set up by Council Decision No 71/306/EEC of 26 July 1971 (OJ, English Special Edition 1971 (II), p. 693).

The directive was devised to bring into line the law of the Member States on this matter and required the Member States to adopt the measures necessary to comply with it within twelve months of its notification; this period expired on 29 July 1972.

2. By a Law of 2 February 1973, the Italian legislature prescribed the 'Rules relating to the procedures for the award of public contracts by restricted invitation to tender' (Norme sui procedimenti di gara negli appalte di opere pubbliche mediante licitazione privata, Gazzetta Ufficiale of 24 February 1973, No 51). The Commission took the view that this Law did not fulfil the objectives of Directive No 71/305/EEC and by a letter of 10 June 1974, pursuant to Article 169 of the EEC Treaty, invited the Italian Government to submit its observations within 30 days of receipt of the said letter.

•

By a letter of 5 July 1974 from its Permanent Representation, the Italian Government conveyed to the Commission a draft bill intended to implement the Community rules 'fully', which, according to the Commission, satisfied to a large extent the conditions laid down by the directive in question. As this bill had not yet been passed in March 1975, the Commission, by a reasoned opinion of 1 April 1975, invited the Italian Republic to adopt the necessary measures within a month.

By a letter of 29 April 1975 from the Permanent Representation, the Italian Government conveyed to the Commission the bill presented to the Chamber of Deputies on 1 August 1974, entitled: 'Rules of adapting procedures for the award of public works contracts to the directives of the European Community' (Norme di adequamento delle procedure di aggiudicazione degli appalti di lavori pubblici alle direttive della Comunità Europea) a text corresponding to the draft bill sent to the Commission on 5 July 1974. At the same time an assurance was given that the Office of the President of the Council of Ministers, the Ministry of Construction and the Ministry for Foreign Affairs would make every effort to set in motion the procedure for the passing of the bill by Parliament.

The application dated 30 January 1976 was lodged at the Court Registry on 5 February 1976.

The written procedure followed the normal course. Upon hearing the report of the Judge Rapporteur and the views of the Advocate General, the Court decided to open the oral procedure without any preparatory inquiry.

II Conclusions of the parties

The Commission claims that the Court should:

(a) declare that the Italian Republic has failed to fulfil its obligations under Council Directive No 71/305/EEC of 26 July 1971, concerning the coordination of procedures for the award of public works contracts;
(b) order the Italian Republic to pay the costs.

In its defence, the Italian Government sets out its point of view, but does not however submit any conclusion on the issues of the action.

III — Submissions and arguments of the parties

In the submission of the Commission, first of all the Italian Republic failed to fulfil its obligation to enact before 29 July 1972 the measures necessary to give effect to the directive and, furthermore, Law No 14 of 2 February 1973 only fulfilled its obligations under that directive very incompletely.

Indeed:

(a) whereas the directive applies to all procedures for the award of contracts, both 'open' and 'restricted' (Article 5), the Italian Law applies only to the procedure for award by restricted invitation to tender, termed 'licitazione privata',
(b) Article 29 (3) of Directive No 71/305/EEC provides for the progressive abolition of the Italian 'anonymous envelope' procedure, but the Italian Law makes no mention of this subject;

(c) The second paragraph of Article 12 of the directive provides for the publication of notices of contracts in the Official Journal of the European Communities: the Italian Law limits itself (Article 7) to providing for the publication of notices in the Official Journal of the Italian Republic;

(d) In Articles 16 (d) and 17 (a) the directive lays down the obligation to indicate the time-limit for the completion of the works. The Italian Law makes no provision in this connexion;

(e) The criteria for qualitative selection, specified as essential in Articles 20, 24, 25 and 26 of the directive (vocational aptitude, financial and economic standing and technical knowledge or ability), which must be observed by the authority awarding contracts, are not mentioned in the Italian Law, which thus maintains the wide discretionary powers conferred on authorities awarding contracts by the previous provisions;

(f) Under the last paragraph of Article 15 of the directive, requests for participation and invitations to tender may be made by telegram, telex message or telephone. As the Italian Law makes no mention of this subject, the Commission is of the opinion that the prohibition on tendering by telegram is still in force in Italy;

(g) The time-limit fixed by authorities for receipt of requests to participate must not, according to the directive (first paragraph of Article 14) be less than twenty-one days from the date of sending the notice of contract; the Italian Law limits itself to providing a minimum time-limit of 10 days from the publication of the notice;

(h) The Italian Law does not lay down any obligation formulated in Article 29 (5) of Directive No 71/305/EEC to justify to the Advisory Committee the rejection of tenders considered to be too low.

The Italian authorities moreover implicitly accepted the findings of the Commission and realized the need to adjust the Italian legal system to the Community provisions, as is shown by the existence of the bill submitted to the Chamber of Deputies on 13 August 1974 and not yet passed.

As appears from the judgment of the Court of Justice of 21 June 1973 (Case 79/72, *Commission* v *Italian Republic* [1973] ECR 667 at p. 672) the failure to observe the time-limit laid down first by the Directive (29 July 1972) and subsequently by the reasoned opinion (1 May 1975) constitutes a serious failure by a Member State to fulfil its obligations.

In its *defence* the Italian Government points out that the bill presented to the Chamber of Deputies on 13 August 1974 is designed to amend existing law to the extent necessary to put the directive into effect.

It was for reasons of legal certainty that the provisions of the directive were reiterated in a Law, a procedure which offers greater guarantees but takes longer. The Italian Government hopes that the bill will be passed as soon as possible, so that the subject-matter of the action may be considered as having ceased to exist.

In its *reply* the Commission points out that the defendant does not challenge the validity of the submissions and conclusions formulated in the application. It stresses, as has already been done in the reasoned opinion of 1 April 1975, that Bill No 3219 submitted to the Chamber of Deputies on 13 August 1974 would in large measure satisfy, both as to substance and as to form, the conditions set by Council Directive No 71/305. The Commission acknowledges that the nature of the Italian legal system is such that it is impossible to carry out the necessary amendments and adjustments in national law by any instrument other than a Law:

no possibility exists of adopting lesser measures, such as administrative measures.

It observes however that the choice of form and methods for giving effect to Community directives left to national authorities by Article 189 of the EEC Treaty is subject to limitations. One limitation of an external kind is constituted by the subject-matter of the directive If for example the directive is aimed at circumscribing the extent of the discretionary power of public authorities, the national measures for giving effect to it inevitably have the nature of legislative acts, that is to say, acts which are mandatory and binding on the administration and capable of creating rights for individuals which are enforceable in a court of law. One limitation which might be described as 'internal' is constituted by the state of national substantive law governing the subject-matter of the directive. The choice of the methods used to adjust the internal legal system will be conditioned by the form of the instruments already in existence; the choice will have to obey the principle of the hierarchy of the sources of law in force in each national legal system.

It follows from these considerations that an instrument having force of law appears to constitute the only method capable of allowing proper application of Directive No 71/305.

If it is true, as the Italian Government states in its defence, that other Member States have not considered it appropriate to give effect to the directive by way of legislation, it should however be observed that, on the practical level and as to its substance, the directive is nevertheless applied in those Member States.

Whilst joining with the Italian Government in hoping for the immediate passing of Bill No 3219 by both Houses, the Commission feels that it must emphasize the seriousness of the infringement committed by the Italian Republic. Directive No 71/305 introduces machinery appropriate to stimulate effective competition between undertakings in the Community, by coordinating procedures for the award of public contracts. Failure to put it into effect hinders and delays the process of interpenetration in the sphere of public works contracts.

The Italian Government did not lodge a rejoinder.

In the oral procedure, on 6 July 1976, the parties enlarged upon the arguments put forward in the written procedure. At the request of the Court, the Commission produced a list of the measures taken in the Member States to give effect to Directive No 71/305/EEC.

The Advocate-General delivered his opinion at the hearing on 13 July 1976.

Law

1 By an application which was received at the Registry on 5 February 1976 the Commission has brought before the Court under Article 169 of the EEC Treaty an action seeking a declaration that the Italian Republic has failed to fulfil its obligations under Directive No 71/305/EEC of the Council of 26 July 1971 (OJ, English Special Edition, 1971 (II), p. 682).

2 In conjunction with Directive No 71/304/EEC of the same date concerning the abolition of restrictions on freedom to provide services in respect of public works contracts, Directive No 71/305/EEC seeks to coordinate the national procedures for the award of these contracts. Under Article 32 Member States were to adopt the measures necessary to comply with the directive within twelve months of its notification to them, which period expired on 29 July 1972.

3 Subsequent to this directive the Italian Republic adopted the Law of 2 February 1973 relating to the procedures for the award of public contracts by restricted invitation to tender (licitazione privata) the text of which was conveyed to the Commission on 16 August 1973.

In application of Article 169 of the EEC Treaty the Commission, however, informed the Italian Republic by letter of 10 June 1974 that it considered that the obligations arising from the abovementioned directive had not been satisfied by the adoption of the Law.

4 In the first place it was claimed that the defendant had excluded from the scope of the Law procedures for the award of public works contracts other than by restricted invitation to tender.

5 Secondly, it was alleged that the defendant had not complied with Article 29 of the directive whereby the Italian 'anonymous envelope' procedure had to be abolished by 29 July 1975 or 29 July 1979 according to the estimated value of the contract as the Italian Law of 2 February 1973 made no provision in this respect.

6 In addition, under Article 12 of the directive, authorities awarding contracts who wish to award a public works contract by open or restricted procedure must make their intention known by means of a notice published in the Official Journal of the Communities whereas the Italian Law limits itself to providing for the publication of a notice in the Official Journal of the Italian Republic.

7 The Italian Law does not contain the provisions referred to in Articles 14, 15, 16 and 17 of the directive concerning the time-limit for the receipt of requests to participate, the form required for tenders and the compulsory indication of the time-limit for the completion of the works put out to tender.

8 Finally, Articles 20, 24, 25 and 26 of the directive lay down the criteria for qualitative selection which allow certain undertakings to be excluded from participation in the contracts, while the Italian Law contains no provision to this effect and retains the wide discretion conferred on authorities awarding contracts by Article 89 of the Royal Decree of 23 May 1924.

9 The defendant did not contest the alleged failures and, on 5 July 1974, conveyed to the Commission a preliminary draft of a bill containing the Community rules in full.'

10 'The draft, which according to the Commission satisfies the essential requirements of the directive, was conveyed to the Italian Parliament on 13 August 1974 but has still not been adopted with the result that the measures intended to ensure the implementation of the directive are not yet in force at the date of this judgment.

11 Article 189 of the Treaty provides that a directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed but leaves to the national authorities the choice of form and methods.

12 The mandatory nature of directives entails the obligation for all Member States to comply with the time-limits contained therein in order that the implementation shall be achieved uniformly within the whole Community.

13 It follows that as the Italian Republic has failed to adopt, within the prescribed period, the measures necessary to comply with Directive No 71/305/EEC of the Council concerning the coordination of procedures for the award of public works contracts, it has failed to fulfil an obligation under the Treaty.

Costs

14 Under Article 69 (2) of the Rules of Procedure of the Court of Justice, the unsuccessful party shall be ordered to pay the costs.

The defendant has failed in its submissions.

It must therefore be ordered to pay the costs.

On those grounds,

THE COURT

hereby rules:

1. **As the Italian Republic has failed to adopt, within the prescribed period, the measures necessary to comply with Directive No 71/305/EEC of the Council concerning the coordination of procedures for the award of public works contracts, it has failed to fulfil an obligation under the Treaty.**

2. **The defendant shall pay the costs.**

Lecourt Kutscher O'Keeffe Donner Mertens de Wilmars

Pescatore Sørensen Mackenzie Stuart Capotorti

Delivered in open court in Luxembourg on 22 September 1976.

A. Van Houtte
Registrar

R Lecourt
President

OPINION OF MR ADVOCATE-GENERAL REISCHL DELIVERED ON 13 JULY 1976 [1]

Mr President,
Members of the Court,

Several Community measures were adopted in 1971 to further the implementation of the important principle of the right of establishment and of freedom to provide services in respect of public works contracts. I may mention on the one hand Council Directive No 71/304 of 26 July 1971 (OJ, English Special Edition, 1971 (II), p. 678), which relates to the abolition of restrictions on freedom to provide services in respect of public works contracts. Next Council Directive No 71/305 of 26 July 1971 (OJ, English Special Edition, 1971 (II), p. 682), issued on the same day, 'concerning the coordination of procedures for the award of public works contracts' has to be considered. Finally reference must be made to the Council Decision which was also made on 26 July 1971 'setting up an Advisory Committee for Public Works Contracts.'

It is the second mentioned directive which is at issue in the present case. Under its Article 32 Member States had to adopt the measures necessary to comply with the Directive within a period which expired on 29 July 1972. The Commission takes the view that the Italian Republic has not fulfilled this obligation. It is true that a law was passed in Italy on 2 February 1973 for the purpose of carrying out the directive. But the Commission has submitted that this measure is inadequate in many respects — I will mention them presently.

The Commission therefore introduced against the Italian Republic a procedure under Article 169 of the EEC Treaty for failure to comply with the Treaty. In a letter of 10 June 1974 the Italian Government was requested to submit its observations on the representations made by the Commission. A reasoned opinion within the meaning of Article 169 with a request that the necessary measures be adopted within the period of one month was despatched on 1 April 1975. The Commission felt itself compelled to do this, because Italy's Permanent Representative only handed over on 5 July 1974 the preliminary draft of a law prepared by the Italian Ministry for Construction, whereas up till then there had been no mention of the passing of this law which was apparently to take into account to a great extent Directive No 71/305. Finally proceedings were commenced in this Court on 5 February 1976, since at that time, as Italy's Permanent Representative informed the Commission on 29 April 1975, a bill corresponding to the preliminary draft had only been introduced in the Italian Chamber of Deputies on 13 August 1974, while the end of the legislative procedure was not in sight.

Allow me to begin my evaluation of the facts of this case by indicating briefly in what respects the present legal position in Italy is, in the opinion of the Commission, incompatible with the said Council directive.

According to Article 5 the directive applies to all procedures for the award of public works contracts, that is both to 'open procedures', whereby any interested contractor may tender, and also to 'restricted procedures' whereby tenders may only be submitted by contractors who have been invited to do so by the authorities awarding contracts. The Italian law of 2 February 1973 does not cover all this, because it only applies to the restricted tendering procedures and completely disregards the so called open procedures.

Under Article 29 of the directive the Italian anonymous envelope procedures is to be discontinued after 29 May 1975 or 29 May 1979 according to the estimated value of the respective contracts. The Italian law of 2 February 1973 has made no arrangements whatever to that effect.

Under Article 12 of the directive the intention to award a public works contract must be made known and published in the Official Journal of the European Communities. The Italian law in contrast only provides for publication in the Official Journal of the Italian Republic.

According to Articles 16 (d) and 17 (a) of the directive any time limit for the completion of the works has to be published. In this respect also the Italian law does not contain the requisite provisions.

Articles 20, 24, 25 and 26 of the directive refer to the definition of the criteria for qualitative selection, which apply to

1 — Translated from the German.

contractors who are eligible to participate and must be applied by the authorities awarding contracts. As the Italian law does not contain any corresponding provisions, Article 89 of the Royal Decree of 23 May 1924 according to which invitations to tender are sent to persons or contractors, who *appear to be suitable*, is still valid in Italy, there is accordingly a very wide discretion.

Under Article 15 of the directive requests for participation in contracts and invitations to tender may also be made by telegram, telex message or telephone. The Italian law by comparison does not provide for such alternatives. On the contrary, the prohibition on the submission of tenders by telegram contained in Article 72 of the Royal Decree is still in force.

Article 14 of the directive provides that the time-limit for the receipt of requests to participate shall be fixed at not less than 21 days from the date of sending the notice. In contrast under the Italian law there is a minimum time-limit of only ten days from publication of the notice.

Finally Article 29 (5) of the directive is important. It imposes on the authority awarding contracts the duty to justify to the Advisory Committee, mentioned at the beginning of my opinion, rejection of tenders because they are too low. The Italian law on the other hand only insists on such justification in the case of the annulment of the document containing the award, but does not provide for any communication to the Advisory Council for Public Works Contracts.

The Italian Republic against which these proceedings have been taken does not dispute any of these findings. We can therefore proceed on the basis that, although the time-limit prescribed by the Council directive and in the opinion given under Article 169 of the EEC Treaty has expired, the legal situation in Italy has not so far conformed to the provisions of the directive.

Under the system of the Treaty and the relevant case-law — for example in Case 52/75 (Judgment of 26 February 1976, *Commission of the European Communities* v *Italian Republic* — it is on the other hand clear that directives impose clear-cut obligations on Member States to bring about a particular legal situation. Under Article 189 of the EEC Treaty only the choice of form and methods for the implementation of directives is left to national authorities. The case-law in particular emphasizes the importance of complying with time-limits prescribed by directives (Judgment of 21 June 1973 in Case 79/72, *Commission* v *Italian Republic*, [1973] ECR 667). If some Member States do not comply with these time-limits after they have expired the legal situation lacks uniformity — a particularly serious matter; in other words the directives are then deprived of their efficacy. Therefore in the field of public works contracts the essential aim of the creation of a uniform market, which would have produced competition between all undertakings in the Community, could not be attained at the prescribed time. The Commission has shown in its pleadings by reference to statistical surveys the effect that this has had in practice.

Furthermore there is in my opinion no doubt at all that the need in Italy to set in motion time-consuming legislative proceedings in order to implement Directive No 71/305 — which are necessary because the subject-matter is already governed by statute — is no justification for the delay which has occurred. A reference to the dates in question shows this to be true: it is known that the Commission initiated the procedure under Article 169 on 10 June 1974; the Italian bill for the implementation of the directive was introduced in the Chamber of Deputies on 13 August 1974. Until the delivery of the reasoned opinion which was not until 1 April 1975 there would have been

sufficient time for the completion of the legislative procedure. Furthermore it must be borne in mind that in proceedings aimed at finding that there has been an infringement of the Treaty, in which the issue is whether a *Member State* has fulfilled its obligations under the Treaty, it is irrelevant which agency of the State, even if it be one that is constitutionally independent, was responsible for the infringement. The Court laid particular emphasis on this point in Case 77/69 (Judgment of 5 May 1970, *Commission of the European Communities* v *Kingdom of Belgium*, [1970] ECR 243).

Without its being necessary therefore to go into the question whether the said bill can lead to a proper and complete implementation of the Council's directive — it appears that another problem exists with regard to the Italian law of 10 February 1962 which may be the subject-matter of further proceedings — it may be declared that the application lodged by the Commission is well founded.

Accordingly the Court can only find that since the Italian Republic did not implement the Council Directive of 26 July 1971 in due time, it is, for the reasons mentioned in the Commission's application, in breach of its obligations under the EEC Treaty. Furthermore the costs are to be borne by the defendant.

(3) Orders the parties to pay their own costs.

Mackenzie Stuart Bosco Due

Pescatore Koopmans Bahlmann Joliet

Delivered in open court in Luxembourg on 28 March 1985.

P. Heim
Registrar

A. J. Mackenzie Stuart
President

Case 274/83

Commission of the European Communities
v
Italian Republic

'Directive — Coordination of procedures for the award of public works contracts'

Summary

1. *Action for failure of a State to fulfil obligations — Procedure prior to the application to the Court — Formal invitation to submit observations — Definition of the subject-matter of the dispute — Reasoned opinion — Detailed list of complaints — Permissibility*
(EEC Treaty, Art. 169)

2. *Approximation of laws — Procedures for the award of public works contracts — Award of contracts — Criteria — The most economically advantageous tender*
(Council Directive 71/305/EEC, Art. 29 (1))

3. *Member States — Implementation of directives — Obligation to provide information — Failure to provide information — Failure to fulfil obligations*
(EEC Treaty, Arts 5 and 155)

1. It follows from the purpose assigned by Article 169 of the EEC Treaty to the preliminary stage of the procedure under Article 169, of which the initial letter is part, that the letter is intended to define the subject-matter of the dispute and to indicate to the Member State which is invited to submit its observations the factors enabling it to prepare its defence. The opportunity for the Member State concerned to submit its observations constitutes an essential guarantee required by the Treaty and, even if the Member State does not consider it necessary to avail itself thereof, observance of that guarantee is an essential formal requirement of the procedure under Article 169.

Although it follows that the reasoned opinion provided for in Article 169 must contain a coherent and detailed statement of the reasons which led the Commission to conclude that the State in question has failed to fulfil one of its obligations under the Treaty, the Court cannot impose such strict requirements as regards the initial letter, which of necessity will contain only an initial brief summary of the complaints and there is

nothing therefore to prevent the Commission from setting out in detail in the reasoned opinion the complaints which it has already made more generally in its initial letter.

2. For the purposes of Article 29 (1) of Directive 71/305 concerning the coordination of procedures for the award of public works contracts the award of a contract on the basis of the criterion of the most economically advantageous tender presupposes that the authority making the decision is able to exercise its discretion in taking a decision on the basis of qualitative and quantitative criteria that vary according to the contract in question and is not restricted solely to the quantitative criterion of the average price stated in the tenders.

3. The Member States are obliged, by virtue of Article 5 of the EEC Treaty, to facilitate the achievement of the Commission's tasks which, under Article 155 of the EEC Treaty, consist in particular of ensuring that the provisions of the Treaty and the measures adopted by the institutions pursuant thereto are applied.

   Where, for that purpose, a directive imposes upon the Member States an obligation to provide information in order to enable the Commission to check whether the directive has been implemented effectively and completely, the failure by a Member State to provide the information constitutes a failure to fulfil its obligations, even if the Commission was, in fact, able to obtain information regarding the implementing provisions adopted by that State.

OPINION OF MR ADVOCATE GENERAL LENZ

delivered on 13 February 1985 *

Mr President,
Members of the Court,

A. This case concerns the implementation in Italy of Council Directive 71/305/EEC of 26 July 1971 concerning the coordination of procedures for the award of public works contracts (Official Journal, English Special Edition 1971 (II), p. 682).

That directive was also at issue in Case 10/76. [1] On that occasion its contents were considered in detail so that it is sufficient for me here merely to refer to that case.

A first Law on the subject was adopted in Italy on 2 February 1973. That Law was at issue in the earlier proceedings, which culminated in a declaration that, by failing to adopt the measures necessary to comply with Directive 71/305 within the period of 12 months from its notification as laid down in Article 32, namely by 29 July 1972, the Italian Republic had failed to fulfil an obligation under the EEC Treaty.

A further law was adopted on 8 August 1977 which, according to the Commission, correctly implemented the directive in Italian law.

However, the matter did not rest there. On 10 December 1981, the legal position was altered by Law No 741 in such a way that the Commission, when it received notice thereof, came to the conclusion that various provisions of the Law were inconsistent with the aforementioned directive.

By a telex message dated 7 April 1982, the Commission notified its views to the Italian Government and asked it to submit its observations. Since no observations were submitted, the Commission, by a letter dated 17 December 1982, instituted proceedings under Article 169 of the EEC Treaty. The letter set out which provisions of the Italian Law of 10 December 1981 (namely Article 9, the first, third, fourth and fifth paragraphs of Article 10, Articles 11 and 13 and the second paragraph of Article 15 (2)) were allegedly contrary to which provisions of the directive and contended that, by failing to communicate the text of the aforementioned Law to the Commission, the Italian Government had failed to fulfil its obligations under Article 33 of Directive 71/305.

In a written reply dated 2 February 1983, the Italian Government accepted most of the Commission's allegations and pointed out that a draft law to amend the Law in question had already been prepared.

The Commission on examining a copy of that draft law sent to it, came to the conclusion that, if the draft law were adopted, it would meet some of its complaints but others would not be satisfactorily dealt with. In any event on 2 August 1983, it delivered a reasoned opinion under Article 169 of the EEC Treaty because at that time the legislative process had still not been completed. Furthermore, because the Italian legal provisions were not amended within the period laid down in that reasoned opinion, the Commission brought the matter before the Court of Justice on 10 December 1983 and sought a declaration that, by adopting certain provisions for the implementation of Directive 71/305 and by failing to notify the Commission of the main provisions of Italian law concerning the award of public works contracts, the Italian Republic had failed to fulfil its obligations under the EEC Treaty.

During the written procedure before the Court of Justice the defendant accepted that several of the complaints were justified (namely those relating to the third, fourth and fifth paragraphs of Article 10 and Article 13 of Law No 741). Conversely the Commission, after noting the Italian Government's explanations, conceded that some of its complaints could not be upheld (namely those relating to Article 11 and, in part, to Article 9 of the said Law).

During the oral procedure it was further learnt that Law No 687 amending Law No 741 and the provisions relating to provisional security and advertising had been adopted on 8 October 1984. Most of the remaining points in dispute have, according to the Commission, thereby been resolved. All that is now outstanding is the application for a declaration that the Italian Republic has failed to fulfil its obligations under the EEC Treaty as regards the criterion for the award of contracts (which was dealt with in the first paragraph of Article 10 of Law No 741 and which

* Translated from the German.

1 — Judgment of 22 September 1976 in Case 10/76 *Commission of the European Communities v Italian Republic* [1976] ECR 1359

pursuant to Law No 687 was provided for in virtually identical terms in the amended version of subparagraph (b) of the first paragraph of Article 24 of the Law of 8 August 1977) and to its failure to comply with Article 33 of the directive after the adoption of Law No 741.

The Italian Government denies both those complaints.

B. It is that dispute which now falls to be considered.

1. Against the first of those complaints, the defendant relied during the *oral procedure* primarily on an *objection of inadmissibility.*

According to the Italian Government, in the letter instituting the procedure it is alleged only that the contested first paragraph of Article 10 of Law No 741 (which inserted in Article 24 of the Law of 8 August 1977 concerning the criteria for the award of contracts the further provision that a contract could also be awarded to a tenderer whose tender corresponded to or came closest to the average of those tenders in the lower half of the scale between the lowest and highest tenders), was contrary to Article 29 (3) of the directive which provides that:

'The price criterion as calculated in accordance with current national regulations (Italian "anonymous envelope" procedure) may be retained for a period of three years following expiry of the time-limit laid down in Article 32 for contracts whose estimated value does not exceed 10 000 000 units of account, and for seven years from the date for contracts whose estimated value is between 1 000 000 and 2 000 000 units of account.'

That apparently occurred, according to the Commission's aforementioned letter, because Article 4 of Law No 14 of 2 February 1973 (to which the contested Article 10 refers) itself refers to Article 1 (d) of the Law of 2 February 1973 which provides for *secret* tenders to be examined by reference to the average value within the meaning of Article 4. However, in its reasoned opinion (and during the proceedings before the Court) the Commission has exclusively taken the view that the criterion for the award of contracts did not correspond to any of the criteria laid down in *Article 29 (1)* of the directive and was therefore inconsistent with that provision which provides that:

'The criteria on which the authorities awarding contracts shall base the award of contracts shall be:

either the lowest price only;

or, when the award is made to the most economically advantageous tender, various criteria according to the contract: e.g. price, period for completion, running costs, profitability, technical merit.'

According to the case-law, that is not possible. It has been held that the letter *instituting* proceedings must define the subject matter at issue in order that the Member State concerned may defend itself in good time. No further *causa petendi* may therefore be introduced at a later stage of the procedure, that is to say it is not possible to cite a further legal provision in support of a complaint. If the Commission is changing its application in that manner, thereby making a claim which was not contained in the letter instituting the procedure, that must be regarded as inadmissible and, as has also been established in the Court's judgments, such an action cannot become admissible by virtue of the fact that the Member State concerned has entered into a dispute with regard to the complaint as amended in the reasoned opinion.

Even if such an attitude appears excessively strict and formalistic, it seems to be correct according to the earlier case-law from which it may be deduced that in proceedings under Article 169 of the EEC Treaty the letter instituting the proceedings is of great significance in defining the factual and legal ambit of the subject-matter at issue. Its purpose is to give the Member State concerned an opportunity to defend itself; only to the extent that such an opportunity has been given, with regard to the factual and legal arguments, down a proper preliminary administrative procedure exist as a pre-requisite for the commencement of proceedings before the Court and therefore only those matters which have already been raised in the administrative procedure may be considered in the proceedings before the Court.

Furthermore, I take the view that the judgment in Case 254/83 [2] referred to by the Commission did not bring about a decisive change in the case-law even though it was declared in that judgment (as was alleged in the reasoned opinion) that the defendant had failed to fulfil its Treaty obligations by failing to adopt the measures in question and also by failing to notify the Commission thereof, despite the fact that the letter instituting the procedure merely alleged that the Commission was not *notified* of the measures which the Member State was under a duty to adopt. For in that case it may well have been concluded that, regardless of its actual wording, the letter instituting the procedure also related *impliedly* to the failure to adopt the measures which had not been notified. In addition it would have been absurd, once it became apparent that the Member State had failed to adopt the measures in question and not merely failed to notify them, nevertheless to limit the judgment to the latter failure, which without the first is left hanging in the air, as it were.

In the case now before the Court it is a undeniable fact that in the letter institutin the proceedings, the Italian provisio complained of and specified as the subject matter was judged only in the light o *paragraph 3* of Article 29 of the directiv and that the Italian Government's respons related to that provision alone. It is als clear on the other hand that the complair first raised in the reasoned opinion that th *first paragraph* of Article 29 of the directiv had not been complied with is a completel different claim and that the Italia Government was not able to make an submissions thereon during the admir istration procedure precisely because th Commission had referred expressly only t Article 29 (3). Since the preliminar administrative procedure has not bee conducted properly the application for declaration that the first paragraph Article 10 of Law No 741 is contrary t Article 29 (1) of the directive cannot b regarded as admissible.

Furthermore, since according to th aforementioned case-law the question is or relating to admissibility, it is a matter f the Court to decide of its own motion; it therefore irrelevant that the Itali Government drew attention to the matt for the first time only during the or procedure and only then raised an objectio of inadmissibility.

2. In view of that conclusion in relation the first of the remaining two points issue, I turn now to consider, as a seconda matter and fairly briefly, the questi whether the Commission's objection relation to the first paragraph of Article of Law No 741 is justified or whether t Italian Government is correct in its vie that the said provision (which was su

2 — Judgment of 3 October 1984 in Case 254/83 *Commission of the European Communities* v *Italian Republic* [1984] ECR 3395.

stantially retained in the Law of 8 October 1984 — a fact which is of course not now in dispute) is wholly in conformity with Article 29 (1) of Directive 71/305.

As has already been pointed out, the provision in question added to Article 24 of the Law of 8 August 1977 (which provided as criteria for the award of contracts (a) the lowest price and (b) the most economically advantageous tender) the further criterion of the average price calculated on the basis of the average of those tenders in the lower half of the scale between the lowest and highest tenders (which is the method of calculation referred to in Article 4 of the Law of 2 February 1973).

The Commission takes the view that that provision does not correspond to the criterion referred to in the first subparagraph of Article 29 (1) precisely because it does not refer to the *lowest* price; it also contends that it does not comply with the criterion of the most economically advantageous tender laid down in the second subparagraph of Article 29 (1) because that provision basically covers only qualitative and not purely quantitative criteria; if price is to be a relevant consideration then it can only be so as one of *several* factors to be considered in taking a discretionary decision.

In reply to the Commission's argument the Italian Government contended that in reality the provision in question, contrary to the Commission's belief, did not add a third criterion for the award of contracts and fell completely within the scope of the second subparagraph of Article 29 (1). That view is based on the fact that in that subparagraph, factors which are certainly not exclusively qualitative criteria, such as the 'period of completion', are of significance. Price is also expressly mentioned as a factor to be taken into account and there is certainly no compelling reason to conclude that price is only of importance in conjunction with other factors. In fact the contested provision lays down a yardstick for calculating the most economically advantageous price because the function of the price in that provision is different from its function in the first subparagraph of Article 29 (1): the correct *market price* is determined by that method, which, by excluding extremely low tenders which can hardly be regarded as serious, ensures that the contract is awarded to a tenderer who may be relied on to carry out the work correctly.

In the light of the wording and scheme of the directive I consider that the view taken by the Commission contains the better arguments. It is obvious that only two criteria for the award of contracts are provided for in the directive. If the sole factor is price, the first subparagraph of Article 29 (1) clearly provides that only the *lowest* price is to be taken into account and no other. However, inasmuch as the price is also relevant under the second subparagraph of Article 29 (1), that is to say in connection with the most economically advantageous tender, the intention must be that in that context price is not to be taken into account in isolation and by way of derogation from the first subparagraph — which would hardly be comprehensible — but only in conjunction with the other factors (such as period for completion, running costs and so on) which must be assessed when a discretionary decision is taken. That view is supported not least by Article 29 (2) which lays down what information is to be provided when the second subparagraph of Article 29 (1) is applied: it provides that *all* the criteria applied to the award, where possible in descending order of importance, are to be stated. That does in fact show that a *number* of criteria fall to be considered under the second subparagraph of Article 29 (1). Thus a tender can hardly be 'the most

economically advantageous tender' if it is determined on the basis of the average of those tenders in the lower half of the scale between the lowest and highest tenders.

Even if the Italian Government's argument that the advertising authority may be particularly concerned to exclude extremely low tenders (because they are often not serious and give rise to doubt whether the work involved will be completed reliably) is accepted, it is certainly not necessary to derogate from the scheme of the directive to achieve that purpose as was done in Italian Law No 741. On the contrary, account may be taken of that aim by laying down minimum prices, which is, according to the Commission's submission, a quite customary practice in Italy. I do not accept the counter-argument that that might give rise to difficulties since the price level may change considerably between the invitation to tender and the completion of the project due to inflation. In fact that problem may be mitigated by speeding up somewhat the procedure which does not necessarily have to take up to a year, as is apparently often the case in Italy. Furthermore, the administration should be equally able, when laying down a minimum price, to make an allowance for inflation over a relatively short period, as is expected of the undertakings submitting tenders, on the basis of whose tendered prices, according to the contested provision, an average price is to be determined as the price which most closely corresponds to the market conditions.

If it were in fact considered appropriate to give a judgment on that part of the appliation, it should be declared that the first paragraph of Article 10 (1) of Law No 741 is incompatible with the first subparagraph of Article 29 (1) of the directive and that it does not comply with the requirements of the second subparagraph of Article 29 (1). It should also be recognized that the Commission has an interest in such a declaration even after the repeal of Law No 741 because the Italian Government has substantially retained the contested provision in Article 2 of the Law of 8 October 1984.

3. The second remaining point at issue relates to Article 33 of the directive which provides that:

'Member States shall ensure that the text of the main provisions of national law which they adopt in the field covered by this directive is communicated to the Commission.'

Since this point does not involve the question of admissibility, it may be dealt with quite briefly.

There is no doubt that the Italian Law of 1981 falls within the scope of Article 33 of the directive because it was obviously adopted in a field covered by the directive and even to some extent amends legislation that was in conformity with Community law in a manner at variance with Community law. Furthermore, it is not disputed that the Italian Government failed to communicate the text of that Law to the Commission. It is therefore clear that Article 33 of the directive has been infringed and that it was correct for a procedure under Article 169 of the EEC Treaty to be instituted.

It is not possible to argue that the breach relates only to a very minor obligation. The purpose of provisions such as Article 33 is absolutely clear: they help the Commission to monitor the implementation of directives which otherwise, in view of the large numbers of such Community acts, would not be sufficiently effective to cover ten

legal systems with provisions whose significance is often difficult to assess. In this context I refer the Court to its judgment in Case 96/81.[1] In that case, whose subject-matter was similar to that in this case, it was emphasized that the Member States are obliged, by virtue of Article 5 of the EEC Treaty, to faciliate the achievement of the Commission's tasks. The Court went on to say that the directive which was the subject of that case imposed an obligation to provide information; that information had to be clear and precise and indicate unequivocally the relevant provisions, for otherwise the Commission would not be in a position to check whether the Member State had effectively and completely implemented the directive.

Finally, it is also clear that the fact that the Commission became aware of the contested provision of Italian law in some other way — although only in March 1982 — did not remedy the aforementioned breach, that is to say does not justify the breach. Furthermore, it goes without saying that, in view of the significance of the contested provisions, the Commission is quite right to seek a declaration that the Italian Republic has failed to comply therewith in order to draw attention, once again, to the importance of such provisions.

4. Finally, a few words must also be said with regard to the costs of the action.

It must be recalled first that the eight complaints originally made against it (one of which was divided into two parts), the Italian Government immediately recognized that three were justified and amended the relevant Italian law accordingly in October 1984 — which it also did in relation to one and a half of the other complaints. It is of importance also that the Commission had to admit that one and a half complaints were unjustified and lastly that one complaint must be declared inadmissible on the ground that the preliminary administrative procedure had not been conducted properly.

In those circumstances, it can hardly be said that the Commission's application was essentially successful and I do not consider it to be justified to order the Italian Republic to pay the whole of the costs of the action. It would be more appropriate to order the Italian Republic to pay half of the Commission's costs and the whole of its own.

5. In view of the foregoing, I propose that the Court should:

Dismiss as inadmissible the application for a declaration that the first paragraph of Article 10 of the Italian Law of 10 December 1981 is contrary to Article 29 (1) of Directive 71/305;

Declare that, by failing to notify the Commission of the text of the Law of 10 December 1981 after it had been adopted, the Italian Republic has infringed Article 33 of the said directive;

Order the Commission to bear half the costs incurred by it and the Italian Republic to pay the other half of the Commission's costs together with its own.

[1] — Judgment of 25 May 1982 in Case 96/81 *Commission of the European Communities* v *Kingdom of the Netherlands* [1982] ECR 1791.

JUDGMENT OF THE COURT
28 March 1985 *

In Case 274/83

Commission of the European Communities, represented by Alberto Prozzillo acting as Agent, with an address for service in Luxembourg at the office o Manfred Beschel, a member of its Legal Service, Jean Monnet Building Kirchberg,

applicant

v

Italian Republic, represented by Arnaldo Squillante, Head of the Department fo Contentious Diplomatic Affairs, acting as Agent, assisted by Ivo Braguglia Avvocato dello Stato, with an address for service in Luxembourg at the Italia Embassy,

defendan

APPLICATION for a declaration that, by adopting certain provisions concernin the award of public works contracts and by failing to notify the Commission of th main provisions of national law which it adopted in the field covered by Counc Directive 71/305/EEC of 26 July 1971 concerning the coordination of procedur for the award of public works contracts (Official Journal, English Special Editio 1971 (II), p. 682), the Italian Republic has failed to fulfil its obligations under th EEC Treaty,

THE COURT

composed of: Lord Mackenzie Stuart, President, G. Bosco and O. Due, Presiden of Chambers, P. Pescatore, T. Koopmans, K. Bahlmann and R. Joliet, Judges,

Advocate General: C. O. Lenz
Registrar: P. Heim

**

gives the following

* Language of the Case: Italian.
** after hearing the Opinion of the Advocate General delivered at the sitting on 3 February 1985.

JUDGMENT

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

Decision

By application lodged at the Court Registry on 16 December 1983, the Commission of the European Communities brought an action pursuant to Article 169 of the EEC Treaty for a declaration that, by adopting certain provisions concerning the award of public works contracts and by failing to notify the Commission of the main provisions of national law which it adopted in the field covered by Council Directive 71/305/EEC of 26 July 1971 concerning the coordination of procedures for the award of public works contracts (Official Journal, English Special Edition 1971 (II), p. 682), the Italian Republic has failed to fulfil its obligations under the EEC Treaty.

On 26 July 1971, the Council of the European Communities adopted two directives for attaining freedom of establishment and freedom to provide services in relation to public works contracts. The first, Directive 71/304/EEC (Official Journal, English Special Edition 1971 (II), p. 678) implements, with regard to public works contracts, the principle of the prohibition of discrimination based on nationality in the matter of freedom to provide services. The second, Directive 71/305/EEC (Official Journal, English Special Edition 1971 (II), p. 682), provides for the coordination of national procedures for the award of public works contracts and lays down in particular:

Common advertising rules (Article 12 *et seq.*);

Common rules on participation (Title IV) comprising the introduction of objective criteria both for qualitative selection of undertakings (Article 23 *et seq.*) and for the award of contracts (Article 29).

In its judgment of 22 September 1976 (Case 10/76 *Commission* v *Italy* [1976] ECR 1359) the Court held that by failing to adopt, within the prescribed period, the measures necessary to comply with Council Directive 71/305, the Italian Republic had failed to fulfil an obligation under the Treaty. On 8 August 1977 the Italian Republic adopted, in response to that judgment, Law No 584 (*Gazzetta Ufficiale*

[Official Gazette] No 232 of 26 August 1977, p. 6272), which in the Commission's opinion duly implemented the directive.

4 On 10 December 1981, the Italian legislature adopted Law No 741 concerning 'supplementary rules to speed up procedures for the performance of public works' (*Gazzetta Ufficiale* No 344 of 16 December 1981, p. 8271). Since the Commission considered that several of the provisions of that Law, especially Articles 9, 10, 11, 13 and 15, infringed in particular the provisions of Directive 71/305 concerning the publication of contract notices in the Official Journal of the European Communities, proof of the financial, economic and technical capacity of the contractor and the criteria for the award of contracts and that, moreover, by failing to notify it of the text of that Law, Italy had failed to fulfil its obligations under Article 33 of the directive, it requested the Italian Government, by a letter dated 17 December 1982, pursuant to Article 169 of the EEC Treaty, to submit its observations with regard to the eight allegations therein contained within two months of receipt of the letter.

5 By a letter dated 24 February 1983 from its Permanent Representation, the Italian Government admitted that the complaints with regard to the third, fourth and fifth paragraphs of Article 10 and Article 13 of Law No 741 were justified but contested the allegations with regard to Article 9, the first paragraph of Article 10 and Article 11 and the first sentence of the second paragraph of Article 15 of the Law. The Italian Government sent to the Commission, in an annex to that letter, the text of a preliminary draft law drawn up by the Minister of Public Works in response to the requests made by the Commission.

6 Since the Commission took the view that it was unable to take that preliminary draft law into account in so far as it amounted merely to 'a vague and incomplete intention on the part of the competent authorities to comply with the provisions of the directive', it delivered a reasoned opinion dated 2 August 1983 which repeated all the complaints which had already appeared in its initial letter. In that opinion, the Italian Republic was invited to adopt the necessary measures within one month.

7 By a telex message dated 27 September 1983, the Italian Government, in response to the reasoned opinion, informed the Commission of the intention of the Minister of Public Works to lay the aforementioned draft before the Italian Parliament

once again since it had lapsed at the end of the previous legislative period. Since no further steps were taken the Commission decided to bring an action before the Court.

Law No 687 amending Law No 741 and the provisions relating to provisional security and advertising was not adopted until 8 October 1984.

In this action the Commission alleges in the first place that on 10 December 1981, Italy adopted Law No 741 concerning supplementary rules to speed up procedures for the performance of public works (*Gazzetta Ufficiale* No 344 of 16 December 1981, p. 8271) Articles 9, 10, 11, 13 and 15 of which infringe certain provisions of Directive 71/305 and in the second place that contrary to Article 33 of that directive Italy did not notify the text of the Law to the Commission.

I — The adoption of certain provisions in Law No 741

(a) *Admissibility of increased tenders*

The Commission contends that Article 29 (1) of the directive provides for only two criteria for the award of contracts, that is to say the lowest price or the most economically advantageous tender, whilst Article 9 of the Italian law permits the acceptance of an increased tender not corresponding to either of those two criteria in the case of a restricted invitation to tender.

The Italian Government replies to that allegation that the possibility of submitting tenders increased with regard to the basic price for tenders fixed by the administration conforms to the criterion of 'the lowest price' provided for in Article 29 (1) of the directive. Article 9 of the Italian Law provides that the contract is to be awarded to the tenderer who submits the offer which exceeds the price fixed by the smallest margin so that the contract is always awarded to the person who tenders 'the lowest price'.

In the light of the submissions made by the Italian Government, the Commission has withdrawn its complaint with regard to that matter.

(b) *Procedure for making increased tenders*

13 According to the Commission, Article 9 of Italian Law No 741 of 10 Decembe 1981, in conjunction with the third paragraph of Article 1 of Law No 504 of July 1970 (*Gazzetta Ufficiale* No 179 of 17 July 1970), provides that the calcu lation of prices in the context of tendering procedures is to include the possibilit of making higher tenders according to the 'anonymous envelope' procedure whereas Article 29 (3) of the directive prohibits the calculation of prices i accordance with that procedure after the expiry of the time-limits referred t therein.

14 The Italian Government replies to that allegation that recourse to the anonymou envelope procedure does not follow from Article 9 of the Law of 1981 and that i practice that procedure is neither provided for nor used in connection with th award of contracts under Article 9. It is only in order to clarify the position and t eliminate the Commission's doubts that Article 1 of the draft law, approved o 22 December 1983, prohibits the use of the anonymous envelope procedur provided for in Article 1 of Law No 504/70 with regard to contracts falling withi the scope of the directive.

15 Since the draft law was adopted on 8 October 1984 the Commission ha withdrawn its complaint in the course of the oral procedure.

(c) *Secret tender equal to or closest to the average tender*

16 According to the Commission the criterion for the award of a contract, for which in Italy the first paragraph of Article 10 of Law No 741 refers to Article 4 of Law No 14 of 2 February 1973 and therefore to Article 1 (d) of that Law which provides that the contract is to be awarded to the tenderer whose tender equals the average tender or failing that is the nearest tender below that average, does not correspond to either of the two criteria provided for in Article 29 (1) of the directive, that is to say the lowest price or the most economically advantageous tender according to various criteria depending on the contract.

17 The Italian Government, on the contrary, considers that the criterion of the average price enables the most economically advantageous tender to be determined by virtue of the specific rules relating to the application of that criterion as defined in Article 4 of Law No 14/73. Moreover, in the course of the oral procedure the

Italian Government has raised an objection of inadmissibility on the ground that in the Commission's initial letter the first paragraph of Article 10 of Law No 741 was alleged to be incompatible only with Article 29 (3) of the directive, whereas in its reasoned opinion the Commission maintained that the criterion for the award of a contract in question did not correspond to either of the criteria provided for in Article 29 (1) of the directive.

It should be recalled that under Article 169 of the Treaty the Commission may bring before the Court an action for a declaration that a State has failed to fulfil its obligations only if that State does not comply with the reasoned opinion within the period laid down therein by the Commission. The Commission does not deliver its reasoned opionion until the Member State has been given an opportunity to submit its observations.

It follows from the purpose assigned to the preliminary stage of the procedure under Article 169 that the initial letter is intended to define the subject-matter of the dispute and to indicate to the Member State which is invited to submit its observations the factors enabling it to prepare its defence.

As the Court held in its judgment of 11 July 1984 (Case 51/83 *Commission* v *Italy* [1984] ECR 2793) the opportunity for the Member State concerned to submit its observations constitutes an essential guarantee required by the Treaty and, even if the Member State does not consider it necessary to avail itself thereof, observance of that guarantee is an essential formal requirement of the procedure under Article 169.

Although it follows that the reasoned opinion provided for in Article 169 of the EEC Treaty must contain a coherent and detailed statement of the reasons which led the Commission to conclude that the State in question has failed to fulfil one of its obligations under the Treaty, the Court cannot impose such strict requirements as regards the initial letter, which of necessity will contain only an initial brief summary of the complaints. As the Court stated in its judgment of 31 January 1984 (Case 74/82 *Commission* v *Ireland* [1984] ECR 317) there is nothing therefore to prevent the Commission from setting out in detail in the reasoned opinion the complaints which it has already made more generally in its initial letter.

22 In that respect it is clear from the documents on the file that in its initial letter dated 17 December 1982 the Commission alleged that the first paragraph of Article 10 of Law No 741 infringed Article 29 (3) of Directive 71/305 which prohibits the anonymous envelope procedure. But it also stated, after citing the text of the Law, that the provision infringed the directive 'in a manner analagous to that indicated in the preceding paragraph'. In that paragraph it complained that Article 9 of Law No 741 provided *inter alia* for a criterion for the award of contracts which was not compatible with either of the two criteria provided for in Article 29 (1) of the directive.

23 Consequently, although its wording is not very explicit, the initial letter did give notice to the Italian Government of the complaint against it. The Commission's complaint is therefore admissible.

24 With regard to the substance of the complaint it appears that the first paragraph of Article 10 of Law No 741 contains, in addition to the criteria for the award of contracts of the lowest price and the most economically advantageous tender, which are provided for in the directive, the criterion of the average price calculated on the basis of the tenders in the lower half of the scale between the lowest and highest tenders.

25 The Italian Government's contention that the criterion for the award of the contract to the person who submits 'the tender which equals the average tender or is the closest to it' serves to determine 'the most economically advantageous tender' within the meaning of Article 29 of the directive is incorrect. In order to determine the most economically advantageous tender, the authority making the decision must be able to exercise its discretion in taking a decision on the basis of qualitative and quantitative criteria that vary according to the contract in question and cannot therefore rely solely on the quantitative criterion of the average price.

26 It is therefore necessary to declare that the first paragraph of Article 10 (1) of Law No 741 is not compatible with Directive 71/305 in so far as it contains a criterion for the award of contracts which is not provided for in Article 29 (1) of the directive.

(d) *Publication of contract notices*

27 The Commission also maintains that the third paragraph of Article 10 of Law No 741, in so far as it suspends until 31 December 1983 the operation of Article 7 of

Law No 14 of 2 February 1973 and the provisions of Law No 584 of 8 August 1977 with regard to the publication of contract notices, is incompatible with Article 12 of the directive which lays down an obligation to publish contract notices falling within the scope of the directive in the Official Journal of the European Communities. According to the Commission the fourth paragraph of Article 10 concerning the publication of awards is also incompatible with Article 12 of the directive which provides that contract notices are not to be published in the daily press before they have been dispatched to the Official Journal.

The Italian Government does not dispute that these complaints are well-founded. It is therefore necessary to declare that it has failed to fulfil its obligations in the manner alleged.

(e) *The contractor's financial and economic standing and technical knowledge and ability*

The fifth paragraph of Article 10 of Law No 741, to the extent to which it suspends until 31 December 1983 Articles 17 and 18 of Law No 584 of 8 August 1977, which implement Articles 25 and 26 of the directive, is in the Commission's opinion incompatible not only with the provisions listing the references which the authority awarding the contract may require in order to assess the contractor's financial and economic standing and technical knowledge and ability, but also with Articles 17 (d), 20, 22 and 27 of the directive, according to which the suitability of contractors is to be checked in accordance with the criteria of economic and financial standing and technical knowledge and ability referred to in Articles 25, 26 and 27 of the directive.

The Italian Government does not dispute that these complaints are well-founded. It is therefore necessary to declare that it has failed to fulfil its obligations.

(f) *Additional or modified works*

The Commission contends that Article 11 of Law No 741, by authorizing the administration to proceed with 'the award of additional or modified works, once a favourable opinion has been delivered by the competent consultative body or deliberative body with regard to approval of the relevant expertise' is incompatible with Article 9 (f) of the directive in so far as it fails to take account of any of the conditions provided for by that provision with regard to the award of additional works to the contractor who successfully tendered for the main works.

32 The Italian Government states, on the contrary, that Article 11 relates solely to 'the award of additional or modified works' and does not relate to the conditions on which additional works are to be awarded to the contractor who was awarded the main contract provided for in Article 9 (f) of the directive. Those conditions continue to be governed by Article 5 (f) of Law No 584/77 which conforms to the aforementioned Article 9 (f) of the directive. Where the conditions in Article 5 (f) are satisfied, Article 11 permits, at the most, the award of works to the successful tenderer before the contract for additional works has been approved in order to speed up procedures for the performance of public works. The hypothesis on which the Commission's complaint is based, namely that Article 11 introduces a derogation from the provisions of Article 9 (f) of the directive, therefore lacks any foundation.

33 In the light of the submissions made by the Italian Government, the Commission has stated that it is not proceeding with this complaint.

(g) *Urgency*

34 The Commission maintains that Article 13 of Law No 741, in so far as it permits, by reference to Article 41 (5) of the Regolamento [Regulation] approved by Regio Decreto [Royal Decree] No 827 of 23 May 1924, the award of private contracts 'when the urgency of the works, purchases, transport and materials is such that there must be no delay', is incompatible with Article 9 (d) of the directive to the extent to which it permits urgency to be relied upon in circumstances which do not correspond to the conditions provided for expressly in Article 9 (d).

35 The Italian Government has not contested that allegation. It is therefore necessary to declare that it has failed to fulfil its obligations in the manner alleged.

(h) *Security*

36 Finally the Commission considers that the first sentence of the second paragraph of Article 15 of Law No 741, according to which 'if it is provided that the undertaking invited to tender can be awarded only one contract that undertaking shall provide only one provisional deposit, calculated on the basis of the amount of the most valuable contract', is incompatible with Articles 25 and 26 of the directive to

the extent to which the provision of security is not mentioned in the exhaustive list of references in Articles 25 and 26 that may be required at the tendering stage as proof of the contractor's financial and economic standing and technical knowledge and ability. Since a deposit serves as a guarantee to the authority awarding in the contract that the works will be performed properly, it can be required only of the contractor to whom the contract is awarded.

According to the Italian Government, this complaint is inadmissible on the ground that the Commission has no interest in the matter in so far as the complaint is based solely on the first sentence of the second paragraph of Article 15 of Law No 741 since it is not that provision which requires contractors to provide a provisional deposit in order to take part in the tendering procedure, but other provisions which are not impugned. The first sentence of the second paragraph of Article 15 merely provides a power to permit a contractor who is taking part in several tender procedures to lodge only one provisional deposit.

In addition, the Italian Government contends that Article 16 (i) of the directive refers in general terms to 'deposits and any other guarantees, whatever their form, which may be required by the authorities awarding contracts' and therefore refers not only to the definitive deposit to be paid by the tenderer to whom the contract is awarded, but also to a provisional deposit whose specific purpose is to guarantee that the tender is serious and to compensate the administration in advance for any injury. The provisional deposit merely reinforces the obligation laid down in Article 16 (m) of the directive that the tenderer must keep open his tender for a certain period of time.

Since Italian Law No 687 amending Law No 741 and in particular the provisions relating to provisional securities was adopted on 8 October 1984, the Commission has withdrawn its complaint in the course of the oral procedure.

II — Failure to notify the text of Law No 741

The Commission claims that, by failing to notify it of the text of Law No 741 of 10 December 1981, Italy has failed to fulfil its obligations under Article 33 of Directive 71/305.

41 The Italian Government for its part considers that this complaint has ceased to be material in so far as the Commission was well aware of the text of the Law when it delivered its reasoned opinion.

42 In that respect it is necessary to declare that even if the Commission was aware of Law No 741 when it delivered its reasoned opinion, the fact remains that the Italian Government has not notified it officially of the text of the law as it is obliged to do under Article 33. It should be emphasized in that respect that the Member States are obliged, by virtue of Article 5 of the EEC Treaty, to facilitate the achievement of the Commission's tasks which, under Article 155 of the EEC Treaty, consist in particular of ensuring that the provisions of the Treaty and the measures adopted by the institutions pursuant thereto are applied. It is for those reasons that Article 33 of the directive in question, like other directives, imposes upon the Member States, an obligation to provide information. In the absence of such information, the Commission is not in a position to ascertain whether the Member State has effectively and completely implemented the directive.

43 It is therefore necessary to declare that the Italian Republic, by failing to notify the Commission officially of the text of Law No 741, has failed to fulfil its obligations under Article 33 of Directive 71/305.

III — Costs

44 Under Article 69 (2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs. As the defendant has failed in the majority of its submissions, it must be ordered to pay the costs.

On those grounds,

THE COURT

hereby:

(1) Declares that the Italian Republic, by adopting Article the first, third and fifth paragraphs of 10 and Article 13 of Law No 741, has failed to fulfil its obligations under Directive 71/305/EEC.

(2) Declares that the Italian Republic, by failing to notify the Commission officially of the text of Law No 741, has also failed to fulfil its obligations under Article 33 of Directive 71/305.

(3) Orders the defendant to pay the costs.

Mackenzie Stuart Bosco Due

Pescatore Koopmans Bahlmann Joliet

Delivered in open court in Luxembourg on 28 March 1985.

P. Heim
Registrar

A. J. Mackenzie Stuart
President

Case 275/83

Commission of the European Communities

v

Kingdom of Belgium

'Social security — Deduction by way of contribution'

Summary

1. *Member States — Obligations — Failure to fulfil obligations — Justification — No permissible*
(EEC Treaty, Art. 169)

2. *Social security for migrant workers — Sickness insurance — Contributions from person entitled to a pension — Deductions from pensions of Community nationals residing i another Member State — Not permissible*
(Regulation No 1408/71 of the Council, Art. 33)

1. A Member State cannot plead the provisions, practices or circumstances existing in its internal legal order to justify a failure to comply with obligations resulting from Community regulations.

2. The deduction by a Member State o contributions from statutory old-age retirement, service-related and survivors pensions in respect of Communit nationals residing in another Membe State, constitutes a failure to fulfil th obligations under Article 33 of Regu lation No 1408/71.

DE EUROPÆISKE FÆLLESSKABERS DOMSTOL

GERICHTSHOF DER EUROPÄISCHEN GEMEINSCHAFTEN

ΔΙΚΑΣΤΗΡΙΟ ΤΩΝ ΕΥΡΩΠΑΪΚΩΝ ΚΟΙΝΟΤΗΤΩΝ

COURT OF JUSTICE OF THE EUROPEAN COMMUNITIES

TRIBUNAL DE JUSTICIA DE LAS COMUNIDADES EUROPEAS

LUXEMBOURG

COUR DE JUSTICE DES COMMUNAUTÉS EUROPÉENNES

CORTE DI GIUSTIZIA DELLE COMMUNITÀ EUROPEE

HOF VAN JUSTITIE VAN DE EUROPESE GEMEENSCHAPPEN

TRIBUNAL DE JUSTIÇA DAS COMUNIDADES EUROPEIAS

Translation

Case 199/85

JUDGMENT OF THE COURT

10 March 1987

(Failure to publish a notice of a public works contract)

In Case 199/85

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

applicant,

v

Italian Republic, represented by Luigi Ferrari Bravo, Head of the Department for Contentious Diplomatic Affairs, acting as Agent, assisted by Pier Giorgio Ferri, Avvocato dello Stato, with an address for service in Luxembourg at the Italian Embassy,

defendant,

APPLICATION for a declaration that the Italian Republic, more particularly the Municipality of Milan, as a local public authority, by deciding to award by private contract a contract for the construction of a plant for the recycling

of solid urban waste and thus failing to publish a contract notice in the Official Journal of the European Communities, has failed to fulfil its obligations under Council Directive 71/305/EEC concerning the co-ordination of procedures for the award of public works contracts,

THE COURT

composed of: Lord Mackenzie Stuart, President, T.F. O'Higgins and F.A. Schockweiler (Presidents of Chambers), T. Koopmans, K. Bahlmann, R. Joliet and G.C. Rodriguez Iglesias, Judges,

Advocate General: C.O. Lenz

Registrar: D. Louterman, Administrator,

having regard to the Report for the Hearing and further to the hearing on 6 November 1986,

after hearing the Opinion of the Advocate General delivered at the sitting on 13 January 1987,

gives the following

JUDGMENT

1 By an application lodged at the Court Registry on 28 June 1985 the Commission of the European Communities brought an action under Article 169 of the EEC Treaty for a declaration that the Italian Republic, more particularly the Municipality of Milan, as a local public authority, by deciding to award by private contract a contract for the construction of a plant for the recycling of solid urban waste and thus failing to publish a notice thereof in the Official Journal of the European Communities, has failed to fulfil its obligations under Council Directive 71/305 of 26 July 1971 concerning the co-ordination of procedures for the award of public works contracts (Official Journal, English Special Edition 1971 (II), p. 682).

2 Reference is made to the Report for the Hearing for the facts and the submissions and arguments of the parties, which are mentioned or discussed hereinafter only in so far as is necessary for the reasoning of the Court.

I - Admissibility

3 The Italian Republic has raised an objection of inadmissibility. It maintains that it fully complied with the reasoned opinion delivered by the Commission and that, consequently, an action before the Court of Justice under Article 169 of the EEC Treaty is no longer admissible.

4 In its reasoned opinion delivered in the pre-litigation procedure the Commission requested the Italian Republic "to adopt the measures necessary to comply with this reasoned opinion within 30 days of notification hereof" and in the final paragraph thereof stated that "by necessary measures is meant above all a written undertaking by the Municipality of Milan that it will comply with all the provisions of Directive 71/305/EEC in future".

5 In response to the reasoned opinion, the Italian authorities sent to the Commission a copy of a letter in which the Minister of the Interior instructed the Prefect of Milan to enjoin the Municipality of Milan strictly to ensure that the directive was complied with in full in future together with the following written declaration by the Mayor of Milan dated 19 April 1984:

> "... although convinced that the Municipal Administration acted, as on every other occasion, in a lawful manner in authorizing the award by private contract of a contract for the construction of the said plant for the recycling of solid urban waste,
>
> I HEREBY DECLARE,
>
> as requested in the aforementioned opinion, that the Municipality of Milan will ensure that, in the future, too, its administrative action is in conformity with the provisions of primary and secondary legislation, including all the provisions of Directive 71/305/EEC, by according them full respect, in both form and substance".

6 It is clear from the documents before the Court that subsequently there were considerable delays in the construction of the proposed plant, the award of the contract for which was objected to by the Commission in

its reasoned opinion, and that considerable changes had to be made to the project. However, no steps were taken with a view to proceeding to a fresh invitation to tender under conditions complying with the terms of the reasoned opinion.

7 It must be pointed out that the purpose of the procedure provided for in Article 169 of the EEC Treaty is, inter alia, to avoid a situation in which a Member State's conduct is put in issue before the Court when, following the commencement by the Commission of the infringement procedure, the State admits the breach of obligations with which it is charged and remedies that breach within the period fixed by the Commission.

8 In this case, however, the declaration issued by the Mayor of Milan disputes the view expressed by the Commission in its reasoned opinion as to the existence of an infringement and no practical measure entailing acceptance of that point of view has been adopted by the Italian authorities.

9 In those circumstances, the Italian Republic cannot be considered to have complied with the reasoned opinion delivered by the Commission and therefore the action brought by the Commission under Article 169 of the EEC Treaty cannot be considered inadmissible. Consequently, the action must be declared admissible.

II - Substance

10 By reference to the observations submitted to the Commission by the Municipality of Milan during the pre-litigation procedure, the defendant justified the award by private contract of the contract in question by relying upon Article 9 (b) and (d) of Directive 71/305.

11 According to the defendant, the construction of the type of plant envisaged involved the use of exclusive rights held by the undertakings to which the contract was awarded and secondly, as the result of certain events, in particular the accident at Seveso, the construction of the plant was a matter of extreme urgency.

12 It should be observed that Directive 71/305 is intended to facilitate the effective attainment within the Community of freedom of establishment and freedom to provide services in respect of public works contracts. To that end it lays down common rules, in particular regarding advertis and participation, so that public works contracts in the Member States are open to all undertakings in the Community.

13 Article 9 of the directive permits awarding authorities to award their works contracts without applying the common rules, except those contained in Article 10, in a number of situations, including (b) and (d), described under the following:

> "when, for technical or artistic reasons or for reasons connected with the protection of exclusive rights, the works may only be carried out by a particular contractor," (b)

"in so far as is strictly necessary when, for reasons of extreme urgency brought by events unforeseen by the authorities awarding contracts, the time-limit laid down in other procedures cannot be kept;" (d).

14 Those provisions, which authorize derogations from the rules intended to ensure the effectiveness of the rights conferred by the Treaty in the field of public works contracts, must be interpreted strictly and the burden of proving the actual existence of exceptional circumstances justifying a derogation lies on the person seeking to rely on those circumstances.

15 In the present case, no facts of such a nature as to show that the conditions justifying the derogations provided for in the aforementioned provisions were satisfied have been put forward. Consequently, the Commission's application must be granted without any need to examine the facts at issue more closely.

16 It must therefore be declared that since the Municipality of Milan decided to award by private contract a contact for the construction of a plant for the recycling of solid urban waste and thus did not publish a contract notice in the Official Journal of the European Communities, the Italian Republic has failed to fulfil its obligations under Council Directive 71/305 of 26 July 1971 concerning the co-ordination of procedures for the award of public works contracts.

Costs

17 According to Article 69 (2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs. Since the defendant has failed in its submissions, it must be orderd to pay the costs.

On those grounds,

THE COURT

hereby:

1. **Declares that since the Municipality of Milan decided to award by private contract a contract for the construction of a plant for the recycling of solid urban waste and thus did not publish a contract notice in the Official Journal of the European Communities, the Italian Republic has failed to fulfil its obligations under Council Directive 71/305/EEC of 26 July 1971 concerning the co-ordination of procedures for the award of public works contracts.**

2. **Orders the Italian Republic to pay the costs.**

Mackenzie Stuart O'Higgins Schockweiler Koopmans

Bahlmann Joliet Rodriguez Iglesias

Delivered in open court in Luxembourg on 10 March 1987.

A.J. Mackenzie Stuart
President

P. Heim
Registrar

Translation Case 199/85

REPORT FOR THE HEARING

(Failure to publish a notice of a public works contract)

In Case 199/85

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

applicant,

v

Italian Republic, represented by Luigi Ferrari Bravo, Head of the Department for Contentious Diplomatic Affairs, acting as Agent, assisted by Pier Giorgio Ferri, Avvocato dello Stato, with an address for service in Luxembourg at the Italian Embassy,

defendant,

APPLICATION for a declaration that the Italian Republic, more particularly the Municipality of Milan, as a local public authority, by deciding to award by private contract a contract for the construction of a plant for the recycling

of solid urban waste and thus failing to publish a contract notice in the Official Journal of the European Communities, has failed to fulfil its obligations under Council Directive 71/305/EEC concerning the co-ordination of procedures for the award of public works contracts.

I. Relevant legal provisions and outline of the facts

1. Council Directive 71/305 of 26 July 1971 concerning the co-ordination of procedures for the award of public works contracts (Official Journal, English Special Edition 1971 (II), p. 682), which was implemented in Italy by Law No. 584 of 8 August 1977, co-ordinated the procedures for the award of public works contracts in Member States on behalf of the State, or regional or local authorities or other legal persons governed by public law, on the basis of the following principles: prohibition of technical specifications that have a discriminatory effect, adequate advertising of contracts and the fixing of objective criteria for participation.

The directive which applies to public works contracts whose value is not less than 1 million ECU, provides, in Title III, Article 12 et seq., for adequate advertising of invitations to tender giving all interested contractors in the Community the chance to know of the invitation to tender and to participate in the procedure. Article 12 requires notices of invitation to tender to be sent to the Official Publications Office of the European Communities, which will publish it in the Official Journal not later than nine days after the date of dispatch. Article 15 provides for an accelerated procedure where the period within which the Publications Office must publish the notice is reduced from nine to five days and the periods within which requests to participate and tenders must be received are reduced to twelve and ten days respectively.

Cr/de/Ly

Article 9 of the directive provides for a number of exceptions to its provisions on advertising. In particular it provides for exemption

"(b) when, for technical or artistic reasons or for reasons connected with the protection of exclusive rights, the works may only be carried out by a particular contractor;"

and

"(d) in so far as is strictly necessary when, for reasons of extreme urgency brought by events unforeseen by the authorities awarding contracts, the time-limit laid down in other procedures cannot be kept."

2. By a resolution of 5 November 1979 the Municipal Council of Milan approved and brought into force Decision No. 0251-0561 of 18 July 1979 adopted by the Board of the Azienda Municipale Nettezza Urbana di Milano /Municipal Refuse Disposal Corporation of Milan, hereinafter referred to as "the Milan Refuse Disposal Corporation"/ by which that body awarded by private contract a contract for the construction of a plant for the recycling of solid urban waste to a consortium of three Italian undertakings for a sum of 27 thousand million lire.

The award of the contract by private contract excluded publication of the contract notice in the Official Journal of the European Communities required by Directive 71/305 and prevented other European undertakings which might have been interested in the contract from participating.

3. During 1980 and 1981 the staff of the Commission repeatedly drew the Italian authorities' attention to the fact that the procedure for the award of the contract followed by them appeared to be incompatible with the directive's requirements.

The Italian authorities contended in essence that the special characteristics of the plant to be constructed necessitated works which would be best carried out by the consortium composed of the successful tenderers which would give a higher rate of salvage than that achieved by existing plants in Europe at the time. Moreover, the construction of that type of plant involved the use of exclusive rights belonging to those undertakings. The Municipality of Milan also stated that the requirement for the application of the exception contained in Article 9 (d) of the directive, namely that there must be "reasons of extreme urgency brought about by events unforeseen by the authorities awarding contracts", was satisfied in this case and that it had done no more than was strictly necessary.

4. Considering the information and particulars given to it to be unsatisfactory, the Commission, by a letter dated 1 August 1983, commenced the procedure provided for in Article 169 of the EEC Treaty and requested the Italian authorities to submit their observations within two months.

5. By a letter dated 10 November 1983 the Permanent Representation of Italy at the European Communities forwarded to the Commission a communication dated 11 October 1983 from the Mayor of Milan containing the observations requested by the Commission. In that letter the Mayor disputed the Commission's observations and maintained that the exceptions contained in Article 9 (b) and (d) of Directive 71/305 were applicable in this case.

With regard to Article 9 (b), the Mayor of Milan emphasized that the advisory technical committee appointed by the Milan Refuse Disposal Corporation had reached the conclusion not only that the plant proposed by

the three Italian undertakings was superior to any to be found in Europe but also that the construction of that type of plant involved the use of exclusive rights belonging to those undertakings.

With regard to Article 9 (d) the Mayor relied on the following three factors as justifying the application of the exception:

The accident at Seveso, and therefore the urgent need to replace an additional incinerator, which, although planned at one stage, could no longer be built because of the refusal of the Lombardy regional authorities as a result of the discovery that the incinerator emitted dioxin, is an unforeseeable event;

The problem of disposing of solid urban waste after the closure of certain refuse dumps, the closing-down of one of the two incinerators and the limited operation of the other is of extreme urgency;

The proposed works are limited to what is strictly necessary and consist of the replacement of the two existing incinerators and of the projected incinerators by a new recycling plant.

6. The Commission was not satisfied with those observations and, on 13 March 1984, delivered a reasoned opinion under Article 169 of the EEC Treaty requesting the Italian Republic to adopt the measures necessary to comply with the opinion within 30 days of its notification. In that reasoned opinion it stated as follows:

"By necessary measures is meant above all a written undertaking by the Municipality of Milan that it will comply with all the provisions of Directive 71/305/EEC in future".

7. In response to the reasoned opinion, the Italian authorities submitted a letter in which the Minister of the Interior instructed the Prefect of Milan to enjoin the Municipality of Milan strictly to ensure that the directive was complied with in full in future together with the following written declaration by the Mayor of Milan dated 19 April 1984:

"... although convinced that the Municipal Administration acted, as on every other occasion, in a lawful manner in authorizing the award by private contract of a contract for the construction of the said plant for the recycling of solid urban waste,

I HEREBY DECLARE,

as requested in the aforementioned opinion, that the Municipality of Milan will ensure that, in the future, too, its administrative action is in conformity with the provisions of primary and secondary legislation, including all the provisions of Directive 71/305/EEC, by according them full respect, in both form and substance".

8. The Commission considered the declaration by the Mayor of Milan to be unsatisfactory. It contended that it was patently ambiguous and gave no effective guarantee for the future and stated that, according to its information, the Municipality of Milan had made another award in respect of the same type of contract and had failed once again to comply with the provisions of Directive 71/305.

9 By an application lodged at the Court Registry on 28 June 1985 pursuant to the second paragraph of Article 169 of the EEC Treaty the Commission brought this action.

10. The written procedure followed the normal course.

11. In its reply the Commission sets out a number of new facts which came to its knowledge after the Italian Government had submitted its defence. In the first place, the construction of the recycling plant decided upon in 1979 was never commenced. In 1984 the Municipality of Milan decided to have the plant in question constructed at Muggiano and the Milan Refuse Disposal Corporation applied to the European Investment Bank for finance. The Commission was asked to give its opinion on that application; it was then that it discovered what it believed to be a further infringement, although in fact the same plant was involved.

The Commission also learnt that proceedings were pending before the Tribunale Amministrativo /Administrative Tribunal/, Lombardy, concerning the award in 1979 by private contract of a contract for the construction of the recycling plant which is the subject of this case. It states that it is possible that those proceedings could give rise to a reference to the Court of Justice for a preliminary ruling.

The Italian Republic did not dispute those new facts.

12. Upon hearing the report of the Judge-Rapporteur and the views of the Advocate General, the Court decided to open the oral procedure without any preparatory inquiry. It nevertheless requested the Italian Government to reply in writing to certain questions set out in part IV below.

II - Conclusions of the parties

The Commission claims that the Court should reject all other conclusions and

(i) declare that by deciding to award by private contract a contract for the construction of a plant for the recycling of solid urban waste and thus failing to publish a contract notice in the Official Journal of the European Communities, the Italian Republic, and in particular the Municipality of Milan, has failed to fulfil its obligations under Directive 71/305/EEC concerning the co-ordination of procedures for the award of public works contracts; and

(ii) order the Italian Republic to pay the costs.

The Italian Republic contends that the Court should:

Declare the application inadmissible.

III - Submissions and arguments of the parties

A - Admissibility of the application

1. The Italian Government, in its defence, raises an objection of inadmissibility against the Commission's application on the ground that the Italian administrative authorities have complied with that which was required of them by the reasoned opinion.

In its reasoned opinion the Commission requested the Italian Republic to adopt the measures necessary to comply with the opinion within 30 days. As soon as it received the opinion the Italian Government took action to ensure compliance with it within the period prescribed by the Commission. Pursuant to the Minister of the Interior's request, the Mayor of Milan adopted the declaration of 19 April 1984 in which he gave a strict undertaking that the Municipality of Milan would ensure that its administrative action complied with the provisions of the directive in question.

The Italian Government disputes the Commission's arguments that

(a) the patent ambiguity of the Mayor's declaration gives no effective guarantee for the future; and

(b) that assessment was confirmed by the fact that subsequent to or at the same time as the adoption of the aforementioned declaration the Municipality of Milan made another award in respect of the same type of contract and once again failed to comply with the provisions of the directive.

(a) With regard to the ambiguity of the Mayor's declaration, the Italian Government considers that it is not possible to conclude from its wording that it contains a contradiction such as to negate the assurance given for the future. In using the words which appear in the preamble to the declaration "although convinced that the Municipal Administration acted ... in a lawful manner", the Mayor of Milan was not contending that the complaint contained in the reasoned opinion was unfounded and that the Municipal Administration's action, viewed objectively, was unlawful, but was merely expressing his

subjective view without any intention to contradict the view taken in the reasoned opinion. According to the Italian Government, the Italian conjunction "pur", with which the phrase begins, is intended to signify clearly and unequivocally that the Municipality's willingness to accept the conclusion contained in the reasoned opinion prevails over its own conviction. In addition, the reasoned opinion did not request formal acknowledgement of the infringement of the provisions of the directive in question but merely a declaration offering certain guarantees concerning compliance therewith in the future.

(b) With regard to the Commission's second argument concerning an alleged further infringement committed by the Municipality of Milan in awarding another contract, the Italian Government considers in the first place, in its defence, that the Commission cannot rely in support of its case on a further allegation which the Court would have to consider without recourse to the procedure provided for in Article 169 of the EEC Treaty and secondly, in its rejoinder, that it is clear that the alleged further infringement never took place.

2. The Commission does not share the Italian Government's view on either of those two points.

(a) With regard to the ambiguity of the Mayor of Milan's declaration, the Commission begins by justifying the wording of the undertaking it required from the Italian Government in its reasoned opinion: the requirement of an undertaking that the provisions of the directive would be complied with in the future was based on the assumption that at the time the reasoned opinion was drawn up the construction of the recycling plant should have been completed in view of the fact that the award of the contract by private contract had been justified four years previously on the ground of extreme urgency and on the

assumption that it was not possible to block or annul the Municipality's decision. Consequently, it was not possible to envisage any measures other than a solemn undertaking with regard to the future.

According to the Commission, the undertaking which it requested from the Italian Government presupposed an acknowledgement, or at least an implicit acknowledgement, of the failure to comply with the directive. However, such an acknowledgement is totally absent from the Mayor of Milan's declaration which, on the contrary, is subject to a clear qualification: in the declaration it is stated in substance that the Municipality would comply in the future, too, with the provisions of Community law relating to public works contracts, as it had done in the past, which means that it would continue to act in the same way, in breach of the provisions of the directive. The Commission maintains that, in order to comply with the reasoned opinion, the Municipality of Milan should not only have given an undertaking for the future but also have admitted that it had acted wrongly in the past.

(b) With regard to the alleged later infringement of the directive in the award of a contract in respect of a new plant, the Commission accepts that the information which came to its notice as a result of a request for finance submitted to the European Investment Bank concerned the same plant as that for which a contract was awarded in 1979. The Commission points out that responsibility for the inaccuracy of its allegation regarding the further infringement lies partially with the Italian Republic since it failed to reply to inquiries made by the Commission concerning that alleged infringement and since it failed to include in its defence any objection to the Commission's statement regarding the alleged second infringement.

The Commission considers that those new facts should not affect the normal course of these proceedings.

B - Submissions and arguments of the parties concerning the substance o action

1. The Commission maintains that the Italian Government cannot rely on the derogations provided for in Article 9 (b) and (d) of Directive 71/305.

(a) Article 9 (b)

The Commission does not accept the arguments submitted by the Italian Government to the effect that the special characteristics of the plant to be constructed necessitated works which, at the time the contract was awarded, could be entrusted only to the consortium composed of the successful tenderers. According to the Municipality of Milan, only that consortium had the special knowledge and exclusive rights needed to build a plant of the type required.

The Commission considers that at the time the contract was awarded other undertakings in the Community were in a position to construct the plant in question, that the Municipality of Milan has never provided details of the exclusive rights held by the successful tenderers by virtue of which they alone were in a position to construct the plant, and finally that the Municipality of Milan has not proved, as is required of any public authority seeking to rely on the derogation contained in Article 9 (b) of

Directive 71/305, that at the relevant time the successful tenderers were the only contractors capable of carrying out the works in question.

(b) Article 9 (d)

The Commission takes the view that in this case the conditions for the application of the derogation contained in this provision - "extreme urgency brought by events unforeseen by the authorities" - have not been satisfied. It considers that the statements of the Municipality of Milan, in particular that it had for many years been considering the construction of urban waste disposal plants, invalidate the claim of "extreme urgency". In addition, neither the events which occurred at Seveso nor the refusal of the Lombardy regional authorities to sanction the construction of an incinerator constituted "events unforeseen by the authorities" since they did not substantially change the Municipality's objectives except with regard to the type of plant and its characteristics. The events which are relied upon by the Municipality and which are described as "unforeseen" had, on the contrary, been foreseen and known for more than a year. In its reply the Commission also contends that the fact that the construction works have not been commenced several years after the award of the contract is incontestable proof that urgency cannot seriously be relied upon.

2. The Italian Government, in its defence, considers that it is neither necessary nor appropriate to submit observations concerning the substance of the action, even as alternative submissions to the preliminary question of

of admissibility. The reasons which led the Municipality of Milan to consider that it had made lawful use of the possibilities provided for by Directive 71/305 have been broadly explained during the administrative stage of the procedure.

IV - Replies to the questions put to the Italian Government

The Court requested the Italian Government to inform it of the reasons why the project for which a contract was awarded in 1979 had not been realized subsequently and, as regards the plant intended to be constructed at Muggiano, to inform it whether it corresponded to the 1979 project, whether its construction was entrusted to the same undertakings as those to whom the 1979 project was awarded and which stage the construction of that plant had reached.

By a letter dated 18 August 1986 the Italian Government replied that the delay in realizing the 1979 project was due to the entry into force in December 1982 of new Italian rules concerning waste disposal giving effect to EEC directives in the matter, which necessitated substantial changes in the proposed plant for which a contract had originally been awarded.

As regards the plant intended to be constructed at Muggiano, the Italian Government confirms that it is the same plant as that for which a contract was awarded in 1979 and that the same undertakings are to carry out its construction. As regards the state of the works at Muggiano, so far only the works preliminary to the actual construction of the plant have been carried out.

G.C. Rodriguez Iglesias
Judge-Rapporteur

DE EUROPÆISKE FÆLLESSKABERS DOMSTOL

GERICHTSHOF DER EUROPAISCHEN GEMEINSCHAFTEN

ΔΙΚΑΣΤΗΡΙΟ ΤΩΝ ΕΥΡΩΠΑΪΚΩΝ ΚΟΙΝΟΤΗΤΩΝ

COURT OF JUSTICE OF THE EUROPEAN COMMUNITIES

TRIBUNAL DE JUSTICIA DE LAS COMUNIDADES EUROPEAS

CVRIA

LUXEMBOURG

COUR DE JUSTICE DES COMMUNAUTÉS EUROPÉENNES

CORTE DI GIUSTIZIA DELLE COMUNITÀ EUROPEE

HOF VAN JUSTITIE VAN DE EUROPESE GEMEENSCHAPPEN

TRIBUNAL DE JUSTIÇA DAS COMUNIDADES EUROPEIAS

Translation

Joined Cases 27, 28 and 29/86

/TCDA/Judgment of 9 July 1987 - Joined Cases 27, 28 and 29/86

@Judgment of the Court (Sixth Chamber)

@9 July 1987 *

@(Procedures for the award of public works contracts -
@Determination of the contractor's
@financial and economic standing)

/P3/
In Joined Cases 27, 28 and 29/86

REFERENCES to the Court under Article 177 of the EEC Treaty by the Third Chamber of the Administrative Appeals Section of the Conseil d'Etat ((State Council)) of Belgium for a preliminary ruling in the proceedings pending before that court

In Case 27/86

between

Constructions et Entreprises Industrielles S.A. (CEI)

@and

Association Intercommunale pour les Autoroutes des Ardennes,

whose successor in title is the Fonds des Routes ((Road Fund)), represented by the Minister of Public Works;

In Case 28/86

between

Ing. A. Bellini & Co. S.p.A., a limited company incorporated under Italian law,

and

Régie des Bâtiments ((Building Commission)), represented by the Minister of Public Works;

Intervener:
Confédération Nationale de la Construction A.s.b.l.;

In Case 29/86

between

Ing. A. Bellini & Co. S.p.A.

@and

Belgian State, represented by the Minister of Defence,

on the interpretation of Council Directive 71/305/EEC of 26 July 1971 concerning the co-ordination of procedures for the award of public works contracts (Official Journal, English Special Edition 1971 (II), p. 682),

@The Court (Sixth Chamber)

composed of: C.N. Kakouris, President of the Chamber, T.F. O'Higgins, T. Koopmans, K. Bahlmann and G.C. Rodriguez Iglesias, Judges,

Advocate General: J. Mischo.

Registrar: B. Pastor, Administrator,

after considering the observations submitted on behalf of

Constructions et Entreprises Industrielles S.A., the plaintiff in the main proceedings in Case 27/86, by X. Leurquin, Avocat,

Ing. A. Bellini & Co. S.p.A., the plaintiff in the main proceedings in Cases 28 and 29/86, by X. Leurquin, Avocat,

Association Intercommunale pour les Autoroutes des Ardennes, now the Fonds des Routes, the defendant in the main proceedings in Case 27/86, by P. Lambert, Avocat,

Régie des Bâtiments, the defendant in the main proceedings in Case 28/86, by P. Lambert, Avocat,

the Belgian State, the defendant in the main proceedings in Case 29/86, by J.P. Pierard, Agent for the Minister of Defence,

Confédération Nationale de la Construction, the intervener in the main proceedings in Case 28/86, by L. Goffin and J.-L. Lodomez, Avocats,

the Kingdom of Spain, by L.J. Casanova Fernandez, Secretary General for European Communities Affairs,

the Italian Republic, by Ivo Braguglia, Avvocato dello Stato,

the Commission of the European Communities, by M. Guerrin, Legal Adviser,

having regard to the Report for the Hearing and further to the hearing on 13 May 1987,

after hearing the Opinion of the Advocate General delivered at the sitting on 11 June 1987,

gives the following

@Judgment

/P5/

1 By three judgments of 15 January 1986, which were received at the Court on 3 February 1986, the Conseil d'Etat of Belgium referred to the Court for a preliminary ruling under Article 177 of the EEC Treaty several questions on the interpretation of Council Directive 71/305/EEC of 26 July 1971 concerning the co-ordination of procedures for the award of public works contracts (Official Journal, English Special Edition 1971 (II), p. 682).

2 Those questions arose in the context of proceedings for the annulment of decisions awarding various public works contracts.

3 The plaintiff in the main proceedings in Case 27/86 (CEI) was excluded in favour of an undertaking which had submitted a higher tender on the ground that the total value of the works, both public and private, which CEI had in hand at the time of the award of the contract exceeded the limit laid down by the applicable Belgian rules.

4 The tenders submitted by the plaintiff in the main proceedings in Cases 28 and 29/86 (Bellini) were also excluded in favour of undertakings which had submitted higher tenders on the ground that Bellini did not satisfy the criteria laid down by the Belgian legislation for recognition in the classes

required by the contract documents notwithstanding the fact that it had submitted a certificate of recognition issued in Italy in a class which entitled it to bid in Italy for contracts of a value corresponding to that of the Belgian contracts in question.

5 In the three main proceedings, the plaintiffs allege in support of their applications for annulment of the decisions awarding the contracts, inter alia, that those decisions were contrary to the provisions of Directive 71/305.

6 Since it considered that an interpretation of certain provisions of that directive was necessary, the Conseil d'Etat stayed proceedings and referred the following questions to the Court of Justice for a preliminary ruling:

A. In Case 27/86

"1. Are the references enabling a contractor's financial and economic standing to be determined exhaustively enumerated in Article 25 of Directive 71/305/EEC?

2. If not, can the value of the works which may be carried out at one time be regarded as a reference enabling a contractor's financial and economic standing to be determined within the meaning of Article 25 of the directive?"

B. In Cases 28 and 29/86

"Does Directive 71/305/EEC of 26 July 1971 concerning the co-ordination of procedures for the award of public works contracts, and in particular Article 25 and Article 26 (d) thereof, permit a Belgian awarding authority to reject a tender submitted by an Italian contractor on the grounds that the undertaking has not shown that it possesses the minimum amount of own funds required by Belgian legislation and that it does not have in its employ on average the minimum number of workers and managerial staff required by that legislation, when the contractor is recognized in Italy in a class equivalent to that required in Belgium by virtue of the value of the contract to be awarded?"

7 Reference is made to the Report for the Hearing for a fuller account of the background to the main proceedings, the Community and national legislation at issue, the written observations submitted to the Court and the conduct of the procedure, which are mentioned or discussed hereinafter only in so far as is necessary for the reasoning of the Court.

The question concerning the exhaustive nature of the list of references in Article 25 of the directive

8 The first paragraph of Article 25 of the directive provides that proof of the contractor's economic and financial standing may, as a general rule, be furnished by one or more of the references mentioned therein. Under the second paragraph, the authorities awarding contracts are required to specify in the notice or in the invitation to tender which references they have chosen from among those mentioned in the previous paragraph "and what references other than those mentioned under (a), (b) or (c) are to be produced".

9 It can be seen from the very wording of that article and in particular, the second paragraph thereof, that the list of references mentioned therein is not exhaustive.

10 The reply to the national court must therefore be that the references enabling a contractor's financial and economic standing to be determined are not exhaustively enumerated in Article 25 of Directive 71/305/EEC.

The question concerning the value of the works which may be carried out at one time

11 With regard to the national court's second question in Case 27/86, it should be noted that the total value of the works awarded to a contractor at a particular moment may be a useful factor in determining, in a specific instance, the financial and economic standing of a contractor in relation to his obligations. Since the references are not exhaustively enumerated in Article 25 of the directive, there is therefore no reason why such information should not be required of tenderers by way of a reference within the meaning of that article.

12 However, in the light of the grounds of the order for reference, the content of the Belgian legislation mentioned therein and the arguments before this Court, the national court's question must be understood as also seeking to ascertain whether a national rule fixing the maximum value of works which may be carried out at one time is compatible with the directive.

13 In that regard, it should be noted that the fixing of such a limit is neither authorized nor prohibited by Article 25 of the directive, because the purpose of that provision is not to delimit the power of the Member States to fix the level of financial and economic standing required in order to take

part in procedures for the award of public works contracts but to determine the references or evidence which may be furnished in order to establish the contractor's financial and economic standing.

14 In order to rule on the compatibility of such a limit with the directive as a whole, the purpose and object of the directive must be borne in mind. The purpose of Directive 71/305 is to ensure that the realization within the Community of freedom of establishment and freedom to provide services in regard to public works contracts involves, in addition to the elimination of restrictions, the co-ordination of national procedures for the award of public works contracts. Such co-ordination "should take into account as far as possible the procedures and administrative practices in force in each Member State" (second recital in the preamble to the directive). Article 2 expressly provides that the authorities awarding contracts are to apply their national procedures adapted to the provisions of the directive.

15 The directive therefore does not lay down a uniform and exhaustive body of Community rules. Within the framework of the common rules which it contains, the Member States remain free to maintain or adopt substantive and procedural rules in regard to public works contracts on condition that they comply with all the relevant provisions of Community law and in particular, the prohibitions flowing from the principles laid down in the Treaty in regard to the right of establishment and the freedom to provide services.

16 The fixing in a Member State of a maximum value for works which may be carried out at one time is not contrary to the said principles and there is nothing to suggest that it has the effect of restricting access by contractors in the Community to public works contracts.

17 In those circumstances, it must be held that as Community law now stands, there is no reason why the Member States, in the context of their powers in regard to public works contracts, should not fix a maximum value for works which may be carried out at one time.

18 The reply to the national court should therefore be that a statement of the total value of the works awarded to a contractor may be required from tenderers as a reference within the meaning of Article 25 of Directive 71/305 and that neither that article nor any other provision of the directive precludes a Member State from fixing the value of the works which may be carried out at one time.

The question concerning the effects of being included in an official list of recognized contractors in one Member State vis-à-vis the authorities awarding contracts in other Member States

19 In order to reply to this question, it is necessary to make clear the function of a contractor's inclusion in an official list of recognized contractors in a Member State in the overall scheme of the directive.

20 Under Article 28 (1), Member States which have official lists of recognized contractors must adapt them to the provisions of Article 23 (a) to (d) and (g) and of Articles 24 to 26.

21 The said provisions of Article 23 define the circumstances relating to the insolvency or dishonesty of a contractor justifying his exclusion from participation in a contract. The provisions of Articles 25 and 26 concern the references which may be furnished as proof of the contractor's financial and economic standing, on the one hand, and technical knowledge or ability on the other.

22 The harmonization of official lists of recognized contractors provided for in Article 28 (1) is therefore of limited scope. It concerns in particular references attesting to the financial and economic standing of contractors and their technical knowledge and ability. On the other hand, the criteria for their classification are not harmonized.

23 Article 28 (2) provides that contractors registered in such lists may, for each contract, submit to the authority awarding contracts a certificate of registration issued by the competent authority. That certificate is to state the references which enabled them to be registered in the list and the classification given in that list.

24 Article 28 (3) entitles contractors registered in an official list in any Member State whatever to use such registration, within the limits laid down in that provision, as an alternative means of proving before the authority of another Member State awarding contracts that they satisfy the qualitative criteria listed in Articles 23 to 26 of the directive (judgment of 10 February 1982 in Case 76/81, Transporoute v Minister of Public Works ((1982)) ECR 417).

25 In regard, in particular, to evidence of contractors' economic and financial standing and technical knowledge or ability, registration in an official list of recognized contractors may therefore replace the references referred to in Articles 25 and 26 in so far as such registration is based upon equivalent information.

26 Information deduced from registration in an official list may not be questioned by the authorities awarding contracts. None the less, those authorities may determine the level of financial and economic standing and technical knowledge and ability required in order to participate in a given contract.

27 Consequently, the authorities awarding contracts are required to accept that a contractor's economic and financial standing and technical knowledge and ability are sufficient for works corresponding to his classification only in so far as that classification is based on equivalent criteria in regard to the capacities required. If that is not the case, however, they are entitled to reject a tender submitted by a contractor who does not fulfil the required conditions.

28 The reply to the national court should therefore be that Article 25, Article 26 (d) and Article 28 of the directive must be interpreted as not precluding an awarding authority from requiring a contractor recognized in another Member State to furnish proof that his undertaking has the minimum own funds, manpower and managerial staff required by national law even when the contractor is recognized in the Member State in which he is established in a class equivalent to that required by the national law by virtue of the value of the contract to be awarded.

/P6/

Costs

29 The costs incurred by the Commission of the European Communities, the Kingdom of Spain and the Italian Republic, which have submitted observations to the Court, are not recoverable. Since these proceedings are, in so far as the parties to the main proceedings are concerned, in the nature of a step in the action pending before the national court, the decision on costs is a matter for that court.

/P3/

On those grounds,

@THE COURT (Sixth Chamber)

in answer to the questions referred to it by the Conseil d'Etat of Belgium by judgments of 15 January 1986, hereby rules:

1. **The references enabling a contractor's financial and economic standing to be determined are not exhaustively enumerated in**

Article 25 of Council Directive 71/305 of 26 July 1971 concerning the co-ordination of procedures for the award of public works contracts.

2. A statement of the total value of the works awarded to a contractor may be required from tenderers as a reference within the meaning of Article 25 of Directive 71/305 and neither that article nor any other provision of the directive precludes a Member State from fixing the value of the works which may be carried out at one time.

3. Article 25, Article 26 (d) and Article 28 of Directive 71/305 must be interpreted as not precluding an awarding authority from requiring a contractor recognized in another Member State to furnish proof that his undertaking has the minimum own funds, manpower and managerial staff required by national law even when the contractor is recognized in the Member State in which he is established in a class equivalent to that required by the national law by virtue of the value of the contract to be awarded.

/S1/Kakouris, O'Higgins, Koopmans, Bahlmann, Rodriguez Iglesias

Delivered in open court in Luxembourg on 9 July 1987.

/S2/P. Heim, Registrar - C.N. Kakouris, President of the Sixth Chamber
/FIN/

* Language of the case: French

/TCDR/Report for the Hearing - Joined Cases 27, 28 and 29/86

@Report for the Hearing
@In Joined Cases 27, 28 and 29/86 *

/P2/

I - Legal background

1. Community law

Directive 71/305/EEC of 26 July 1971, in conjunction with Directive 71/304/EEC, lays down provisions directed to the attainment of freedom of establishment and freedom to provide services in respect of public works contracts awarded in Member States on behalf of the State, or regional or local authorities or other legal persons governed by public law, including provisions not only for the abolition of restrictions but also for the co-ordination of national procedures for the award of public works contracts.

The questions raised in these cases relate to the interpretation of the provisions of Directive 71/305 dealing with the requirements which undertakings must satisfy in order to take part in tendering procedures, which are contained in Title IV entitled "Common Rules on Participation".

The relevant provisions of Directive 71/305 are as follows:

Article 23 enumerates the criteria relating to contractors which may be lead to their exclusion from participation in a contract and, in respect of some of those cases, the evidence which contractors may submit in order to establish that those criteria do not apply to them.

Article 25 defines the references establishing a contractor's financial and economic standing as follows:

"Proof of the contractor's financial and economic standing may, as a general rule, be furnished by one or more of the following references:

(a) appropriate statements from bankers;

(b) the presentation of the firm's balance sheets or extracts from the balance sheets, where publication of the balance sheet is required under company law in the country in which the contractor is established;

(c) a statement of the firm's overall turnover and the turnover on construction works for the three previous financial years.

The authorities awarding contracts shall specify in the notice or in the invitation to tender which reference or references they have chosen and what references other than those mentioned under (a), (b) or (c) are to be produced.

If, for any valid reason, the contractor is unable to supply the references requested by the authorities awarding contracts, he may prove his economic and financial standing by any other document which the authorities awarding contracts consider appropriate."

Under the terms of Article 26,

"Proof of the contractor's technical knowledge or ability may be furnished by:

...

(b) a list of the works carried out over the past five years, accompanied by certificates of satisfactory execution for the most important works....

...
...

(d) a statement of the firm's average annual manpower and the number of managerial staff for the last three years...".

Article 28 lays down the procedures for the establishment and administration by Member States of official lists of recognized contractors and provides that the registration of a contractor in such a list constitutes a presumption of suitability for the authorities of other Member States awarding contracts. Paragraphs (2) and (3) provide:

> "2. Contractors registered in these lists may, for each contract, submit to the authority awarding contracts a certificate of registration issued by the competent authority. This certificate shall state the references which enabled them to be registered in the list and the classification given in this list".
>
> "3. Certified registration in such lists by the competent bodies shall, for the authorities of other Member States awarding contracts, constitute a presumption of suitability for works corresponding to the contractor's classification only as regards Articles 23 (a) to (d) and (g), 24, 25 (b) and (c) and 26 (b) and (d) and not as regards Articles 25 (a) and 26 (a), (c) and (e).
>
> Information which can be deduced from registration in official lists may not be questioned. ..."

2. National law

The relevant legislation in Case 27/86 comprises essentially the Decree-Law of 3 February 1947 laying down conditions for the recognition of contractors (Moniteur Belge of 12 February 1947), Article 1 of which lays down the conditions which must be met by contractors in order to be authorized to carry out public works. In addition to the general conditions contained in that article, paragraph (B) requires a prior special recognition:

> "if at the time of the award of the contract or in the course of its performance the total value of all the works carried out by the contractor at one time, whether public or for the public interest or private, exceeds a maximum to be laid down by Royal Decree".

The Royal Decree of 31 January 1978 laying down measures for the implementation of the Decree-Law of 3 February 1947 (Moniteur Belge of 25 February 1978) lays down those amounts; it specifies that the relevant amount for recognized contractors in Class 8 is Bfr 1 200 million.

Article 9 of the Royal Decree provides that, although "this provision shall not confer rights upon such contractors", recognized contractors must request an exemption if, at the time when they tender for public works or in the event of their being awarded a contract, the total value of the public and private works which they have or will have to carry out at one time exceeds or will exceed by more than 10% the amount laid down for the class in which they are recognized.

In Cases 28 and 29/86 the relevant provision is also to be found in the Decree-Law of 3 February 1947, Article 1 of which was supplemented by paragraph (C) which is worded as follows:

> "Registration in the official list of contractors recognized by a Member State of the European Community shall be equivalent to recognition as provided for in B in respect of any works which recognition entitles the contractor to carry out in the country where he is established".

The above-mentioned Royal Decree of 31 January 1978 lays down the maximum value of contracts which may be awarded to recognized contractors in each class, namely Bfr 75 million in Class 6 and Bfr 150 million in Class 7. There is no limit to the value of contracts which may be awarded to contractors in Class 8.

The Ministerial Decree of 7 February 1978 (Moniteur Belge of 25 February 1978), which lays down the criteria to be taken into account in examining requests for recognition by contractors, lays down certain conditions for recognition including a requirement of equity capital of Bfr 15 million in Class 6 and Bfr 30 million in Class 7, average annual manpower over the previous three years of 50 in Class 6 and 100 in Class 7, and a managerial staff of two in Class 6 and 4 in Class 7.

II - Facts and procedure

1. Background to the disputes

Case 27/86

On 13 January 1978, the Association Intercommunale pour les Autoroutes des Ardennes put out an invitation to tender for a contract for works on the Ardennes motorway by Special Contract Document No. Z 78/C.77, which provided that tenderers should be recognized in Class 8.

When the tenders were opened it transpired that Constructions et Entreprises Industrielles S.A. (hereinafter referred to as "CEI") was the lowest tenderer.

The three best-placed tenderers were requested to state the total value of their work in hand at the time of the award of the contract. In its reply, CEI admitted that the work in progress on its order book exceeded Bfr 1 200 million. On 22 September 1978, the board of the Association Intercommunale pour les Autoroutes des Ardennes, the awarding authority, decided to award the

contract to a contractor who had submitted the highest tender but whose works to be carried out at one time had a value not exceeding the limits laid down in the Royal Decree of 31 January 1978.

By an application lodged on 15 November 1978, CEI, the plaintiff in the main proceedings, brought an action against that decision before the Conseil d'Etat; it submitted inter alia that the awarding authority had infringed Directive 71/305/EEC by rejecting its tender on the ground that the total value of its works in progress exceeded the limits laid down in the Royal Decree of 31 January 1978 although Articles 25 and 26 of the directive laid down no criteria for the selection of contractors other than their financial standing and technical ability and those criteria did not include the requirement of recognition where their works in progress exceeded a set amount.

Cases 28 and 29/86

Of the two public works contracts at issue, the first was put out to tender by the Régie des Bâtiments under Special Contract Document No. K

90/78-H 87, which called for tenderers in Category D, Class 6, and the second by the Ministry of Defence under Special Contract Document No. 8/M/A/034/1978, which called for tenderers in Category D, Class 7.

In both procedures Ing. A. Bellini & Co. S.p.A, the plaintiff in the main proceedings (hereinafter referred to as "Bellini"), whose registered office is in Bergamo (Italy), was classed as the lowest tenderer when the prices were compared but its tender was rejected on the ground that Bellini did not satisfy the criteria laid down by the Belgian legislation for recognition in the classes required by the contract documents.

Bellini had submitted with one of its tenders a copy of its certificate of recognition by the Italian Ministry of Construction in Category 2, Class 8, which entitled it, under Italian legislation, to bid for contracts up to a maximum of Lit 4 000 million, that is, about Bfr 142 million at the mid-price exchange rate at the time; that amount corresponded to Class 7 under the Belgian legislation.

One of the grounds relied upon by the awarding authorities in rejecting Bellini's tenders was that it had insufficient capital. It appeared from the preparatory documents preceding the decisions on the tenders, which were cited in the references for a preliminary ruling submitted by the Conseil d'Etat, that the awarding authority took the view that Bellini's proven capital was insufficient under Belgian legislation for recognition in Class 6 or 7 as required by the contract documents for the contracts in question. According to those documents, Bellini's equity capital totalled Bfr 2 625 000 when inclusion in Classes 6 and 7 under the Belgian legislation required own funds of Bfr 15 million and Bfr 30 million respectively.

Another ground relied upon by the awarding authorities in rejecting Bellini's tenders was that it had insufficient manpower. Bellini had established that it was duly paying social security contributions to the Istituto Nazionale della Previdenza Sociale in respect of one manager and 28

other staff, whereas the Belgian legislation required average manpower for the three previous years of 50 workers and 2 managerial staff for Class 6 and 100 workers and four managerial staff for Class 7.

By applications dated 13 March and 9 July 1979, Bellini instituted proceedings before the Conseil d'Etat for the annulment of the two tendering decisions.

Bellini submitted inter alia that the awarding authorities had infringed Article 3 (c) and Article 7 of the EEC Treaty and Articles 25 and 28 (3) of Directive 71/305/EEC by questioning its economic and financial standing as attested by its registration in the official list of contractors recognized in Italy when its registration in that list established a presumption of economic and financial standing and it was not possible to question the information to be deduced from such registration, in particular that referred to in Article 25 (b) and (c) and Article 26 (b) and (d) of Directive 71/305. Its treatment at the hands of the awarding authorities therefore constituted discrimination against it on grounds of nationality and was contrary to the freedom of movement for legal persons within the Community.

2. The questions referred to the Court for a preliminary ruling

By orders dated 15 January 1986, the Third Chamber of the Administrative Appeal Section of the Conseil d'Etat, taking the view that the resolution of the three disputes before it depended on the interpretation of Directive 71/305/EEC, stayed the proceedings and referred the following questions to the Court for a preliminary ruling under Article 177 of the EEC Treaty:

A. In Case 27/86

"1. Are the references enabling a contractor's financial and economic standing to be determined exhaustively enumerated in Article 25 of Directive 71/305/EEC?

2. If not, can the value of the works which may be carried out at one time be regarded as a reference enabling a contractor's financial and economic standing to be determined within the meaning of Article 25 of the directive?"

In the grounds of the order for the reference, the Conseil d'Etat states that, on the one hand, the purpose of the test of the total value of works which may be carried out at one time by a tenderer for public works is to

avoid any monopoly, permit a rational allocation of work and prevent unbridled competition or speculation on the part of contractors resulting in their incurring commitments beyond their means, and, on the other hand, Directive 71/305 is intended to ensure equality between tenderers for public works and to that end it lays down objective selection criteria in order to remove the assessment of the suitability of contractors from the sole discretion of the administration.

B. The question submitted in Cases 28 and 29/86 is as follows:

> "Does Directive 71/305/EEC of 26 July 1971 concerning the co-ordination of procedures for the award of public works contracts, and in particular Article 25 and Article 26 (d) thereof, permit a Belgian awarding authority to reject a tender submitted by an Italian contractor on the grounds that the undertaking has not shown that it possesses the minimum amount of own funds required by Belgian legislation and that it does not have in its employ on average the minimum number of workers and managerial staff required by that legislation, when the contractor is recognized in Italy in a class equivalent to that required in Belgium by virtue of the value of the contract to be awarded?"

3. Procedure

The orders making the reference were lodged at the Court Registry on 3 February 1986.

By an order of 19 March 1986 pursuant to Article 43 of the Rules of Procedure, the Court ordered that the three cases be joined for the purpose of the written and oral procedure and the judgment because of the close connexion between them.

Pursuant to Article 20 of the Protocol on the Statute of the Court of Justice of the EEC, written observations were submitted as follows:

In Case 27/86, by the Association Intercommunale pour les Autoroutes des Ardennes, whose successor in title is the Fonds des Routes, the defendant in the main proceedings, represented by the Minister of Public Works, who is represented by Pierre Lambert, of the Brussels Bar, and by Constructions et Enterprises Industrielles S.A. (CEI), the plaintiff in the main proceedings, represented by R. Libiez, J. Putzeys and X. Leurquin, of the Brussels Bar;

In Case 28/86, by the Régie des Bâtiments, the defendant in the main proceedings, represented by the Minister of Public Works, who is represented by Pierre Lambert, of the Brussels Bar, and by the Confédération Nationale de la Construction, an intervener in the main proceedings, represented by Léon Goffin and Jean-Louis Lodomez, of the Brussels Bar;

In Case 29/86, by the Belgian State, the defendant in the main proceedings, represented by the Minister of Defence, who is represented by Jean-Paul Pierard, Deputy Legal Adviser, acting as Agent;

In Cases 28 and 29/86, by Ing. A. Bellini & Co. S.p.A., the plaintiff in the main proceedings, represented by J. Putzeys and X. Leurquin, of the Brussels Bar;

In all three cases, by the Commission of the European Communities, represented by Maurice Guerrin, its Legal Adviser, acting as Agent, by the Kingdom of Spain, represented by Luis Javier Casanova Fernandez, acting as Agent, and by the Italian Government, represented by Ivo M. Braguglia, Avvocato dello Stato, acting as Agent.

By a decision of 19 November 1986, pursuant to Article 95 (1) and (2) of the Rules of Procedure, the Court assigned the joined cases to the Sixth Chamber.

Upon hearing the report of the Judge-Rapporteur and the views of the Advocate General, the Court decided to open the oral procedure without any preparatory enquiry.

III - Summary of the written observations submitted to the Court

1. Question 1 in Case 27/86

The parties to the main proceedings, the Kingdom of Spain, the Italian Government and the Commission are all of the view that the references enabling a contractor's financial and economic standing to be determined are not exhaustively enumerated in Article 25 of Directive 71/305.

In support of that contention, they state in essence that the expression "as a general rule" in the first paragraph of Article 25 of the directive and the words in the second paragraph to "references other than those mentioned

under (a), (b) or (c)" make it clear beyond doubt that the enumeration of references in Article 25 is not exhaustive. They also note that the third paragraph of that article refers to "any other document which the authorities awarding contracts consider appropriate" as evidence of a contractor's economic standing. That indeed was the criterion adopted by the Court of Justice in its judgment of 10 February 1982 in Case 76/81 (Transporoute et Travaux v Minister of Public Works, [1982] ECR 417).

The answer proposed by the Commission contains a qualification:

"1. The references enabling a contractor's financial and economic standing to be determined are exhaustively enumerated in Article 25 of Directive 71/305/EEC in so far as the awarding authority may not refuse to accept one of those references when it is submitted by a contractor. Nevertheless, awarding authorities may require references other than those mentioned in Article 25 (a), (b) and (c) provided that they make this clear in the notice of tender or the invitation to tender."

2. Question 2 in Case 27/86

The Fonds des Routes, the defendant in the main proceedings, the Kingdom of Spain and the Commission take the view that the question submitted by the Conseil d'Etat must be answered in the affirmative.

The Fonds des Routes argues in support of its contention that the limit on the value of the works which may be carried out by a contractor at one time is in the interests of public policy and was mentioned in the General Programme for the Abolition of Restrictions on Freedom to provide Services drawn up by the Council on 18 December 1961 (Official Journal, English Special Edition, Second Series, IX, p.3).

The Kingdom of Spain states that the limitation in question constitutes an objective criterion which does not permit discrimination. It adds that Spanish legislation lays down a set of limits on the total value of works which may be carried out at one time similar to that laid down by the Belgian legislation.

The Commission takes the view that the consideration of the total value of the works which a contractor has or will have to carry out at one time and the requirement of an exception where certain amounts are exceeded comes within the discretion, conferred on awarding authorities by the second paragraph of Article 25, to require additional references, other than those enumerated in subparagraphs (a), (b) or (c), although that discretion must not be exercised in an arbitrary or discriminatory manner.

Constructions et Entreprises Industrielles S.A. (CEI), the plaintiff in the main proceedings, and the Italian Government, suggest a negative answer.

CEI's observations are based on a general interpretation of Articles 25 and 26 of the directive. In its view, those two articles reflect a common rule for the qualitative selection of tenderers for public works contracts

which is implicit in the directive to the effect that awarding authorities are obliged to allow tenderers not excluded under Article 23 to establish their individual financial, economic and technical suitability.

Only references covering each individual contractor's financial, economic and technical situation can constitute proof of his suitability.

The requirement in the Belgian legislation that the value of the works to be carried out by the contractor at one time either when the contract is awarded or in the course of its performance should not exceed a certain ceiling is incompatible both with the common rule entitling each contractor to establish his suitability for the contract in question and with the scheme of the references provided for by Articles 25 and 26.

The imposition of such a ceiling creates an irrebuttable presumption of financial and economic unsuitability which precludes contractors from establishing their suitability. It constitutes a general and

abstract disqualification rule which is unlawful because it is not one of those exhaustively enumerated in Article 23.

Moreover it is quite clear that that ceiling constitutes a substantive rule which bears no similarity to the forms of evidence envisaged by Article 25.

CEI goes on to examine whether the fact that the Belgian legislation provides for the possibility of requesting an individual exemption from the ceiling on the value of works which may be carried out at one time is to beseen as a way of enabling contractors to prove their suitability. It argues that that is not the case because a Belgian awarding authority is not required to examine a request for an exemption. Furthermore, the Ministerial Decree of 7 February 1978 by stipulating that the tenderer must have submitted a request for recognition in the relevant class in order to be eligible for an exemption lays down a condition which cannot be fulfilled by CEI which is already recognized in a higher class.

Finally, CEI argues that, in its examination of tenders, the awarding authority may in any event only require the references exhaustively enumerated in the notice or the invitation to tender, and this in its view rules out the application in this instance of the ceiling on the value of works which may be carried out at one time.

In conclusion, CEI proposes that Question 2 be answered as follows:

"The value of works which may be carried out at one time cannot be regarded as a reference enabling a contractor's financial and economic standing to be determined within the meaning of Article 25 of Directive 71/305/EEC because:

1. It does not constitute a reference with regard to financial and economic standing which is required of a contractor in the form of a document like all the other references mentioned in Article 25 of Directive 71/305/EEC; instead it creates a general and abstract rule disqualifying any contractor exceeding a particular ceiling on the value of the works which may be carried out at one time;

2. It does not constitute a reference within the meaning of Article 25 since it is not based on the actual financial and economic circumstances of the undertaking itself;

3. It does not constitute a reference since it was not mentioned to in the notice or the invitation to tender;

4. It does not constitute a reference since it leaves it entirely to the discretion of the awarding authority to decide whether to go on to examine the contractor's financial and economic standing or whether to eliminate him on that ground alone;

5. It does not constitute a reference since it creates an obstacle precluding a contractor recognized in Class 8 from either obtaining an exemption from that requirement or establishing by means of another document that he has the financial and economic standing to be awarded the contract in question."

The Italian Government infers from the object of the ceiling on the value of the works which may be carried out at one time, as defined by the Conseil d'Etat - namely to avoid any monopoly and to permit a rational allocation of work - that that criterion cannot be regarded as a reference to establish the financial and economic standing of tenderers within the meaning of Article 25 of Directive 71/305. It states that if that criterion does not

fall within the exceptions provided for in the second paragraph of Article 25 of the directive, that automatically makes it "a means of proof which does not come within the closed category of those authorized by the directive" (judgment in Transporoute, cited above, at paragraph 10 of the decision).

3. The question submitted in Cases 28 and 29/86

The Régie des Bâtiments, the defendant in the main proceedings in Case 28/86, the Confédération Nationale de la Construction, an intervener in themain proceedings in Case 28/86, the Belgian State, the defendant in the main proceedings in Case 29/86, the Kingdom of Spain and the Commission propose an affirmative answer on the basis of the following arguments.

According to Article 20 of Directive 71/305, awarding authorities are required to check the suitability of tenderers in accordance with the criteria of financial and economic standing and technical ability laid down in Articles 25 to 28. The directive also provides for the way in which tenderers are to prove both their financial and economic standing and their technical ability. Yet since the directive does not fix the standard to be reached in regard to

each of those criteria it is for the Member States to lay down the threshold above which they will regard each tenderer's financial and economic standing and technical ability as appropriate for the contract under tender.

The presumption of suitability created by Article 28 of the directive entails that a certificate of registration in a list of contractors recognized in a Member State replaces, for the purposes of the awarding authority in another Member State, both the presentation of the firm's balance sheet and the statement of its turnover (Article 25 (b) and (c)) and the statement ofits manpower (Article 26 (d)). However, the fact that this is a mere presumption of suitability means that it is rebuttable. The proof provided by registration in an official list relates only to the objective factors on which that registration is based. Each Member State is free to lay down more or less restrictive conditions with regard to suitability to carry out works of a particular value.

In those observations it is also pointed out that Article 28 (2) of the directive provides that the certificate of registration must state the references which enabled the contractor to be registered and the classification given in that list, which, it is contended, can serve no other

purpose than to enable the awarding authority to check whether the presumption of suitability created by the certificate is rebutted by the statutory requirements of the Member State awarding the contract.

Lastly, the automatic assumption that registration in a list of contractors recognized in one Member State is equivalent to such registration in another State is contrary to the letter and the spirit of the Community rules and would constitute discrimination against contractors registered in countries where the conditions for recognition are stricter than those laid down by other countries' legislation.

Bellini and the Italian Government take the view that the question submitted by the Conseil d'Etat must be answered in the negative.

Relying on arguments similar to those put forward by CEI in Case 27/86, Bellini bases its observations on an interpretation of Articles 25 and 26 of Directive 71/305. In its view those articles lay down a common rule for the qualitative selection of tenderers for public works, the effect of which is to

enable contractors to prove in each individual case their financial and economic standing and technical ability on the basis of references reflecting the objective financial, economic and technical situation of each contractor taken individually.

The rule contained in the Belgian legislation on recognition, requiring certain minimum own funds and a certain minimum staff, which is applicable to all contracts and all contractors without taking account of their individual financial, economic and technical situation, is a general and abstract rule and therefore incompatible with the common qualitative selection rule contained in Articles 25 and 26 of the directive, which enables contractors to prove their suitability for each contract.

Moreover those requirements in fact constitute general and abstract grounds for the exclusion of a contractor and are therefore also incompatible with Article 23 of the directive, which exhaustively enumerates the circumstances in which exclusion is justified.

Bellini further takes the view that the application of those requirements to contractors recognized in another Member State would be contrary to the scheme laid down by Article 28 (3) of the directive for the examination by an awarding authority of the financial and economic standing and technical ability of such contractors. It considers that the conditions as to own funds, manpower and numbers of managerial staff are matters covered by Article 25 (b) and Article 26 (d) of Directive 71/305/EEC in regard to which a contractor must be presumed financially, economically and technically suitable by virtue of Article 28 (3).

The Italian Government cites the judgment in Transporoute, cited above, in which the Court held that Article 28 (3) entitles contractors registered in an official list in a Member State to use such registration, within the limits laid down in that provision, as an alternative means of satisfying an awarding authority in another Member State that they meet the qualitative criteria listed in Articles 23 to 26 of the directive. The presumption of suitability which applies, under Article 28 (3), to a contractor registered in an official

list already includes all the aspects of his financial standing and technical ability of which evidence is required by the legislation of the Member State awarding the contract by means of the requirement of minimum capital and manpower. The Italian Government therefore states that registration in an official list replaces the references provided for by Article 25 (b) and (c) (balance sheet, statement of turnover) which serve to establish a contractor's financial and economic standing and thereby precludes another Member State from requiring evidence of a certain minimum capital. The same argument holds for the minimum manpower and managerial staff requirements.

/S2/Judge Rapporteur, G.C. Rodríguez Iglesias
/FIN/

* Language of the case: French

DE EUROPÆISKE FÆLLESSKABERS DOMSTOL

GERICHTSHOF DER EUROPÄISCHEN GEMEINSCHAFTEN

ΔΙΚΑΣΤΗΡΙΟ ΤΩΝ ΕΥΡΩΠΑΪΚΩΝ ΚΟΙΝΟΤΗΤΩΝ

COURT OF JUSTICE OF THE EUROPEAN COMMUNITIES

TRIBUNAL DE JUSTICIA DE LAS COMUNIDADES EUROPEAS

LUXEMBOURG

COUR DE JUSTICE DES COMMUNAUTÉS EUROPÉENNES

CORTE DI GIUSTIZIA DELLE COMMUNITÀ EUROPEE

HOF VAN JUSTITIE VAN DE EUROPESE GEMEENSCHAPPEN

TRIBUNAL DE JUSTIÇA DAS COMUNIDADES EUROPEIAS

Case 45/87-R

ORDER

OF THE PRESIDENT OF THE COURT

of 16 February 1987

(Public works contract - Community tender procedure)

In Case 45/87-R,

COMMISSION OF THE EUROPEAN COMMUNITIES, represented by its Agent, Eric L. White, Member of its Legal Service, with an address for service in Luxembourg at the office of G. Kremlis, Jean Monnet Building, Kirchberg,

applicant,

against

IRELAND

defendant,

Application for interim measures to prevent the award of a contract relating to the Dundalk Water Supply until the final judgment in the main action in the present case,

The President of the Court of Justice of the European Communities makes the following

ORDER

1. Dundalk Urban District Council is the promoter of a projet known as the Dundalk Water Supply Augmentation Scheme. Contract n° 4 of this Scheme concerns the construction of a water main to transport water from the river Fane source to a treatment plant at Cavan Hill and thence into the existing town supply system. The invitation to tender for this Contract by open procedure was published in Supplement 50/13 of the Official Journal of the European Communities dated 13 March 1986. At point 13 of the published notice it was stated that:

> "The contract will be awarded, subject to the Dundalk Urban District council being satisfied as to the ability of the contractor to carry out the work, to the contractor who submits a tender, in accordance with the tender documents, which is adjudged to be the most economically advantageous to the Council in respect of price, period of completion, technical merit and running costs.
>
> The lowest or any tender need not necessarily be accepted."

2. The Commission received complaints that one of the tenders submitted was being unfairly excluded from consideration. One of the complainants is an Irish contractor tendering for the Contract, P. J. Walls (Civil) Ltd. ("Walls") and the other is the Spanish company offering to supply asbestos cement pipes for the Contract, Uralita S.A. ("Uralita").

3. Walls submitted three offers in response to the tender invitation, one of which based on the use of pipes supplied by "Uralita" of Spain, was the lowest tender offered. The consulting engineers to the project have, however, stated that this tender is not in accordance with Clause 4.29 of the Specification to the Contract which provides that:

> "Asbestos Cement Pressure pipes shall be certified as complying with Irish Standard Specification 188 - 1975 in accordance with the Irish Standard Mark Licensing Scheme of the Institute for Industrial Research and Standards. All asbestos Cement Watermains are to have a bituminous coating internally and externally. Such coatings shall be applied at the factory by dipping".

Only pipes made by Tegral Pipes Ltd. of Drogheda, Ireland, are currently certified to this standard.

4. Following various discussions, the Commission instituted proceedings under Article 169 of the EEC Treaty on 20 October 1986, setting out its view that this clause of the Specification constituted a breach of Articles 30-36 of the EEC Treaty and of Article 10 of Council Directive of 71/305/EEC of 26 July 1971 co-ordinating procedures for the award of public works contracts (O.J. N° L 185 of 25 August 1971, p.5 (English Special Edition p.682)). The Irish Government replied on 14 November 1986. The Commission was not satisfied with this reply and addressed a reasoned opinion to the Irish Government on 13 January 1987. The Irish Government replied on 3 February 1987. The Irish Government agreed to undertake not to award the contract until 20 February 1987.

5. By an application lodged at the Court Registry on 13 February 1987, the Commission applied for a declaration that by the inclusion of Clause 4.29 in the Contract and by the refusal to accept the use of asbestos cement pipes manufactured to an

equivalent standard, Ireland has failed to fulfil its obligations under Article 30 of the EEC Treaty and Article 10 of Council Directive 71/305/EEC.

6. By an application lodged at the Court Registry on 13 February 1987, the applicant requested the Court, pursuant to Article 186 of the EEC Treaty and Article of the Rules of Procedure, to order Ireland to take such measures as may be necessary to prevent, until such time as the Court has given final judgment in this case or a settlement has been reached between the Commission and Ireland, the award of a contract for the works to which this case relates, or if such a contract should already have been awarded, to order Ireland to take such measures as may be necessary to cancel such a Contract.

7. According to Article 84 (2) of the Rules of Procedure, the President may grant an application for interim measures even before the observations of the opposite party have been submitted. That decision may be varied or cancelled even without any application being made by any party.

8. It appears necessary to make use of this power in the present case so as to ensure that the application for interim measures is not prejudiced by the existence of a fait accompli. If the contract in question were awarded before the application for interim measures is decided, difficult questions might arise as to the possibility of subsequently cancelling it. Moreover, the Commission state that other phases of the scheme (for example, the pumping station) are still at the design stage and that a delay in the award is therefore unlikely to delay the ultimate objective of increasing water supply in the Dundalk area. The interests of justice and of the parties involved can therefore best be maintained by an order maintaining the status quo until there has been the possibility of hearing the parties and deciding the application for interim measures with all due deliberation.

On those grounds,

THE PRESIDENT

by way of an interim decision,

hereby

ORDERS

as follows:

1. Ireland shall take such measures as may be necessary to prevent, until such time as the application by the Commission for interim measures has been disposed of or until further order, the award by Dundalk Urban District Council of Contract N° 4 of the Dundalk Water Supply Augmentation Scheme.

2. The costs are reserved.

Done at Luxembourg on 16 February 1987.

A.J. Mackenzie Stuart
President

P. Heim
Registrar

DE EUROPÆISKE FÆLLESSKABERS DOMSTOL

GERICHTSHOF DER EUROPÄISCHEN GEMEINSCHAFTEN

ΔΙΚΑΣΤΗΡΙΟ ΤΩΝ ΕΥΡΩΠΑΪΚΩΝ ΚΟΙΝΟΤΗΤΩΝ

COURT OF JUSTICE OF THE EUROPEAN COMMUNITIES

TRIBUNAL DE JUSTICIA DE LAS COMUNIDADES EUROPEAS

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TRIBUNAL DE JUSTIÇA DAS COMUNIDADES EUROPEIAS

Case 45/87

JUDGMENT OF THE COURT
22 September 1988

(Public works contract - Community tender procedure - Applicability of Article 30 of the EEC Treaty)

In Case 45/87

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

applicant,

supported by

The Kingdom of Spain, represented by Jaime Folguera Crespo, Deputy Director General for Co-ordination of Community Affairs with responsibility for Legal Affairs, and Rafael Garcia-Valdecasas Fernandez, Head of the Legal Department for matters before the Court of Justice of the European Communities, acting as Agents,

v

Ireland, represented by Louis J. Dockery, Chief State Solicitor, acting as Agent, with an address for service in Luxembourg at the Irish Embassy, 28 Route d'Arlon,

defendant,

APPLICATION for a declaration that by allowing the inclusion in the contract specification for the Dundalk Water Supply Augmentation Scheme - Contract No. 4 of Clause 4.29 providing that asbestos cement pressure pipes are to be certified as complying with Irish Standard 188:1975 in accordance with the Irish Standard Mark Licensing Scheme of the Institute for Industrial Research and Standards and consequently refusing to consider (or rejecting without adequate justification) a tender providing for the use of asbestos cement pipes manufactured to an alternative standard providing equivalent guarantees of safety, performance and reliability (such as ISO 160), Ireland has failed to fulfil its obligations under Article 30 of the EEC Treaty and Article 10 of Council Directive 71/305/EEC,

THE COURT

composed of: Lord Mackenzie Stuart, President, O. Due, J.C. Moitinho de Almeida and G.C. Rodriguez Iglesias (Presidents of Chambers), T. Koopmans, U. Everling, Y. Galmot, C.N. Kakouris and T.F. O'Higgins, Judges,

Advocate General: M. Darmon

Registrar: J.-G. Giraud,

having regard to the Report for the Hearing and further to the hearing on 27 April 1988,

after hearing the Opinion of the Advocate General delivered at the sitting on 21 June 1988,

gives the following

Judgment

1 By application lodged at the Court Registry on 13 February 1987, the Commission of the European Communities brought an action under Article 169 of the EEC Treaty for a declaration that by allowing the inclusion in the contract specification for the Dundalk Water Supply Augmentation Scheme - Contract No. 4 of a clause providing that the asbestos cement pressure pipes should be certified as complying with

Irish Standard 188:1975 in accordance with the Irish Standard Mark Licensing Scheme of the Institute for Industrial Research and Standards (IIRS) and consequently refusing to consider (or rejecting without adequate justification) a tender providing for the use of asbestos cement pipes manufactured to an alternative standard providing equivalent guarantees of safety, performance and reliability, Ireland has failed to fulfil its obligations under Article 30 of the EEC Treaty and Article 10 of Council Directive 71/305/EEC of 26 July 1971 concerning the co-ordination of procedures for the award of public works contracts (Official Journal, English Special Edition 1971 (II), p. 682).

2 Dundalk Urban District Council is the promoter of a scheme for the augmentation of Dundalk's drinking water supply. Contract No. 4 of that scheme is for the construction of a water main to transport water from the River Fane source to a treatment plant at Cavan Hill and thence into the existing town supply system. The invitation to tender for that contract by open procedure was published in the Official Journal of the European Communities on 13 March 1986 (Official Journal No. S 50, p. 13).

3 Clause 4.29 of the specification relating to Contract No. 4, which formed part of the contract specification, included the following paragraph:

"Asbestos cement pressure pipes shall be certified as complying with Irish Standard Specification 188:1975 in accordance with the Irish Standard Mark Licensing Scheme of the Institute for Industrial Research and Standards. All asbestos cement watermains are to have a bituminous coating internally and externally. Such coatings shall be applied at the factory by dipping."

4 The dispute stems from complaints made to the Commission by an Irish undertaking and a Spanish undertaking. In response to the invitation to tender for Contract No. 4, the Irish undertaking had submitted three tenders, one of which provided for the use of pipes manufactured by the Spanish undertaking. In the Irish undertaking's view, that tender, which was the lowest of the three submitted by it, gave it the best chance of obtaining the contract. The consulting engineers to the project wrote a letter to the Irish undertaking concerning that contract stating that there would be no point in its coming to the pre-adjudication interview if proof could not be provided that the firm supplying the pipes was approved by the IIRS as a supplier of products complying with Irish Standard 188:1975 ("I.S.188"). It is common ground that the Spanish undertaking in question had not been certified by the IIRS but that its pipes complied with international standards, and in particular with ISO 160-1980 of the International Organization for Standardization.

5 Reference is made to the Report for the Hearing for a fuller account of the relevant provisions, the background to the case and the submissions and arguments of the parties and of the intervener, which are mentioned or discussed hereinafter only in so far as is necessary for the reasoning of the Court.

6 In the Commission's view, this action raises inter alia the question of the compatibility with Community law, in particular Article 30 of the EEC Treaty and Article 10 of Directive 71/305, of the inclusion in a contract specification of clauses like the disputed Clause 4.29. It further argues that the Irish authorities' rejection, without any examination, of a tender providing for the use of Spanish-made pipes not complying with Irish standards also infringed those provisions of Community law. It is appropriate to examine first the issues raised by Clause 4.29.

Directive 71/305

7 Article 10 of Directive 71/305, to which the Commission refers, provides that Member States are to prohibit the introduction into the contractual clauses relating to a given contract of technical specifications which mention products of a specific make or source or of a particular process and which therefore favour or eliminate certain undertakings. In particular, the indication of types or of a specific

origin or production is to be prohibited. However, such indication is permissible if it is accompanied by the words "or equivalent" where the authorities awarding contracts are unable to give a description of the subject of the contract using specifications which are sufficiently precise and intelligible to all parties concerned. The words "or equivalent" do not appear in Clause 4.29 of the contract notice at issue in this case.

8 The Irish Government argues that the provisions of Directive 71/305 do not apply to the contract in question. It points out that Article 3 (5) of the directive provides that the directive is not to apply to "public works contracts awarded by the production, distribution, transmission or transportation services for water and energy". There is no doubt that the contract in this case was a public works contract to be awarded by a public distribution service for water.

9 The Commission does not deny that fact but points out that Ireland requested the publication of the relevant notice in the Official Journal by reference to the obligatory publication of contract notices laid down by the directive. The Commission, in common with the Spanish Government, which intervened in support of its conclusions, considers that, having voluntarily brought itself within the scope of the directive, Ireland was obliged to comply with its provisions.

10 With regard to this point, the Irish Government's argument must be accepted. The actual wording of Article 3 (5) is wholly unambiguous, in so far as it excludes public works contracts of the type at issue from the scope of the directive. According to the preamble to the directive, that exception to the general application of the directive was laid down in order to avoid the subjection of distribution services for water to different systems for their works contracts, depending on whether they come under the State and authorities governed by public law or whether they have separate legal personality. There is no reason to consider that the exception in question no longer applies, and the reasons underlying it are no longer valid, where a Member State has a contract notice published in the Official Journal of the European Communities, whether through an error or because it initially intended to seek a contribution from the Community towards the financing of the work.

11 The application must therefore be dismissed in so far as it is based on the infringement of Directive 71/305.

Article 30 of the Treaty

12 It must be observed at the outset that the Commission maintains that Dundalk Urban District Council is a public body for whose acts the Irish Government is responsible. Moreover, before accepting a tender

Dundalk Council has to obtain the authorization of the Irish Department of the Environment. Those facts have not been challenged by the Irish Government.

13 It must also be noted that according to the Irish Government the requirement of compliance with Irish standards is the usual practice followed in relation to public works contracts in Ireland.

14 The Irish Government points out that the contract at issue relates not to the sale of goods but to the performance of work, and the clauses relating to the materials to be used are completely subsidiary. Contracts concerned with the performance of work fall under the Treaty provisions relating to the free supply of services, without prejudice to any harmonization measures which might be taken under Article 100. Consequently, Article 30 cannot apply to a contract for works.

15 In that connexion, the Irish Government cites the case-law of the Court and, in particular, the judgment of 22 March 1977 in Case 74/76 (Iannelli & Volpi v Meroni, [1977] ECR 557), according to which the field of application of Article 30 does not include obstacles to trade covered by other specific provisions of the Treaty.

16 That argument cannot be accepted. Article 30 envisages the elimination of all measures of the Member States which impede imports in

intra-Community trade, whether the measures bear directly on the movement of imported goods or have the effect of indirectly impeding the marketing of goods from other Member States. The fact that some of those barriers must be considered in the light of specific provisions of the Treaty, such as the provisions of Article 95 relating to fiscal discrimination, in no way detracts from the general character of the prohibitions laid down by Article 30.

17 The provisions on the freedom to supply services invoked by the Irish Government, on the other hand, are not concerned with the movement of goods but the freedom to perform activities and have them carried out; they do not lay down any specific rule relating to particular barriers to the free movement of goods. Consequently, the fact that a public works contract relates to the provision of services cannot remove a clause in an invitation to tender restricting the materials that may be used from the scope of the prohibitions set out in Article 30.

18 Consequently, it must be considered whether the inclusion of Clause 4.29 in the invitation to tender and in the tender specifications was liable to impede imports of pipes into Ireland.

19 In that connexion, it must first be pointed out that the inclusion of such a clause in an invitation to tender may cause economic operators

who produce or utilize pipes equivalent to pipes certified as complying with Irish standards to refrain from tendering.

20 It further appears from the documents in the case that only one undertaking has been certified by the IIRS to I.S. 188 to apply the Irish Standard Mark to pipes of the type required for the purposes of the public works contract at issue. That undertaking is located in Ireland. Consequently, the inclusion of Clause 4.29 had the effect of restricting the supply of the pipes needed for the Dundalk scheme to Irish manufacturers alone.

21 The Irish Government maintains that it is necessary to specify the standards to which materials must be manufactured, particularly in a case such as this where the pipes utilized must suit the existing network. Compliance with another standard, even an international standard such as ISO 160-1980, would not suffice to eliminate certain technical difficulties.

22 That technical argument cannot be accepted. The Commission's complaint does not relate to compliance with technical requirements but to the refusal of the Irish authorities to verify whether those requirements are satisfied where the manufacturer of the materials has

not been certified by the IIRS to I.S. 188. By incorporating in t... notice in question the words "or equivalent" after the reference to t... Irish standard, as provided for by Directive 71/305 where it is applicable, the Irish authorities could have verified compliance wi... the technical conditions without from the outset restricting the contract only to tenderers proposing to utilize Irish materials.

23 The Irish Government further objects that in any event the pipes manufactured by the Spanish undertaking in question whose use was provided for in the rejected tender did not meet the technical requirements, but that argument, too, is irrelevant as regards the compatibility with the Treaty of the inclusion of a clause like Clause 4.29 in an invitation to tender.

24 The Irish Government further maintains that protection of public health justifies the requirement of compliance with the Irish standard in so far as that standard guarantees that there is no contact between the water and the asbestos fibres in the cement pipes, which would adversely affect the quality of the drinking water.

25 That argument must be rejected. As the Commission has rightly pointed out, the coating of the pipes, both internally and externally, was the subject of a separate requirement in the invitation to tender. The Irish Government has not shown why compliance with that requirement

would not be such as to ensure that there is no contract between the water and the asbestos fibres, which it considers to be essential for reasons of public health.

26 The Irish Government has not put forward any other argument to refute the conclusions of the Commission and the Spanish Government and those conclusions must consequently be upheld.

27 It must therefore be held that by allowing the inclusion in the contract specification for tender for a public works contract of a clause stipulating that the asbestos cement pressure pipes must be certified as complying with Irish Standard 188:1975 in accordance with the Irish Standard Mark Licensing Scheme of the Institute for Industrial Research and Standards, Ireland has failed to fulfil its obligations under Article 30 of the EEC Treaty.

The rejection of the tender providing for the use of the Spanish-made pipes

28 The second limb of the Commission's application is concerned with the Irish authorities' attitude to a given undertaking in the course of the procedure for the award of the contract at issue.

29 It became apparent during the hearing that the second limb of the application is in fact intended merely to secure the implementation of

the measure which is the subject of the first limb. It must therefore be held that it is not a separate claim and there is no need to rule on it separately.

Costs

30 Under Article 69 (2) of the Rules of Procedure the unsuccessful party is to be ordered to pay the costs. Nevertheless, by virtue of the first subparagraph of Article 69 (3) the Court may order the parties to bear their own costs in whole or in part where each party succeeds on some and fails on other heads. As the Commission has failed in one of its submissions, the parties must be ordered to bear their own costs.

On those grounds,

THE COURT

hereby:

1. Declares that by allowing the inclusion in the contract specification for tender for a public works contract of a clause stipulating that the asbestos cement pressure pipes must be certified as complying with Irish Standard 188:1975 in accordance with the Irish Standard Mark Licensing Scheme of the Institute for Industrial Research and Standards,

Ireland has failed to fulfil its obligations under Article 30 of the EEC Treaty;

2. Dismisses the remainder of the application;

3. Orders the parties, including the intervener, to bear their own costs.

Mackenzie Stuart | Due | Moitinho de Almeida

Rodriguez Iglesias | Koopmans | Everling

Galmot | Kakouris | O'Higgins

Delivered in open court in Luxembourg on 22 September 1988.

A.J. Mackenzie Stuart
President

J.-G. Giraud
Registrar

J 45/87

Case 45/87

REPORT FOR THE HEARING

(Public works contract - Community tender procedure - Applicability of Article 30 of the EEC Treaty)

In Case 45/87,

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

applicant,

supported by

The Kingdom of Spain, represented by Jaime Folguera Crespo, Deputy Director General for Co-ordination of Community Affairs with responsibility for Legal Affairs, and Rafael Garcia-Valdecassas Fernandez, Head of the Legal Department for matters before the Court of Justice of the European Communities, acting as Agents,

v

Ireland, represented by Louis J. Dockery, Chief State Solicitor, acting as Agent, with an address for service in Luxembourg at the

Irish Embassy, 28 Route d'Arlon,

defendant,

APPLICATION for a declaration that by allowing the inclusion in the contract specification for the Dundalk Water Supply Augmentation Scheme - Contract No. 4 of Clause 4.29 providing that asbestos cement pressure pipes are to be certified as complying with the Irish Standard Specification 188:1975 in accordance with the Irish Standard Mark Licensing Scheme of the Institute of Industrial Research and Standards and consequently refusing to consider (or rejecting without adequate justification) a tender providing for the use of asbestos cement pipes manufactured to an alternative standard providing equivalent guarantees of safety, performance and reliability (such as ISO 160), Ireland has failed to fulfil its obligations under Article 30 of the EEC Treaty and Article 10 of Council Directive 71/305/EEC.

R 45/87
Ke/fa/Ma

I Facts and procedure

1. Legal context

1.1 Council Directive 71/305

On 26 July 1971, the Council adopted Directive 71/305 concerning the co-ordination of procedures for the award of public works contracts (Official Journal, English Special Edition 1971 (II), p. 682), hereinafter to as "the directive".

Article 10 (1) of the directive provides that the "technical specifications may be defined by reference to national standards". However, Article 10 (2) lays down certain conditions with which technical specifications must comply. It provides that:

> "Unless such specifications are justified by the subject of the contract, Member States shall prohibit the introduction into the contractual clauses relating to a given contract of technical specifications which mention products of a specific make or source or of a particular process and which therefore favour or eliminate certain undertakings. In particular, the indication of trade marks, patents, types, or of a specific origin or production, shall be prohibited. However, if such indication is accompanied by the words 'or equivalent', it shall be authorised in cases where the authorities awarding contracts are unable to give a description of the subject of the contract using specifications which are sufficiently precise and intelligible to all parties concerned."

According to Article 3 (5) of the directive:

> "The provisions of this Directive shall not apply to public works contracts awarded by the production, distribution, transmission or transportation services for water and energy."

In that regard, the sixth recital in the preamble to the directive states that:

> "... it is necessary to avoid the subjection of the production, distribution and transmission or transportation services services for water and energy to different systems for their works contracts, depending on whether they come under the State, regional or local authorities or other legal persons governed by public law or whether they have separate legal personality; ... it is therefore necessary to exclude from the scope of this Directive those services referred to above which by reason of their legal status, would fall within its scope until such time as a definitive solution can be adopted in the light of experience;"

1.2 Standards for asbestos cement pressure pipes and joints

(a) ISO 160-1980

The International Organization for Standardization (hereinafter referred to as "the ISO") is a world-wide federation of national standards institutes. Those institutes are the ISO member bodies. The ISO develops international technical standards applicable to goods and services. The work of developing those standards is carried out

through ISO technical committees. Every member body interested in a subject for which a technical committee has been set up has the right to be represented on that committee. International organizations, governmental and non-governmental, also take part in the work. Draft international standards adopted by the technical committees are circulated to the member bodies for approval before their acceptance as international standards by the ISO council.

The ISO seeks to have its international standards adopted by the national standards institutes in the standards which those institutes lay down at national level. Different methods to that end are indicated by the ISO in Guide 21-1981, entitled "Adoption of International Standards in National Standards". An international standard may be adopted, inter alia, by the development and publication of a national standard which takes over the precise terms of an international standard or is equivalent thereto. ISO Guide 21 defines as "equivalent" standards which differ by reason of "editorial changes" or because of "minor technical deviations".

The conformity of a product or a service with a standard is certified by "certificate of conformity" or by licences permitting the placing on the products of a "mark of conformity". Various ISO guides recommend methods by which both systems may be implemented.

In regard to asbestos cement pressure pipes and joints, which are at issue in this case, international standard ISO 160 was developed by the technical committee on products in fibre-reinforced cement. In the Community, that standard has been approved by the member bodies in the Federal Republic of Germany, France, Greece, Italy, the Netherlands, Portugal, Spain and the United Kingdom. The standard in question specifies the conditions of manufacture, classification, characteristics and acceptance tests applicable to asbestos cement pipes. With regard to the diameter of pipes, standard ISO 160 provides that the nominal diameter of the pipes corresponds to the internal diameter expressed in millimetres, tolerances excluded. With regard to length, it provides that it should preferably be not less than 4 metres for pipes with a nominal diameter exceeding 200 millimetres. The nominal length should preferably be a multiple of 0.5 metres.

(b) I.S. 188:1975

In Ireland, the Industrial Research and Standards Act 1961 authorized the Institute for Industrial Research and Standards (IIRS) to lay down technical standards. In 1984, the IIRS set up the National Standards Authority of Ireland (NSAI), which took over the duties of the IIRS in regard to standards with effect from 1 January 1985. The NSAI is the ISO member body for Ireland.

In 1975, the IIRS laid down standard I.S. 188:1975 for asbestos cement pressure pipes. For information, it is stated in an annex to standard I.S. 188 that it is broadly similar to international standard ISO 160 and British standard BS 486:1973. However, it can be seen from the specifications in standard I.S. 188 that, unlike standard ISO 160, the former defines the nominal diameter of the pipes as corresponding to the outside diameter; the internal diameter and consequently, the thickness of the pipes, are to be determined by the manufacturer. Furthermore, standard I.S. 188 provides for outside diameters at the ends of the pipes. Finally, it provides that the standard length of pipes is to be 4 metres but adds that "other lengths may be supplied by agreement between the manufacturer and the purchaser".

For the purpose of certifing conformity with standard I.S. 188 of asbestos cement pipes, the NSAI operates a system of marks indicating such conformity (Irish Standard Mark). That system is governed by the NSAI Irish Standard Mark Certification Schemes. Licences making it possible to apply the Irish Standard Mark to products or services under standard I.S. 188 are issued by the NSAI in the name if the IIRS. Until June 1986, the only companies authorized by the IIRS under I.S. 188 to use the Irish Standard Mark for their products were Tegral Pipes Ltd., Drogheda (Ireland), in respect of pipes of all dimensions, and Toschi Productions GmbH, Rethem (Federal Republic of Germany), in respect of pipes of 250 mm in Class 15.

(c) BS 486:1973 and BS 486:1981

In 1973 the British Standards Institution laid down standard BS 486 for asbestos cement pressure pipes and joints. When it was last revised in 1981, that standard was made to correspond more closely to standard ISO 160. The foreword to the standard indicates that the differences between it and ISO standard 160-1980 are as follows:

> outside diameters at finished ends are given for the range of nominal diameters in general use in the U.K.;
>
> minor editorial changes have been made.

Like standard ISO 160, standard BS 486 indicates the nominal diameters of pipes, specifying that the nominal diameter corresponds to the internal diameter. The thickness of the wall of the pipes and the point at which that is measured is to be specified by the manufacturer. However, paragraph 3.5.1.4.1 of BS 486:1981 lays down the external diameter of the finished ends as does Irish standard I.S. 188. The outside diameters at the finished ends laid down for different nominal diameters and classes of pipes are the same as those provided for in I.S. 188. The specifications concerning the length of the pipes contained in standard BS 486:1981 are the same as those in ISO 160.

2. Background to the dispute

2.1 The invitation to tender for the Dundalk Water Supply Augmentation Scheme

Dundalk Urban District Council is the promoter of a project known as the Dundalk Water Supply Augmentation Scheme. Contract No. 4 of this scheme concerns the construction of a water main to transport water from the River Fane source to a treatment plant at Cavan Hill and thence into the existing town supply system. The invitation to tender for this contract by open procedure was published in Supplement to the Official Journal No. S 50 of 13 March 1986, p. 13. At point 13 of the published notice it was stated that:

> "The contract will be awarded, subject to the Dundalk Urban District Council being satisfied as to the ability of the contractor to carry out the work, to the contractor who submits a tender, in accordance with the tender documents, which is adjudged to be the most economically advantageous to the Council in respect of price, period of completion, technical merit and running costs.
>
> The lowest or any tender need not necessarily be accepted."

An Irish firm specializing in work of that sort, namely P.J. Walls (Civil) Ltd., hereinafter referred to as "Walls", submitted three tenders in response to the invitation to tender:

Tender A based on the use of 700 mm diameter asbestos cement pipes supplied by Tegral Ltd. (the only Irish producer of such pipes);

Tender B based on the use of 700 mm diameter "K9" ductile iron pipes supplied by Stanton and Staveley, a UK company;

Tender C based on the use of 700 mm diameter asbestos cement pipes supplied by Uralita, of Spain.

The price quoted in Tender C was significantly below that in Tenders A and B, due entirely to the cost of the pipes. Walls considered that in those circumstances, Tender C offered them the best possibility of obtaining the contract.

On 6 June 1986, the consulting engineers to the project, engaged by Dundalk Urban District Council, wrote to Walls inviting them to a pre-adjudication interview. The letter in question added that proof would be required that the firm supplying the pipes "is registered with the IIRS for the purposes of the Irish Standard Mark Licensing Scheme referred to in the Specification". There would be no point in coming to the meeting if Walls were unable to prove compliance with Clause 4.29 of the specification annexed to the contract in question. That clause provides that:

> "Asbestos cement pressure pipes shall be certified as complying with Irish Standard Specification 188 - 1975 in accordance with the Irish Standard Mark Licensing Scheme of the Institute for Industrial Research and Standards. All asbestos cement

watermains are to have a bituminous coating internally and externally. Such coatings shall be applied at the factory by dipping."

At the pre-adjudication interview on 24 June 1986, Walls claimed that the pipes obtained from Uralita of Spain complied with standards BS 486 and ISO 160 and were of a quality equal to that required by standard I.S. 188. However, the consulting engineers stated that they could not take account of Tender C since the only companies certified by the NSAI under I.S. 188:1975 were Tegral Pipes and Toschi Productions.

2.2. Steps taken by Uralita and Walls

On that basis, an exchange of views took place between the IIRS and the NSAI, on the one hand, and Walls and Uralita, on the other, concerning the characteristics and the quality of Uralita pipes. By telex of 13 June 1986, Uralita indicated to the IIRS inter alia that its pipes complied with standards ISO 160-1980 and BS 486:1981. The difference between standard ISO 160-1980 (or BS 486:1981) and I.S. 188:1975 (or BS 486:1973) was that the ISO standard laid down an internal diameter, leaving the outside diameter at the finished ends to the manufactuer's discretion. However, standard I.S. 188:1975 fixed the outside diameter leaving the internal diameter to the manufactuer's discretion. Uralita indicated that it could manufacture pipes to comply with I.S. 188:1975, but the outside diameters would then be larger than those of pipes manufactured in accordance with the ISO standard and the pipes would be thicker than

was actually required. As a result, the prices would be less competitive. Finally, Uralita indicated that the world-wide trend in asbestos cement pipe manufacture was towards a fixed internal diameter. Consequently, Uralita did not have the appropriate mandrels for manufacture in accordance with standard I.S. 188:1975.

In September 1986, Uralita applied to the NSAI for certification on the basis of standard I.S.188 under the NSAI Irish Standard Mark Certification Scheme. In support of its application, Uralita submitted inter alia a certificate from SGS Española de Control S.A., a company in the international "Société Générale de Surveillance" group. At the request of Uralita, that company carried out an inspection at Uralita's factory for the purpose of checking the quality of the pipes manufactured there. In its certificate, dated 1 September 1986, it concludes as follows:

> "As per above all the test results meet entirely with ISO-160-1980 likewise these tests results meet with all BS 486-1981 requirements. With regard to IS-188-1975 the results do totally comply with the mechanical strengths requested in the above standard as well as with the tolerances in lengths, thicknesses, outside diameters, straightness and regularity of the internal diameters."

In a letter of 12 September 1986, the NSAI replied as follows:

"On the basis of the data contained in certificate no. 050111/37352 issued by SGS Española de Control S.A., the Uralita pipes for which you have sought certification i.e. 700 mm nominal bore, class 15, 20 and 25 do not satisfy the requirements of IS 188:1986 with respect to outside diameter at finished ends:

	Nominal bore/ class	Outside diameter at finished ends	Tolerance
		mm	mm
IS 188:1986	700/15	761	$\pm$ 1.0
	700/20	780	$\pm$ 1.0
	700/25	801	$\pm$ 1.0
Uralita	700/15	769	$\pm$ 0.7
	700/20	790	$\pm$ 0.7
	700/25	822	$\pm$ 0.7

A pre-requisite for certification is that all the requirements of the standard specification are met."

By letter of 23 September 1986, Uralita replied that Ireland was the only country to require a specific outside diameter. Its pipes, manufactured in accordance with standard ISO 160, provided a better performance. The consequence of manufacturing in accordance with IS 188 was that the internal diameter of the pipes was less than the nominal diameter of 700mm thus reducing the flow capacity of the pipes. In a letter of 12 December 1986, the NSAI expressly accepted that the Uralita pipes complied with standard ISO 160-1980, but it repeated that they did not satisfy the requirements of I.S. 188.

2.3. The steps taken by the Commission

Following the refusal of the consulting engineers to consider tenders, Walls and Uralita lodged complaints with the Commission. Since it considered that Clause 4.29 of the specification constituted an infringement of Articles 30 to 36 of the EEC Treaty and Article 10 of Directive 71/305, the Commission addressed a telex to the Permanent Representative of Ireland on 11 August 1986. By letter of 9 September 1986 the Permanent Representative replied that the Irish Government did not accept the validity of the Commission's complaint. The complainants had not submitted any evidence that their products met the requirements of I.S. 88 or any equivalent standard.

As a result of that reply, the Commission, acting in pursuance of Article 169 of the EEC Treaty, sent a letter to the Irish Government on 20 October 1986 calling upon it to submit its observations within two weeks. By letter of 14 November 1986, the Irish Government replied reiterating its views and putting forward the grounds on which it considered that Clause 4.29 of the specification was objectively necessary. The use of pipes not complying with I.S. 188 would make it very expensive if not impossible to connect them to the existing pipe network. The cost of spares, fittings and specials as well as the handling costs of Uralita pipes was considerably higher than the difference in price between Walls's Tender C and the other

tenders which were submitted. Furthermore there was a danger to public health inasmuch as Walls and Uralita had not shown that they were in a position to coat the pipes, both internally and externally, with bitumen. Finally, there were difficulties due to the fact that since the Uralita pipes had an inside diameter of 700mm, they had a 5% greater flow than pipes manufactured to the Irish standard, which would have an inside diameter of 687 mm.

After a meeting with the Commission's officials, the Irish Government provided further explanations in a letter of 29 December 1986. That letter indicated that the Minister for the Environment had already approved the award of the contract and that although the Dundalk Urban District Council had undertaken not to proceed with the formal awarding of the contract before 31 January 1987, it would not be possible to delay the award any later unless the Court of Justice ordered such a delay.

Since it was not satisfied with those replies, the Commission, under cover of a letter of 13 January 1987, delivered a reasoned opinion stating that the inclusion in the contract specification of Clause 4.29 and the refusal to consider a tender providing for the use of asbestos cement pipes manufactured to an alternative standard providing equivalent guarantees (such as ISO 160) constituted failures by Ireland to comply with its obligations under Article 30 of the Treaty and Article 10 of Directive 71/305. Ireland was requested to

take all necessary measures to comply with the reasoned opinion within 15 days following notification. By letter of 3 February 1987, Ireland re-affirmed its previous position. It also undertook not to award the contract before 20 February 1987.

Since Ireland did not comply with the reasoned opinion, the Commission brought this action.

3. Procedure before the Court

The Commission's application was lodged at the Court Registry on 13 February 1987.

On the same day, the Commission applied for interim measures in the form of an order that the defendant should take such measures as might be necessary to prevent, until such time as the Court had given final judgment in the case or a settlement had been reached between the Commission and Ireland, the award of a contract for work relating to the Dundalk Water Supply Augmentation Scheme: Contract No. 4. That application was dismissed by order of the President of the Court of 13 March 1987.

The written procedure followed the normal course. However, since the Commission did not submit its reply within the time allowed there is neither a reply nor a rejoinder.

By an application lodged at the Court Registry on 26 June 1987, the Kingdom of Spain applied for leave to intervene in support of the Commission's conslusions. By order of 8 July 1987, the Court allowed that application. The intervener submitted its observations in a statement lodged at the Court Registry on 23 September 1987.

Upon hearing the report of the Judge-Rapporteur and the views of the Advocate General, the Court decided to open the oral procedure without any preparatory inquiry. However, it requested the applicant and the defendant to reply in writing to certain questions.

II Conclusions of the parties

The Commission of the European Communities, the applicant, claims that the Court should:

1. Declare that by allowing the inclusion in the contract specification for the Dundalk Water Supply Augmentation Scheme Contract No. 4 of Clause 4.29 providing that asbestos cement pressure pipes shall be certified as complying with the Irish Standard Specification 188 - 1975 in accordance with the Irish Standard Mark Licensing Scheme of the Institute of Industrial Research and Standards (IIRS) and consequently refusing to

consider (or rejecting without adequate justification) a tender providing for the use of asbestos cement pipes manufactured to an alternative strandard providing equivalent guarantees of safety, performance and reliability (such as ISO 160), Ireland has failed to fulfil its obligations under Article 30 of the EEC Treaty and Article 10 of Council Directive 71/305/EEC;

2. Order Ireland to pay the costs.

Ireland, the defendant, contends that the Court should:

1. Dismiss the Commission's application and declare it not to be well founded.

2. Order the Commission to pay the costs.

III Submissions and arguments of the parties

1. Technical aspects

Ireland puts forward a certain number of technical arguments in support of the proposition that Clause 4.29 of the contract specification in question is objectively necessary and justified. The Commission contests those arguments, claiming in particular that standard ISO 160 is equivalent to standard I.S. 188. The differences between the positions of the parties concern, inter alia, the following points.

(a) The equivalence of standard BS 486 to standard ISO 160.

The Commission, relying principally on the certificate of SGS Española de Control, considers that the Uralita pipes comply both with standard ISO 160 and standard BS 486. It interprets the latter standard as not requiring specific outside diameters at the finished ends of the pipes. However, by indicating such diameters "for the range of nominal diameters in general use in the U.K.", BS 486 indicates them only for information.

Ireland relies on a statement by the British Standards Institution according to which the said outside diameters of the finished ends (identical to those laid down in standard I.S. 188) are compulsory. The Uralita pipes do not therefore meet the requirements of the British standard.

(b) Diameter of fittings and specials

In Ireland's view, fittings are manufactured in the United Kingdom and Ireland with an internal diameter of 687 mm, which is suitable for pipes manufactured to standards I.S. 188 or BS 486. Such fittings cannot be adapted to the different outside diameter of Uralita pipes. Consequently, the latter cannot be directly connected

to the existing pipe network. This gives rise to problems of interchangeability and interconnectability which considerably increase the cost of using Uralita pipes.

The Commission claims that 700 mm pipes manufactured to ISO 160 have an advantage over I.S. 188 pipes as regards their compatibility with fittings and specials since these are manufactured to an actual internal diameter equal to the nominal diameter of 700 mm. That fact is confirmed by a telex of 6 February 1987 from the U.K. manufacturers, Stanton and Staveley, to Walls.

(c) Cost of spares and interconnexions

According to Ireland a large stock of spares would be necessary for the Uralita pipes in order to ensure the continuity of water supply, having regard in particular to the requirements of transport and the time required for delivery.

The Commission considers that a stock of Uralita spares would be cheaper than the same stock of I.S. 188 spares.

(d) The length of the Uralita pipes

The Commission states that the length of the pipes may be 4 metres or 6 metres under both I.S. 188 and ISO 160 and is a matter for agreement between the manufacturer and purchaser.

Ireland accepts that that is the position in relation to standards but it points out that all correspondence with Uralita indicates a 6 metre pipe. However, Dundalk Urban District Council required a 4 metre pipe because of the lower cost of repairing and maintaining such pipes.

(e) Flow capacity

Noting that Uralita has emphasized that the flow capacity of its pipes is greater than that of those manufactured by Tegral because of the slightly larger diameter at the finished ends, Ireland claims that this is in fact a disadvantage since abstraction of water from the River Fane is limited by court order.

The Commission claims that the greater flow capacity of ISO 160 pipes is an advantage since it would lead to lower energy costs.

(f) Consequential costs

According to Ireland, the possible need to test the Uralita pipes upon their arrival in Ireland and other delays linked to the use of such pipes in the completion of Contract No. 4 would have the effect of causing delay in the completion of Contracts Nos. 5, 6 and 7 of the Dundalk Scheme. As a result, claims would be made by the contractors carrying out the latter contracts.

The Commission considers that the risk of delay due to the use of imported pipes was a matter for the contractor to take into account in making his estimate. Furthermore, the local authority would have the remedies available to it under the contract in question.

(g) Risk to public health

Ireland consider that in regard to the three aspects of public health, namely the asbestos fibre, the bitumen coating and the sealing ring material, Uralita has not adequately demonstrated its compliance with safety equivalent to that required by standard I.S. 188.

The Commission points out that only white asbestos fibres (as opposed to blue asbestos fibres) are used in pipe manufacture and

present no health risk. In any case, the bitumen coating was separately specified in the contract specification and Uralita quoted for pipes on that basis.

2. Infringement of Directive 71/305

The Commission admits first of all that Ireland is not required to apply the provisions of Directive 71/305, since Article 3 (5) thereof excludes water services from its provisions. However, it considers that Ireland itself applied the directive to the contract at issue by publishing a notice in the Official Journal and it is therefore obliged to apply the directive correctly.

However, Ireland did not correctly apply Article 10 (2) of the directive. In the first place, the condition concerning a certificate of conformity to standard I.S. 188 is not justified by the subject of the contract. Other standards exist for asbestos cement pipes, such as BS 486 and ISO 160, which provide equivalent guarantees of safety, performance and reliability equivalent to I.S. 188. The fact that pipes made to other standards need to be imported, are not interchangeable with existing stocks of spare parts and that their use may necessitate a larger stock of spares are not valid reasons for excluding them from consideration. Furthermore, the effect of Clause 4.29 is to favour certain undertakings and to eliminate others, since

the only undertaking in a position to supply the pipes required by the specification in the invitation to tender is Tegral. Finally, Article 10 (2) of the directive permits reference to a specific brand or product only if the words "or equivalent" are added. Those words were not included in Clause 4.29.

The Commission also states that the fact that Clause 4.29 of the contract specification is incompatible with the directive makes the rejection of Walls's Tender C incompatible with the directive.

The Kingdom of Spain maintains in particular that the fact of advertising the tender procedure in the Official Journal, which is optional, makes it subject to all the rules laid down by the directive. Otherwise, it would serve no purpose to procure competition between tenderers from the various Member States without applying to the tender procedure the rules laid down to ensure that such competition is fair.

Ireland observes in the first place that the directive does not apply to this case, as can be seen from its terms, including the explicit exclusion from its scope of contracts relating to water

services. The fact that Ireland initially acted as if the directive applied to the contract in question is irrelevant. No Member State can make a directive apply to circumstances expressly excluded from its scope.

In the second place, Ireland contends that Clause 4.29 of the contract specification does not constitute an "indication of trade marks, patents, types, or of a specific origin or production" within the meaning of Article 10 (2) of the directive.

3. Infringement of Article 30 of the Treaty

The Commission states in limine that Dundalk Urban District Council is a body for whose acts Ireland is responsible in Community law. Moreover, the Council has to obtain the authorization of the Department of the Environment before accepting a tender.

It then submits that the tender procedure at issue constitutes a restriction on trade incompatible with Article 30 of the EEC Treaty inasmuch as it excludes the use of pipes manufactured in other Member States which provide equivalent guarantees of safety, performance and reliability in the construction of pipelines. If Clause 4.29 had not been included in the contract specification, other contractors might have submitted tenders providing for the use of imported pipes. If

the contract specification had provided for the use of pipes complying with other standards, the contractors could have taken account of additional requirements (length, coating and the need for a stock of spare parts). They would therefore have been able to avoid having their tender rejected on the basis of arguments or pretexts alleging the necessity to impose such conditions.

The arguments put forward by Ireland, particularly in its reply to the reasoned opinion, must be rejected. In the Commission's view, specifications in public works contracts restricting the use of imported goods fall under Article 30 even if there is no general restriction on imports. Furthermore, asbestos cement pipes are used solely in public works. Ireland wrongly maintains that manufacturers in other Member States can have their products certified as complying with standard I.S. 188. There is no justification in requiring manufacturers in other Member States, manufacturing pipes to equivalent standards, to change their manufacturing techniques or apply for certification from the IIRS. The argument to the effect that Article 30 is inapplicable because the rules applying to public contracts are laid down in Directive 71/305 is also without foundation. Since Ireland relied on the judgment of 22 March 1977 (Case 74/76, Ianelli v Meroni, [1977] ECR 557), the Commission

observes that that judgment is merely authority for the proposition that Article 30 does not apply to obstacles to trade covered by other provisions of the Treaty. The directive is not a provision of the Treaty.

The Commission goes on to maintain that the requirement to obtain a certificate of conformity with standard I.S. 188 is not justified by Article 36 of the Treaty or by "a mandatory requirement" in the sense of the case-law of the Court. Such a justification is lacking since pipes manufactured in conformity with standards such as ISO 160 and BS 486 provide equivalent guarantees. In so far as the use of "equivalent" pipes has an influence on the cost of the work, account must be taken of that factor in selecting a particular tender. It does not justify the exclusion of such pipes a priori.

The Kingdom of Spain supports the Commission's arguments, in particular by drawing attention to the basic principles of the Court's case-law in regard to the free movement of goods and the inferences that the Commission drew from the judgment of the Court of 20 February 1979 (Case 120/78, REWE v Bundesmonopolverwaltung für Branntwein, [1979] ECR 649).

Ireland maintains in the first place that public works are not subject to Article 30 of the Treaty but to Articles 59 et seq. concerning the provision of services. Were it not for the fact that the contract at issue in this case related to water services, Directive 71/305 would have applied to it. However, the directive was

adopted on the basis of Articles 57(2), 66 and 100 of the Treaty and the recitals in the preamble thereto make it clear that further rules applicable to public works contracts relating to water services are to be adopted in the future. The application of the rules concerning the provision of services is justified by the fact that the many provisions that make up a public works contract constitute a single unit in the context of the contractual obligations being undertaken. In all cases the requirements relating to materials must be viewed as being subsidiary to those relating to the supply of the services necessary to turn such materials into finished works.

If the provisons of the Treaty concerning the provision of services apply, Article 30 of the Treaty cannot apply. The Court stated in its judgment of 22 March 1977, cited above, that "however wide the field of application of Article 30 may be, it nevertheless does not include obstacles to trade covered by other provisions of the Treaty".

Ireland maintains secondly that in any event, even if Article 30 of the Treaty applied to public works contracts, a technical specification such as Clause 4.29 cannot be regarded as a "trading rule" likely to hinder intra-Community trade. That clause does not

therefore have an effect equivalent to a quantitative restriction within the meaning of the case-law of the Court.

Finally, Ireland states that Clause 4.29 applies both to imported asbestos cement pipes and those manufactured in Ireland and the interests it is designed to protect, namely, a high standard of quality and uniformity of design in such piping and a capacity to cope efficiently with Irish conditions and pre-existing services, must be regarded as "mandatory requirements" in the sense of the case-law of the Court in regard to the free movement of goods. Furthermore, the clause is justified by reasons connected with the protection of health within the meaning of Article 36 of the Treaty. It is imperative for the protection of the health of the people of Dundalk and the surrounding area that there be no delay in improving their water supply. Furthermore, the requirements of I.S. 188 in regard to bitumen coating are based upon an urgent need to ensure the health and safety of persons using potable water flowing through the pipes in question.

IV Replies to questions put by the Court

1. Question to the applicant

"The Commission has requested the Court to declare that Ireland has failed to fulfil it obligations

'by allowing the inclusion in the contract specification ... of Clause 4.29 providing that [the] pipes shall be certified as complying with the Irish Standard Specification 188 ...' and

'consequently refusing to consider ... a tender providing for the use of ... pipes manufactured to an alternative standard providing equivalent guarantees of safety, performance and reliability ...'.

The Commission is requested to indicate:

whether those are two separate claims or whether the second part merely serves as evidence in support of the first;

whether, in that second part, the Commission is asking the Court to determine that Tender C submitted by P.J. Walls (Civil) Ltd was the most economically advantageous tender."

Answer

The Commission states that the two claims are separate. The first claim alleges a potential barrier to trade which affected all tenderers and suppliers. The second alleges an actual barrier to trade concerning a specific tenderer and a specific supplier. The Commission attaches considerable importance to the second claim. It wishes to establish that a refusal by a public authority or its agents to consider a tender incorporating imported materials, or the unjustified rejection of such a tender, constitutes a measure which may be contrary to Article 30 of the EEC Treaty. As regards the second part of the question, it is important to note that Walls's Tender C was

rejected by the consulting engineers because it was not based on the use of pipes bearing the Irish Standard Mark in accordance with the contract specification. The Commission therefore considers that Walls's Tender C was wrongfully rejected because it was not properly considered on its merits by the promoter. It is not therefore necessary on this view for the Court to enter into the technical and economic arguments advanced by Ireland in its defence. It is only if the Court should come to the view that Walls's Tender C was properly considered that it would be necessary to examine whether the rejection was well-founded and in particular whether Walls's Tender C was the economically most advantageous tender.

2. Question to the defendant

"It would appear from the documents in the case that the authorities concerned first refused even to consider Tender C submitted by P.J. Walls (Civil) Ltd which was based on the use of pipes manufactured by the Spanish company Uralita on the ground that the pipes did not comply with Irish Standard Specification 188. In the course of its correspondence with the Commission, the Irish Government gives the impression that that refusal was also justified on other grounds of a technical and economic nature.

The Irish Government is requested to indicate:

whether the initial refusal was in fact decided on without any examination of the pipes in question;

whether such an examination was carried out subsequently."

Answer

Ireland states that the initial refusal was decided on without any examination of the pipes in question. That is in accordance with standard practice. Materials are never examined at the stage at which the consulting engineers verify whether the tenders comply with the conditions laid down in the specification. An examination of the pipes was also not carried out subsequently. An examination is carried out only of materials delivered to a project site by an appointed contractor to ensure that those materials in fact comply with the required specification.

T. Koopmans
Judge-Rapporteur

DE EUROPÆISKE FÆLLESSKABERS DOMSTOL
GERICHTSHOF DER EUROPÄISCHEN GEMEINSCHAFTEN
ΔΙΚΑΣΤΗΡΙΟ ΤΩΝ ΕΥΡΩΠΑΪΚΩΝ ΚΟΙΝΟΤΗΤΩΝ
COURT OF JUSTICE OF THE EUROPEAN COMMUNITIES
TRIBUNAL DE JUSTICIA DE LAS COMUNIDADES EUROPEAS

CVRIA
LUXEMBOURG

COUR DE JUSTICE DES COMMUNAUTÉS EUROPÉENNES
CORTE DI GIUSTIZIA DELLE COMUNITÀ EUROPEE
HOF VAN JUSTITIE VAN DE EUROPESE GEMEENSCHAPPEN
TRIBUNAL DE JUSTIÇA DAS COMUNIDADES EUROPEIAS

Translation

/TCDA/Judgment of 20 September 1988 - Case 31/87

@Judgment of the Court (Fourth Chamber)

@20 September 1988 *

@(Procedure for the award of public works contracts)

/P3/

In Case 31/87

REFERENCE to the Court under Article 177 of the EEC Treaty by the Sixth Chamber of the Arrondissementsrechtbank ((District Court)), The Hague, for a preliminary ruling in the proceedings pending before that court between

Gebroeders Beentjes B.V.

@and

State of the Netherlands,

on the interpretation of Council Directive 71/305/EEC of 26 July 1971 concerning the co-ordination of procedures for the award of public works contracts (Official Journal, English Special Edition 1971 (II), p. 682),

@THE COURT (Fourth Chamber)

composed of: G.C. Rodríguez Iglesias, President of the Chamber, T. Koopmans and C.N. Kakouris, Judges,

Advocate General: M. Darmon

Registrar: J.-G. Giraud,

after considering the observations submitted on behalf of:

the Italian Government, by P.G. Ferri,

the Commission of the European Communities, by R. Wainwright and R. Barents,

having regard to the Report for the Hearing and further to the hearing on 8 March 1988,

after hearing the Opinion of the Advocate General delivered at the sitting on 4 May 1988,

gives the following

@Judgment

/P5/

1 By a judgment of 28 January 1987, which was received at the Court on 3 February 1987, the Arrondissementsrechtbank, The Hague, referred to the Court for a preliminary ruling under Article 177 of the EEC Treaty a number of questions on the interpretation of Council Directive 71/305/EEC of 26 July 1971 concerning the co-ordination of procedures for the award of public works contracts (Official Journal, English Special Edition 1971 (II) p. 682).

2 These questions arose in proceedings between Gebroeders Beentjes B.V. and the Netherlands Ministry of Agriculture and Fisheries in connexion with a public invitation to tender for a public works contract in connexion with a land consolidation operation.

3 In the main proceedings, Beentjes, the plaintiff, claimed that the decision of the awarding authority rejecting its tender, although it was the lowest, in favour of the next-lowest bidder had been taken in breach of the provisions of the above-mentioned directive.

4 It was in these circumstances that the Arrondissementsrechtbank stayed the proceedings and asked the Court for a preliminary ruling on the following questions:

> "1. Is a body with the characteristics of a 'local committee', as provided for in the Ruilverkavelingswet 1954 and described in paragraph 5.3 of (the national court's) judgment to be regarded as 'the State' or a 'regional or local authority' for the purposes of Council Directive 71/305/EEC of 26 July 1971?
>
> 2. Does Directive 71/305/EEC allow a tenderer to be excluded from a tendering procedure on the basis of considerations such as those mentioned in paragraph 6.2 of (the national court's) judgment if in the invitation itself no qualitative criteria are laid down in this regard (but reference is simply made to general conditions containing a general reservation such as that relied upon by the State in this case)?
>
> 3. May parties such as Beentjes in a civil action such as this rely on the provisions of Directive 71/305/EEC indicating the cases in which and the conditions under which a tenderer may be excluded from the tendering procedure on qualitative grounds, even if in the incorporation of those provisions of the directive in national legislation the contracting authority is given wider powers to refuse to award a contract than are permitted under the directive?"

5 As regards the second question, it should be stated that the considerations referred to in the national court's judgment concern the reasons for which Beentjes' tender was rejected by the awarding authority, which considered that Beentjes lacked sufficient specific

experience for the work in question, that its tender appeared to be less acceptable and that it did not seem to be in a position to employ long-term unemployed persons. It is apparent from the documents before the Court that the first two criteria cited above were provided for in Article 21 of the Uniform Rules on Invitations to Tender of 21 December 1971 (Uniform Aanbestedingsreglement, hereinafter referred to as "the Uniform Rules"), to which the contested invitation to tender referred, while the condition regarding the employment of long-term unemployed persons was expressly set out in the invitation to tender.

6 Reference is made to the Report for the Hearing for a more detailed account of the facts of the main proceedings, the relevant provisions of Community and national law, the written observations submitted to the Court and the course of the proceedings, which are mentioned or discussed hereinafter only in so far as is necessary for the reasoning of the Court.

The first question

7 By its first question, the national court seeks in substance to establish whether Directive 71/305/EEC applies to the award of public works contracts by a body such as the local land consolidation committee.

8 It appears from the documents before the Court that the local land consolidation committee is a body with no legal personality of its own whose functions and composition are governed by legislation and that its members are appointed by the Provincial Executive of the province concerned. It is bound to apply rules laid down by a central committee established by royal decree, whose members are appointed by the Crown. The State ensures observance of the obligations arising out of measures of the committee and finances the public works contracts awarded by the local committee in question.

9 The objective of Directive 71/305/EEC is to coordinate national procedures for the award of public works contracts concluded in Member States on behalf of the State, regional or local authorities or other legal persons governed by public law.

10 Pursuant to Article 1 (b) of the Directive, the State, regional or local authorities and the legal persons governed by public law specified in Annex I are to be regarded as "authorities awarding contracts".

11 For the purposes of this provision, the term "the State" must be interpreted in functional terms. The aim of the directive, which is to ensure the effective attainment of freedom of establishment and freedom to provide services in respect of public works contracts, would be jeopardized if the provisions of the directive were to be held to be inapplicable solely because a public works contract is awarded by a body which, although it was set up to carry out tasks entrusted to it by legislation, is not formally a part of the State administration.

12 Consequently, a body such as that in question here, whose composition and functions are laid down by legislation and which depends on the authorities for the appointment of its members, the observance of the obligations arising out of its measures and the financing of the public works contracts which it is its task to award, must be regarded as falling within the notion of the State for the purpose of the above-mentioned provision, even though it is not part of the State administration in formal terms.

13 In reply to the first question put by the national court, it should therefore be stated that Directive 71/305/EEC applies to public works contracts awarded by a body such as the local land consolidation committee.

The second question

14 The second question put by the national court seeks, in the first place, to establish whether Directive 71/305/EEC precludes the rejection of a tender on the following grounds:

lack of specific experience relating to the work to be carried out;

the tender does not appear to be the most acceptable in the view of the awarding authority;

inability of the contractor to employ long-term unemployed persons.

Secondly, it seeks to determine what prior notice is required by the directive as regards the use of such criteria, should they be regarded as compatible with the directive.

15 According to the structure of the directive, in particular Title IV (Common rules on participation), the examination of the suitability of contractors to carry out the contracts to be awarded and the awarding of the contract are two different operations in the procedure for the award of a public works contract. Article 20 of the directive provides that the contract is to be awarded after the contractor's suitability has been checked.

16 Even though the directive, which is intended to achieve the co-ordination of national procedures for the award of public works contracts while taking into account, as far as possible, the procedures and administrative practices in force in each Member State (second recital in the preamble), does not rule out the possibility that examination of the tenderer's suitability and the award of the contract may take place simultaneously, the two procedures are governed by different rules.

17 Article 20 provides that the suitability of contractors is to be checked by the authorities awarding contracts in accordance with the criteria of economic and financial standing and of technical knowledge or ability referred to in Articles 25 to 28. The purpose of these articles is not to delimit the power of the Member States to fix the level of financial and economic standing and technical knowledge required in order to take part in procedures for the award of public works contracts but to determine the references or evidence which may be furnished in order to establish the contractor's financial and economic standing and technical knowledge or ability (see judgment of 9 July 1987 in Joined Cases 27 to 29/86, C.E.I. and Bellini ((1987)) ECR 3347). Nevertheless, it is clear from these provisions that the authorities awarding contracts can check the suitability of the contractors only on the basis of criteria relating to their economic and financial standing and their technical knowledge and ability.

18 As far as the criteria for the award of contracts is concerned, Article 29 (1) provides that the authorities awarding contracts must base their decision either on the lowest price only or, when the award is made to the most economically advantageous tender, on various criteria according to the contract: e.g. price, period for completion, running costs, profitability, technical merit.

19 Although the second alternative leaves it open to the authorities awarding contracts to choose the criteria on which they propose to base their award of the contract, their choice is limited to criteria aimed at identifying the offer which is economically the most advantageous. Indeed, it is only by way of exception that Article 29 (4) provides that an award may be based on criteria of a different nature "within the framework of rules whose aim is to give preference to certain tenderers by way of aid, on condition that the rules invoked are in conformity with the Treaty, in particular Articles 92 et seq."

20 Furthermore, the directive does not lay down a uniform and exhaustive body of Community rules; within the framework of the common rules which it contains, the Member States remain free to maintain or

adopt substantive and procedural rules in regard to public works contracts on condition that they comply with all the relevant provisions of Community law, in particular the prohibitions flowing from the principles laid down in the Treaty in regard to the right of establishment and the freedom to provide services (judgment of 9 July 1987, cited above).

21 Finally, in order to meet the directive's aim of ensuring development of effective competition in the award of public works contracts, the criteria and conditions which govern each contract must be given sufficient publicity by the authorities awarding contracts.

22 To this end, Title III of the directive sets out rules for Community-wide advertising of contracts drawn up by awarding authorities in the Member States so as to give contractors in the Community adequate information on the work to be done and the conditions attached thereto, and thus enable them to determine whether the proposed contracts are of interest. At the same time additional information concerning contracts must, as is customary in the Member States, be given in the contract documents for each contract or else in an equivalent document (cf. ninth and tenth recital in the preamble to the directive).

23 The different aspects of the question put by the national court must be examined in the light of the foregoing.

24 In this case specific experience relating to the work to be carried out was a criterion for determining the technical knowledge and ability of the tenderers. It is therefore a legitimate criterion for checking contractors' suitability under Articles 20 and 26 of the directive.

25 The exclusion of a tenderer because its tender appears less acceptable to the authorities awarding the contract was provided for, as appears from the documents before the Court, in Article 21 of the

Uniform Rules. Under Article 21 (3), "the contract shall be awarded to the tenderer whose tender appears the most acceptable to the awarding authority".

26 The compatibility of such a provision with the directive depends on its interpretation under national law. It would be incompatible with Article 29 of the directive if its effect was to confer on the authorities awarding contracts unrestricted freedom of choice as regards the awarding of the contract in question to a tenderer.

27 On the other hand, such a provision is not incompatible with the directive if it is to be interpreted as giving the authorities awarding contracts discretion to compare the different tenders and to accept the most advantageous on the basis of objective criteria such as those listed by way of example in Article 29 (2) of the Directive.

28 As regards the exclusion of a tenderer on the ground that it is not in a position to employ long-term unemployed persons, it should be noted in the first place that such a condition has no relation to the checking of contractors' suitability on the basis of their economic and financial standing and their technical knowledge and ability or to the criteria for the award of contracts referred to in Article 29 of the directive.

29 It follows from the judgment of 9 July 1987, cited above, that in order to be compatible with the directive such a condition must comply with all the relevant provisions of Community law, in particular the prohibitions flowing from the principles laid down in the Treaty in regard to the right of establishment and the freedom to provide services.

30 The obligation to employ long-term unemployed persons could inter alia infringe the prohibition of discrimination on grounds of nationality laid down in the first paragraph of Article 7 of the Treaty if it became apparent that such a condition could be satisfied only by tenderers from the State concerned or indeed that tenderers from other

Member States would have difficulty in complying with it. It is for the national court to determine, in the light of all the circumstances of the case, whether the imposition of such a condition is directly or indirectly discriminatory.

31 Even if the criteria considered above are not in themselves incompatible with the directive, they must be applied in conformity with all the procedural rules laid down in the directive, in particular the rules on advertising. It is therefore necessary to intepret those provisions in order to determine what requirements must be met by the various criteria referred to by the national court.

32 It appears from the documents before the Court that in this case the criterion of specific experience relating to the work to be carried out and that of the most acceptable tender were not mentioned in the contract documents or in the contract notice; these criteria are derived from the Article 21 of the Uniform Rules, to which the notice made a general reference. On the other hand, the requirement regarding the employment of long-term unemployed persons was the subject of special provisions in the contract documents and was expressly mentioned in the notice published in the Official Journal of the European Communities.

33 As regards the criterion of specific experience relating to the work to be carried out, it should be stated that although the last sentence of Article 26 of the directive requires the authorities awarding contracts to specify in the contract notice which of the references concerning the technical knowledge and ability of the contractor are to be produced, it does not require them to list in the notice the criteria on which they propose to base their assessment of the contractors' suitability.

34 Nevertheless, in order for the notice to fulfil its rôle of enabling contractors in the Community to determine whether a contract is of interest to them, it must contain at least some mention of the specific conditions which a contractor must meet in order to be considered suitable to tender for the contract in question. However,

such a mention cannot be required where, as in this case, the condition is not a specific condition of suitability but a criterion which is inseparable from the very notion of suitability.

35 As regards the criterion of "the most acceptable offer", it should be noted that even if such a criterion were compatible with the directive in the circumstances set out above, it is clear from the wording of Article 29 (1) and (2) of the directive that where the authorities awarding the contract do not take the lowest price as the sole criterion for awarding the contract but have regard to various criteria with a view to awarding the contract to the most economically advantageous tender, they are required to state these criteria in the contract notice or the contract documents. Consequently, a general reference to a provision of national legislation cannot satisfy the publicity requirement.

36 A condition such as the employment of long-term unemployed persons is an additional specific condition and must therefore be mentioned in the notice, so that contractors may become aware of its existence.

37 In reply to the second question put by the national court it should therefore be stated that:

- the criterion of specific experience for the work to be carried out is a legitimate criterion of technical ability and knowledge for the purpose of ascertaining the suitability of contractors. Where such a criterion is laid down by a provision of national legislation to which the contract notice refers, it is not subject to the specific requirements laid down in the directive concerning publication in the contract notice or the contract documents;

- the criterion of "the most acceptable tender", as laid down by a provision of national legislation, may be compatible with the directive if it reflects the discretion which the authorities awarding contracts have in order to determine the most economically advantageous tender on the basis of objective criteria and thus does not involve an element of

arbitrary choice. It follows from Article 29 (1) and (2) of the directive that where the authorities awarding contracts do not take the lowest price as the sole criterion for the award of a contract but have regard to various criteria with a view to awarding the contract to the most economically advantageous tender, they are required to state those criteria in the contract notice or the contract documents;

- the condition relating to the employment of long-term unemployed persons is compatible with the directive if it has no direct or indirect discriminatory effect on tenderers from other Member States of the Community. An additional specific condition of this kind must be mentioned in the contract notice.

The third question

38 The third question seeks in substance to establish whether Articles 20, 26 and 29 of Directive 71/305 may be relied upon by individuals before the national courts.

39 As the Court held in its judgment of 10 April 1984 in Case 14/83 (Von Colson and Kamann v Land Nordrhein-Westfalen ((1984)) ECR 1891), the Member States' obligation arising from a directive to achieve the result envisaged by the directive and their duty under Article 5 of the Treaty to take all appropriate measures, whether general or particular, to ensure fulfilment of that obligation are binding on all the authorities of the Member States, including, for matters within their jurisdiction, the courts. It follows that in applying national law, in particular the provisions of a national law specifically introduced in order to implement a directive, national courts are required to interpret their national law in the light of the wording and the purpose of the directive in order to achieve the result referred to in the third paragraph of Article 189 of the Treaty.

40 Furthermore, the Court has consistently held (see most recently the judgment of 26 February 1986 in Case 152/84, Marshall v Southampton and South-West Hampshire Health Authority ((1986)) ECR 723) that where

the provisions of a directive appear, as far as their subject-matter is concerned, to be unconditional and sufficiently precise, those provisions may be relied on by individuals against the State where that State fails to implement the directive in national law within the prescribed period or where it fails to implement the directive correctly.

41 It is therefore necessary to consider whether the provisions of Directive 71/305 in question are, as far as their subject-matter is concerned, unconditional and sufficiently precise to be relied on by an individual against the State.

42 As the Court held in its judgment of 10 February 1982 in Case 76/81 (Transporoute v Minister of Public Works ((1982)) ECR 417), in relation to Article 29, the directive's rules regarding participation and advertising are intended to protect tenderers against arbitrariness on the part of the authority awarding contracts.

43 To this end, as has been stated in relation to the reply to the second question, the rules in question provide inter alia that in checking the suitability of contractors the awarding authorities must apply criteria of economic and financial standing and technical knowledge and ability, and that the contract is to be awarded either solely on the basis of the lowest price or on the basis of several criteria relating to the tender. They also set out the requirements regarding publication of the criteria adopted by the awarding authorities and the references to be produced. Since no specific implementing measure is necessary for compliance with these requirements, the resulting obligations for the Member States are therefore unconditional and sufficiently precise.

44 In reply to the third question it should therefore be stated that the provisions of Articles 20, 26 and 29 of Directive 71/305 may be relied on by an individual before the national courts.

/P6/

Costs

45 The costs incurred by the Commission of the European Communities and by the Italian Republic are not recoverable. As these proceedings are, in so far as the parties to the main proceedings are concerned, a step in the action before the national court, the decision on costs is a matter for that court.

/P3/

On those grounds,

@THE COURT (Fourth Chamber)

in answer to the questions referred to it by the the Arrondissementsrechtbank, The Hague, by a judgment of 28 January 1987, hereby rules:

1. **Directive 71/305 applies to public works contracts awarded by a body such as the local land consolidation committee.**

2. **The criterion of specific experience for the work to be carried out is a legitimate criterion of technical ability and knowledge for the purpose of ascertaining the suitability of contractors. Where such a criterion is laid down by a provision of national legislation to which the contract notice refers, it is not subject to the specific requirements laid down in the directive concerning publication in the contract notice or the contract documents.**

The criterion of "the most acceptable tender", as laid down by a provision of national legislation, may be compatible with the directive if it reflects the discretion which the authorities awarding contracts have in order to determine the most economically advantageous tender on the basis of objective criteria and thus does not involve an element of

arbitrary choice. It follows from Article 29 (1) and (2) of the directive that where the authorities awarding contracts do not take the lowest price as the sole criterion for the award of a contract but have regard to various criteria with a view to awarding the contract to the most economically advantageous tender, they are required to state those criteria in the contract notice or the contract documents.

The condition relating to the employment of long-term unemployed persons is compatible with the directive if it has no direct or indirect discriminatory effect on tenderers from other Member States of the Community. An additional specific condition of this kind must be mentioned in the contract notice.

3. The provisions of Articles 20, 26 and 29 of Directive 71/305 may be relied on by an individual before the national courts.

/S1/Rodríguez Iglesias, Koopmans, Kakouris

Delivered in open court in Luxembourg on 20 September 1988.

/S2/J.-G. Giraud, Registrar - G.C. Rodríguez Iglesias, President of the Fourth Chamber

/FIN/

* Language of the case: Dutch

/TCDR/Report for the Hearing - Case 31/87

@Report for the Hearing
@Case 31/87 *

/P2/

I. Relevant legislation

1. Community law

Council Directive 71/305/EEC of 26 July 1971 is intended to secure freedom of establishment and freedom to provide services in respect of public works contracts awarded in Member States on behalf of the State, regional or local authorities or other legal persons governed by public law by means of co-ordination of national procedures for the award of such contracts and at the same time the abolition of restrictions.

The questions raised in the present case concern the interpretation of the provisions of the directive fixing the scope ratione personae of the directive, and of the provisions concerning the criteria for the qualitative selection of undertakings and the criteria for the award of contracts set out in Title IV, which establishes the common rules on participation.

As far as the scope of the directive is concerned, Article 1 provides that the State, regional or local authorities and the legal persons governed by public law specified in Annex I are to be regarded as authorities awarding contracts.

As regards the conditions under which undertakings may tender for contracts and the conditions for awarding such contracts, the provisions of the directive at issue in the present case are as follows:

Article 26, which provides that proof of the contractor's technical knowledge or ability may be furnished by:

"(b) a list of the works carried out over the past five years, accompanied by certificates of satisfactory execution for the most important works ..."

Article 29, which states that:

"1. The criteria on which the authorities awarding contracts shall base the award of contracts shall be:

- either the lowest price only;
- or, when the award is made to the most economically advantageous tender, various criteria according to the contract: e.g. price, period for completion, running costs, profitability, technical merit.

2. In the latter instance, the authorities awarding contracts shall state in the contract documents or in the contract notice all the criteria they intend to apply to the award, where possible in descending order of importance.

3. ...

4. The provisions of paragraph 1 shall not apply when a Member State bases the award of contracts on other criteria, within the framework of rules whose aim is to give preference to certain tenderers by way of aid, on condition that the rules invoked are in conformity with the Treaty, in particular Articles 92 et seq."
...

2. National law

The relevant national legislation is, in substance, as follows:

Article 51 of the Ruilverkavelingswet 1954 (Land Consolidation Law), which governs the composition and functions of local land consolidation committees.

The Royal Decree of 6 April 1973, enacted to implement Directive 71/305, Article 6 of which refers to the Uniform Rules on Invitations to Tender ((Uniform Aanbestedingsreglement)) for contracts open to public tender.

Article 21 of the Uniform Rules on Invitations to Tender, which, with reference to the choice of the contractor, provides that:

"1. The awarding authority is not under an obligation to award the contract.

2. Only tenderers whose ability to carry out the work is unquestioned, in the view of the awarding authority, from the technical, economic, financial and organizational points of view, may be considered for the contract.

3. Without prejudice to paragraph 2, the contract shall be awarded to the tenderer whose tender appears the most acceptable to the awarding authority.

4. ...."

II. The main proceedings

On 21 June 1984, the land consolidation committee for Waterland issued a public invitation to tender in connexion with a land consolidation operation. The general conditions of the invitation to tender stated that the procedure for awarding the contract was to comply with the provisions of the Uniform Rules on Invitations to Tender (hereinafter referred to as "the Uniform Rules"). The general conditions did not mention any specific qualitative criteria.

The contract was not awarded to the undertaking which submitted the lowest tender, namely Beentjes, but to the next-lowest tender. In giving its reasons for its choice, the local committee stated that Beentjes lacked specific experience for the work in question, that Beentjes' tender appeared to it to be less acceptable and that Beentjes was not in a position to employ long-term unemployed persons, although this aspect was the subject of special provisions in the general conditions.

Beentjes brought an action against the State of the Netherlands in the courts claiming inter alia that the local committee had failed to comply with the provisions of Council Directive 71/305/EEC of 26 July 1971 concerning the coordination of procedures for the award of public works contracts. It maintained that the local committee was comparable in legal terms to an organ of central government and that, in any event, the State was responsible for the acts of such a committee. The committee ought therefore to have applied the provisions of Directive 71/305/EEC, which were applicable to the

invitation to tender in question pursuant to the Royal Decree of 6 April 1973 laying down rules for the award of public works contracts. In Beentjes' view, none of the grounds put forward by the local committee for not awarding the contract to Beentjes were in conformity with the rules concerning the criteria for the award of public works contracts laid down in the directive, rules upon which the undertaking considered that it was entitled to rely before the national court.

The Netherlands State contested Beentjes' claim, contending that the local committee cannot be regarded as a State organ and that in any event a tender procedure carried out in accordance with the Uniform Rules satisfies the conditions set out in Directive 71/305. In particular, Article 21 (2) of the Uniform Rules, which provides that only tenderers whose ability to carry out the work is unquestioned, in the view of the awarding authority, from technical, economic, financial and organizational points of view may be considered, has always been regarded as compatible with the directive.

III. Questions submitted by the national court

The Arrondissementsrechtbank ((District Court)), The Hague, took the view that the disposition of the case depended on the interpretation of Directive 71/305. Accordingly, it stayed the proceedings and referred the following questions to the Court for a preliminary ruling pursuant to Article 177 of the EEC Treaty:

"1. Is a body with the characteristics of a local committee as provided for in the Ruilverkavelingswet 1954 and described in paragraph 5.3 of (the national court's) judgment to be regarded as the 'State' or a 'regional or local authority' for the purposes of Council Directive 71/305/EEC of 26 July 1971?

2. Does Directive 71/305/EEC allow a tenderer to be excluded from a tendering procedure on the basis of considerations such as those mentioned in paragraph 6.2 of (the national court's) judgment if in the invitation itself no qualitative criteria are laid down in this regard (but reference is simply made to general conditions containing a general reservation such as that relied upon by the State in this case)?

3. May parties such as Beentjes in a civil action such as this rely on the provisions of Directive 71/305/EEC indicating the cases in which and the conditions under which a tenderer may be excluded from the tendering procedure on qualitative grounds, even if in the incorporation of those provisions of the directive in national legislation the contracting authority is given wider powers to refuse to award a contract than are permitted under the directive?"

For the Court's information, the national court states that land consolidation is carried out by local committees appointed by the Provincial Executive of the province concerned, that in principle a local committee consists of no more than five members, that the State ensures observance of the obligations arising out of the measures of the local committee, that the local committee is bound to apply rules laid down by a Central Committee set up by Royal Decree whose members are appointed by the Crown, and that the local committee has no legal personality of its own.

IV. Proceedings before the Court

The order making the reference was received at the Court Registry on 3 February 1987.

Pursuant to Article 20 on the Protocol of the Statute of the Court of Justice of the EEC, written observations were submitted by the Commission of the European Communities, represented by its Legal Adviser Richard Wainwright and by René Barents, a member of its Legal Department, and by the Italian Government, represented by Pier Giorgio Ferri, Avvocato dello Stato.

Upon hearing the Report of the Judge-Rapporteur and the views of the Advocate General the Court decided to assign the case to the Fourth Chamber and to open the oral proceedings without any preparatory inquiry.

V. Summary of the written observations submitted to the Court

1. The first question

The Italian Government does not express any view on the first question, because it considers that it concerns a question of interpretation strictly limited to the implementation of the directive in the Netherlands legal system.

The Commission takes the view that, contrary to what the Netherlands State maintained in the main proceedings, relying on a judgment delivered in 1984 by the Hoge Raad ((Supreme Court)), the first question must be answered in the affirmative.

In reaching this conclusion, the Commission refers in the first place to the provisions of the Treaty concerning freedom of establishment and freedom to provide services, whose aim requires that the concept of the State should also cover organs which although they are not part of the administration are, as far as their composition and their functioning is concerned, totally dependent on the State both in organizational and in financial terms.

Secondly, the Commission relies on the judgment of the Court of 24 November 1982 in Case 249/81 (Commission v Ireland ((1982)) ECR 4005), in which the Court held that Ireland was responsible for measures contrary to Article 30 of the Treaty taken by a body governed by private law but essentially controlled by the State. In the Commission's view this reasoning should also apply with regard to the provisions concerning freedom of establishment and freedom to provide services.

Finally, the Commission lists a number of characteristics of the local committee which reveal that its link with the State is much closer than was the case in the above-mentioned judgment: the local committee is not a body governed by private law but has a legislative basis, its members are appointed by the Provincial Executive, it is totally dependent as regards its

functioning on the Central Committee appointed by the Crown, the contracts awarded by the local committee are financed by the public authorities and observance of its obligations is guaranteed by the State.

The Commission therefore considers that a body which has the characteristics of the local land consolidation committee falls within the notion of the State for the purposes of Article 1 (b) of the directive.

2. The second question

The Commission and the Italian Government argue that the second question put by the national court should be answered in the negative.

The Italian Government stresses that verification of the contractor's suitability and assessment of the tender constitute two different, independent and successive operations. This is clear, in its view, from Article 20 of the directive, which provides that contracts are to be awarded "after the suitability of contractors ... has been checked". The suitability of the tenderer must therefore be assessed by a decision taken before that concerning the award of the contract in accordance with the criteria allowed under Article 29 of the directive.

A tender procedure such as that in this case, where the unfavourable assessment of the tenderer was expressed after its tender had been accepted as the best, is not consistent with Article 20 of the directive, because the decision on suitability was not made before assessment of the tender. It is also incompatible with Article 29 of the directive, inasmuch as the contract was awarded on the basis of subjective criteria and not objective criteria, which alone are permitted under this article of the directive.

As regards the criteria for qualitative selection, the Commission argues that where none of the references listed in Articles 25 and 26 of the directive are required in the notice of invitation to tender, a contractor cannot be excluded on the basis of considerations relating to his financial or economic means or his technical competence. As regards the criteria for the award of contracts, under Article 29 of the directive the contract must be

awarded to the tenderer who has submitted the lowest tender, unless it has been expressly indicated in the invitation to tender that the contract will be awarded to the most economically advantageous tender and the invitation to tender sets out the criteria for determining what constitutes such a tender.

In the Commission's view it follows from the foregoing that where the invitation to tender merely refers to a general provision of rules on invitations to tender as regards the fixing of criteria for qualitative selection or criteria for the award of the contract, the contract must be awarded to the tenderer who has submitted the lowest tender if neither the invitation to tender nor the documents to which the invitation to tender refers contain statements regarding the references required for qualitative selection or the criteria for the award of the contract.

3. The third question

The Commission and the Italian Government are both of the opinion that the third question should be answered in the affirmative.

The Italian Government observes that in order to decide whether the provisions of a directive produce effects upon which an individual may rely directly, it is necessary, as the Court has consistently held, to determine whether those provisions are precise and unconditional in their substance. The provisions of Directive 71/305 go beyond the mere harmonization of laws. By restricting the discretionary nature of decisions regarding participation in a tender procedure and ensuring their transparency, these provisions seek to give undertakings in the Community equal access to the activities in question without any overt or disguised discrimination.

The Italian Government therefore concludes that the third question should be answered in the affirmative in so far as an individual relies on the above-mentioned provisions of Directive 71/305/EEC in order to protect his right to participate in a tender procedure, a right which has been denied to him under national rules which are not consistent with the provisions of the directive.

The Commission states that it is clear from the judgment of 10 February 1982 (Case 76/81, Transporoute ((1982)) ECR 417) that individuals may rely in the national courts on the provisions of the directive concerning the qualitative selection of tenderers and the award of public works contracts.

/S2/G.C. Rodríguez Iglesias, Judge-Rapporteur
/FIN/

* Language of the case: Dutch

DE EUROPÆISKE FÆLLESSKABERS DOMSTOL
GERICHTSHOF DER EUROPAISCHEN GEMEINSCHAFTEN
ΔΙΚΑΣΤΗΡΙΟ ΤΩΝ ΕΥΡΩΠΑΪΚΩΝ ΚΟΙΝΟΤΗΤΩΝ
COURT OF JUSTICE OF THE EUROPEAN COMMUNITIES
TRIBUNAL DE JUSTICIA DE LAS COMUNIDADES EUROPEAS

LUXEMBOURG

COUR DE JUSTICE DES COMMUNAUTÉS EUROPÉENNES
CORTE DI GIUSTIZIA DELLE COMUNITÀ EUROPEE
HOF VAN JUSTITIE VAN DE EUROPESE GEMEENSCHAPPEN
TRIBUNAL DE JUSTIÇA DAS COMUNIDADES EUROPEIAS

Translation

/TCDA/Judgment of 22.6.1989 - Case 103/88

Judgment of the Court *

22 June 1989

(Public works contracts - Abnormally low tenders - Direct effect of directives in relation to administrative authorities)

/P3/

In Case 103/88,

REFERENCE to the Court under Article 177 of the EEC Treaty by the Tribunale Amministrativo Regionale per la Lombardia [Regional Administrative Tribunal for Lombardy] for a preliminary ruling in the proceedings before that court between

Fratelli Costanzo S.p.A., a company incorporated under Italian law, whose registered office is at Misterbianco,

and

Comune di Milano [Municipality of Milan]

on the interpretation of Article 29 (5) of Council Directive 71/305/EEC of 26 July 1971 concerning the co-ordination of procedures for the award of public works contracts (Official Journal, English Special Edition 1971 (II), p. 682) and the third paragraph of Article 189 of the EEC Treaty,

THE COURT,

composed of O. Due, President, R. Joliet and F. Grévisse (Presidents of Chambers), Sir Gordon Slynn, G.F. Mancini, F.A. Schockweiler and J.C. Moitinho de Almeida, Judges,

Advocate General: C.O. Lenz

Registrar: H.A. Rühl, Principal Administrator,

after considering the observations submitted on behalf of

Fratelli Costanzo S.p.A., the plaintiff in the main proceedings, by L. Acquarone, M. Ali, F.P. Pugliese, M. Annoni and G. Ciampoli, Avvocati, in the written procedure and by L. Acquarone in the oral procedure,

the Comune di Milano, the defendant in the main proceedings, by P. Marchese, C. Lopopolo and S. Ammendola, Avvocati, in the written procedure and by P. Marchese in the oral procedure,

Ing. Lodigiani S.p.A., the intervener in the main proceedings, by E. Zauli and G. Pericu, Avvocati, in the written procedure and by G. Pericu in the oral procedure,

the Government of the Kingdom of Spain, by J. Conde de Saro and R. Silva de Lapuerta, acting as Agents, in the written procedure and by R. Silva de Lapuerta, acting as Agent, in the oral procedure,

the Government of the Italian Republic, by Professor L. Ferrari Bravo, Head of the Legal Department of the Ministry of Foreign Affairs, acting as Agent, assisted by I.M. Braguglia, Avvocato dello Stato,

the Commission of the European Communities, by G. Berardis, a member of its Legal Department, acting as Agent, in the written and oral procedures,

having regard to the Report for the Hearing and further to the hearing on 7 March 1989,

after hearing the Opinion of the Advocate General delivered at the sitting on 25 April 1989,

gives the following

Judgment

/P5/

1 By order of 16 December 1987, which was received at the Court Registry on 30 March 1988, the Tribunale Amministrativo Regionale per la Lombardia referred to the Court for a preliminary ruling under Article 177 of the EEC Treaty a number of questions on the interpretation of Article 29 (5) of Council Directive 71/305/EEC of 26 July 1971 concerning the co-ordination of procedures for the award of public works contracts (Official Journal, English Special Edition 1971 (II),p. 682) and the third paragraph of Article 189 of the EEC Treaty.

2 The questions were raised in proceedings brought by Fratelli Costanzo S.p.A. (hereinafter referred to as "Costanzo"), the plaintiff in the main proceedings, for the annulment of a decision of the Giunta Municipale [Municipal Executive Board] of Milan eliminating the tender submitted by Costanzo from a tendering procedure for a public works contract and awarding the contract in question to Ing. Lodigiani S.p.A. (hereinafter: "Lodigiani").

3 Article 29 (5) of Council Directive 71/305/EEC provides as follows:

> "If, for a given contract, tenders are obviously abnormally low in relation to the transaction, the authority awarding contracts shall examine the details of the tenders before deciding to whom it will award the contract. The result of this examination shall be taken into account.
>
> For this purpose it shall request the tenderer to furnish the necessary explanations and, where appropriate, it shall indicate which parts it finds unacceptable.
>
> If the documents relating to the contract provide for its award at the lowest price tendered, the authority awarding contracts must justify to the Advisory Committee set up by the Council Decision of 26 July 1971 the rejection of tenders which it considers to be too low."

4 Article 29 (5) of Directive 71/305 was implemented in Italy by the third paragraph of Article 24 of Law No. 584 of 8 August 1977 amending the procedures for the award of public works contracts in accordance with the directives of the European Economic Community (Gazzetta Ufficiale della Repubblica Italiana [Official Journal of the Italian Republic]

No. 232 of 26 August 1977, p. 6272). That provision is worded as follows:

> "If, for a given contract, tenders are abnormally low in relation to the transaction, the authority awarding the contract shall, after requesting the tenderer to furnish the necessary explanations and after indicating, where appropriate, which parts it considers unacceptable, examine the details of the tenders and may disallow them if it takes the view that they are not valid; in that event, if the call for tenders provides that the lowest tender price is the criterion for the award of the contract, the awarding authority is obliged to notify the rejection of the tenders, together with its reasons for doing so, to the Ministry of Public Works, which is responsible for forwarding the information to the Advisory Committee for Public Works Contracts of the European Economic Community within the period laid down by the first paragraph of Article 6 of this Law."

5 Subsequently, in 1987, the Italian Government adopted three decree laws in succession which provisionally amended the third paragraph of Article 24 of Law No. 584 (Decree Law No. 206 of 25 May 1987, Gazzetta Ufficiale No. 120 of 26 May 1987, p. 5; Decree Law No. 302 of 27 July 1987, Gazzetta Ufficiale No. 174 of 28 July 1987, p. 3; and Decree Law No. 393 of 25 September 1987, Gazzetta Ufficiale No. 225 of 26 September 1987, p. 3).

6 The three decree laws each contain an Article 4 worded in identical terms, as follows:

> "In order to speed up the procedures for the award of public works contracts, for a period of two years from the date on which this decree enters into force tenders with a percentage discount greater than the average percentage divergence of the tenders admitted, increased by a percentage which must be stated in the call for

tenders, shall be considered abnormal for the purposes of the third paragraph of Article 24 of Law No. 584 of 8 August 1977 and shall be excluded from the tendering procedure."

7 The decree laws lapsed because they were not converted into laws within the period prescribed by the Italian constitution. However, a subsequent law provided that the effects of legal measures adopted pursuant to them were to remain valid (Article 1 (2) of Law No. 478 of 25 November 1987, Gazzetta Ufficiale No. 277 of 26 November 1987, p. 3).

8 In preparation for the 1990 World Cup for football, to be held in Italy, the Comune di Milano issued a restricted call for tenders for alteration work on a football stadium. The criterion chosen for awarding the contract was that of the lowest price.

9 The call for tenders stated that in accordance with Article 4 of Decree Law No. 206 of 25 May 1987 tenders which exceeded the basic amount fixed for the price of the work by a percentage more than ten points below the average percentage by which the tenders admitted exceeded that amount would be considered anomalous and consequently eliminated.

10 The tenders admitted to the procedure exceeded the basic amount fixed for the price of the work by an average of 19.48%. In accordance with the call for tenders any tender which did not exceed the basic amount by at least 9.48% was to be automatically eliminated.

11 The tender submitted by Costanzo was less than the basic amount. Accordingly, on 6 October 1987 the Giunta Municipale, on the basis of Article 4 of Decree Law No. 393 of 25 September 1987, which in the meantime had replaced the decree law cited in the call for tenders, decided to exclude Costanzo's bid from the tendering procedure and to award the contract to Lodigiani, which had submitted the lowest tender of those which fulfilled the condition set out in the call for tenders.

12 Costanzo challenged that decision in proceedings before the Tribunale Amministrativo Regionale per la Lombardia, claiming inter alia that it was illegal on the ground that it was based on a decree law which was itself incompatible with Article 29 (5) of Council Directive 71/305.

13 The national court therefore referred the following questions to the Court of Justice for a preliminary ruling:

"A. Given that, under Article 189 of the EEC Treaty, the provisions contained in a directive may relate to the 'result to be achieved' (hereinafter referred to as 'provisions as to results') or else be concerned with the 'form and methods' required to achieve a given result (hereinafter referred to as 'provisions as to form and methods'), is the rule contained in Article 29 (5) of Council Directive 71/305/EEC of 26 July 1971 (where it provides that - should a tender be obviously abnormally low - the authority must 'examine the details' of the tender and request the tenderer to furnish the necessary explanations, indicating where appropriate which parts it finds unacceptable) a 'provision as to results' and therefore of such a nature that the Italian Republic was obliged to 'transpose' it without any amendment of substance (as indeed it did, by the third paragraph of Article 24 of Law No. 584 of 8 August 1977) or is it a 'provision as to form and methods', with the result that the Italian Republic could derogate from it by providing

that where a tender is abnormally low the tenderer must automatically be eliminated from the tendering procedure, without any 'examination of the details' and without any request to the tenderer to furnish 'explanations' for the 'abnormal tender'?

B. If the reply to Question (A) is negative (in the sense that Article 29 (5) of Council Directive 71/305/EEC is to be held to be a 'provision as to form and methods'):

B.1 Did the Italian Republic (after "transposing" the aforesaid provision by way of Law No. 577 of 5 August 1977 without introducing any amendment of substance regarding the procedure to be followed in cases where a tender is abnormally low) retain the power to amend the domestic implementing provision? In particular, could Article 4 of Decree Law No. 206 of 25 May 1987, Decree Law No. 302 of 27 July 1987 and Decree Law No. 393 of 25 September 1987 (whose wording is identical) amend Article 24 of Law No. 584 of 8 August 1977?

B.2 Could the (identically worded) Articles 4 of the decree laws mentioned above amend Article 29 (5) of Council Directive 71/305/EEC, as implemented by Law No. 584 of 5 April 1977, without stating adequate reasons therefor, regard being had to the fact that a statement of reasons - which is necessary for Community legislation (cf. Article 190 of the EEC Treaty) - appears also to be necessary for domestic legislation introduced to give effect to Community provisions (which is therefore 'sub-primary' legislation and, in the absence of indication to the contrary, must also be subject to the rule which requires 'primary' legislation to state reasons)?

C. Is there, in any event, a conflict between Article 29 (5) of Council Directive 71/305/EEC and the following provisions:

(a) the third paragraph of Article 24 of Law No. 584 of 8 August 1977 (which refers to 'abnormally low' tenders, whereas the directive is concerned with tenders which are 'obviously' abnormally low and provides for examination of the details only in cases of 'obvious' abnormality);

(b) Article 4 of Decree Laws Nos. 206 of 25 May 1987, 302 of 27 July 1987 and 393 of 25 September 1987 (which make no allowance for preliminary examination of the details or a request for clarification to the party concerned, contrary to Article 29 (5) of the directive; furthermore, the decree laws mentioned above do not refer to 'obviously' abnormal tenders and to that extent appear to be invalid, as does Law No. 584 of 8 August 1977)?

D. If the Court of Justice rules that the aforesaid Italian legislative provisions conflict with Article 29 (5) of Council Directive 71/305/EEC, was the municipal authority empowered, or obliged, to disregard the domestic provisions which conflicted with the aforesaid Community provision (consulting the central authorities if necessary), or does that power or obligation vest solely in the national courts?"

14 Reference is made to the Report for the Hearing for a fuller account of the facts of the case before the national court, the applicable legislation, the course of the procedure, and the written observations submitted to the Court, which are mentioned or discussed hereinafter only in so far as is necessary for the reasoning of the Court.

The second part of the third question and the first question

15 In the second part of the third question the Tribunale Amministrativo Regionale seeks in essence to establish whether Article 29 (5) of Council Directive 71/305 prohibits Member States from introducing provisions which require the automatic exclusion from procedures for the award of public works contracts of certain tenders determined according to a mathematical criterion, instead of obliging the awarding authority to apply the examination procedure laid down in the

directive, giving the tenderer an opportunity to furnish explanations. In its first question it asks whether the Member States may, when implementing Council Directive 71/305, depart to any material extent from Article 29 (5) thereof.

16 With regard to the second part of the third question it should be noted that Article 29 (5) of Directive 71/305 requires the awarding authority to examine the details of tenders which are obviously abnormally low, and for that purpose obliges the authority to request the tenderer to furnish the necessary explanations. Article 29 (5) further requires the awarding authority, where appropriate, to indicate which parts of those explanations it finds unacceptable. Finally, if the criterion adopted for the award of the contract is the lowest price tendered, the awarding authority must justify to the Advisory Committee set up by the Council Decision of 26 July 1971 (Official Journal, English Special Edition 1971 (II), p. 693) the rejection of tenders which it considers to be too low.

17 The Comune di Milano and the Italian Government maintain that it is in keeping with the aim of Article 29 (5) to replace the examination procedure which it envisages, giving the tenderer an opportunity to state its views, with a mathematical criterion for exclusion. They point out that the aim of that provision is, as the Court ruled in its judgment of 10 February 1982 in Case 76/81 (Transporoute v Minister of Public Works [1982] ECR 417, at p. 428), to protect tenderers against arbitrariness on the part of the authority awarding the contract. A mathematical criterion for exclusion affords an

absolute safeguard. It has the further advantage of being faster in its application than the procedure laid down by the directive.

18 That argument cannot be upheld. A mathematical criterion for exclusion deprives tenderers who have submitted exceptionally low tenders of the opportunity of demonstrating that those tenders are genuine ones. The application of such a criterion is contrary to the aim of Directive 71/305, namely to promote the development of effective competition in the field of public contracts.

19 The answer to the second part of the third question must therefore be that Article 29 (5) of Council Directive 71/305 prohibits Member States from introducing provisions which require the automatic exclusion from procedures for the award of public works contracts of certain tenders determined according to a mathematical criterion, instead of obliging the awarding authority to apply the examination procedure laid down in the directive, giving the tenderer an opportunity to furnish explanations.

20 With regard to the first question, it should be observed that it was in order to enable tenderers submitting exceptionally low tenders to demonstrate that those tenders are genuine ones that the Council, in Article 29 (5) of Directive 71/305, laid down a precise, detailed procedure for the examination of tenders which appear to be abnormally low. That aim would be jeopardized if Member States were able, when

implementing Article 29 (5) of the directive, to depart from it to any material extent.

21 The answer to the first question must therefore be that when implementing Council Directive 71/305 Member States may not depart to any material extent from the provisions of Article 29 (5) thereof.

The second question

22 In its second question the national court asks whether, after implementing Article 29 (5) of Council Directive 71/305 without departing from it to any material extent, Member States may subsequently amend the domestic implementing provision, and if so whether they must give reasons for doing so.

23 The national court raised this question only in the event that the answer to the first question should be that Member States could, when implementing Article 29 (5) of Directive 71/305, depart materially from it.

24 In the light of the answer given to the first question the second question is devoid of purpose.

The first part of the third question

25 In the first part of its third question the national court seeks to establish whether Article 29 (5) of Council Directive 71/305 allows Member States to require the

examination of tenders whenever they appear to be abnormally low, and not only when they are obviously abnormally low.

26 The examination procedure must be applied whenever the awarding authority is contemplating the elimination of tenders because they are abnormally low in relation to the transaction. Consequently, whatever the threshold for the commencement of that procedure may be, tenderers can be sure that they will not be disqualified from the award of the contract without first having the opportunity of furnishing explanations regarding the genuine nature of their tenders.

27 It follows that the answer to be given to the first part of the third question is that Article 29 (5) of Council Directive 71/305 allows Member States to require that tenders be examined when those tenders appear to be abnormally low, and not only when they are obviously abnormally low.

The fourth question

28 In the fourth question the national court asks whether administrative authorities, including municipal authorities, are under the same obligation as a national court to apply the provisions of Article 29 (5) of Council Directive 71/305 and to refrain from applying provisions of national law which conflict with them.

29 In its judgments of 19 January 1982 in Case 8/81 (Becker v Finanzamt Münster-Innenstadt [1982] ECR 53, at p. 71) and 26 February 1986 in Case 152/84 (Marshall v Southampton and South-

West Hampshire Area Health Authority [1986] ECR 723, at p.748) the Court held that wherever the provisions of a directive appear, as far as their subject-matter is concerned, to be unconditional and sufficiently precise, those provisions may be relied upon by an individual against the State where that State has failed to implement the directive in national law by the end of the period prescribed or where it has failed to implement the directive correctly.

30 It is important to note that the reason for which an individual may, in the circumstances described above, rely on the provisions of a directive in proceedings before the national courts is that the obligations arising under those provisions are binding upon all the authorities of the Member States.

31 It would, moreover, be contradictory to rule that an individual may rely upon the provisions of a directive which fulfil the conditions defined above in proceedings before the national courts seeking an order against the administrative authorities, and yet to hold that those authorities are under no obligation to apply the provisions of the directive and refrain from applying provisions of national law which conflict with them. It follows that when the conditions under which the Court has held that individuals may rely on the provisions of a directive before the national courts are met, all organs of the administration, including decentralized authorities such as municipalities, are obliged to apply those provisions.

32 With specific regard to Article 29 (5) of Directive 71/305, it is apparent from the discussion of the first question that it is unconditional and sufficiently precise to be relied upon by an individual against the State. An individual may therefore plead that provision before the national courts and, as is clear from the foregoing, all organs of the administration, including decentralized authorities such as municipalities, are obliged to apply it.

33 The answer to the fourth question must therefore be that administrative authorities, including municipal authorities, are under the same obligation as a national court to apply the provisions of Article 29 (5) of Council Directive 71/305/EEC and to refrain from applying provisions of national law which conflict with them.

/P6/

Costs

34 The costs incurred by the Spanish Government, the Italian Government and the Commission of the European Communities, which have submitted observations to the Court, are not recoverable. As these proceedings are, in so far as the parties to the main proceedings are concerned, in the nature of a step in the action before the national court, the decision on costs is a matter for that court.

/P3/

On those grounds,

THE COURT,

in answer to the questions referred to it by the Tribunale Amministrativo Regionale per la Lombardia by order of 16 December 1987, hereby rules:

(1) Article 29 (5) of Council Directive 71/305 prohibits Member States from introducing provisions which require the automatic exclusion from procedures for the award of public works contracts of certain tenders determined according to a mathematical criterion, instead of obliging the awarding authority to apply the examination procedure laid down in the directive, giving the tenderer an opportunity to furnish explanations.

(2) When implementing Council Directive 71/305/EEC, Member states may not depart to any material extent from the provisions of Article 29 (5) thereof.

(3) Article 29 (5) of Council Directive 71/305 allows Member States to require that tenders be examined when those tenders appear to be abnormally low, and not only when they are obviously abnormally low.

(4) Administrative authorities, including municipal authorities, are under the same obligation as a national court to apply the provisions of Article 29 (5) of

Council Directive 71/305/EEC and to refrain from applying provisions of national law which conflict with them.

/S1/Due, Joliet, Grévisse, Slynn, Mancini, Schockweiler, Moitinho de Almeida

Delivered in open court in Luxembourg on 22 June 1989.

/S2/J.-G. Giraud, Registrar - O. Due, President
/FIN

* Language of the case: Italian

Report for the Hearing in Case 103/88 *

/P2/

I - Facts and procedure

A. Facts and legislative framework

This case concerns the manner in which Italy has transposed into national law Article 29 (5) of Council Directive 71/305/EEC of 26 July 1971 concerning the co-ordination of procedures for the award of public works contracts (Official Journal, English Special Edition 1971 (II), p. 682).

Article 29 (5) is worded as follows:

> If, for a given contract, tenders are obviously abnormally low in relation to the transaction, the authority awarding contracts shall examine the details of the tenders before deciding to whom it will award the contract. The result of this examination shall be taken into account.
>
> For this purpose it shall request the tenderer to furnish the necessary explanations and, where appropriate, it shall indicate which parts it finds unacceptable.
>
> If the documents relating to the contract provide for its award at the lowest price tendered, the authority awarding contracts must justify to the Advisory Committee set up by the Council Decision of 26 July 1971 the rejection of tenders which it considers to be too low.

Article 29 (5) of the directive was initially implemented in Italian law by the third paragraph of Article 24 of Law No. 584 of 8 August 1977 amending the procedures for the award of public works contracts in accordance with the directives of the European Economic Community (Gazzetta Ufficiale della Repubblica Italiana [Official Journal of the Italian Republic] No. 232 of 26 August 1977, p. 6272). That provision is formulated as follows:

> If, for a given contract, tenders are abnormally low in relation to the transaction, the authority awarding the contract shall, after requesting the tenderer to furnish the necessary explanations and indicating, where appropriate, which parts it considers unacceptable, examine the details of the tenders and may disallow them if it takes the view that they are not valid; in that event, if the call for tenders provides that the lowest tender price is the criterion for the award of the contract, the awarding authority is obliged to notify the rejection of the tenders, together with its reasons for doing so, to the Ministry of Public Works, which is responsible for forwarding the information to the Advisory Committee for Public Works Contracts of the European Economic Community within the period laid down by the first paragraph of Article 6 of this Law.

Subsequently, in 1987, the Italian Government adopted three decree laws in succession which provisionally amended the third paragraph of Article 24 of Law No. 584 (Decree Law No. 206 of 25 May 1987, GURI No. 120 of 26 May 1987, p. 5; Decree Law No. 302 of 27 July 1987, GURI No. 174 of 28 July 1987, p. 3; Decree Law No. 393 of 25 September 1987, GURI No. 225 of 26 September 1987, p. 3).

The three decree laws each contain an Article 4 worded in identical terms, as follows:

> In order to speed up the procedures for the award of public works contracts, for a period of two years from the date on which this decree enters into force tenders with a percentage discount greater than the average percentage divergence of the tenders admitted, increased by a percentage which must be stated in the call for tenders, shall be considered abnormal for the purposes of the third paragraph of Article 24 of Law No. 584 of 8 August 1977 and shall be excluded from the tendering procedure.

The decree laws lapsed because they were not converted into laws within the period prescribed by the Italian constitution. However, a subsequent law provided that the effects of legal measures adopted pursuant

to them were to remain valid (Article 1 (2) of Law No. 478 of 25 November 1987, GURI No. 277 of 26 November 1987, p. 3).

The task of organizing the 1990 World Cup for football was entrusted to the Italian football league. Milan is one of the municipalities on whose territory the championship will be held.

In anticipation of that event, the Municipal Council [Consiglio Communale] of Milan decided on 21 July 1987 to carry out work to extend, modernize and roof the "G. Meazza Stadium" for a basic amount of Lit 82 043 643 386.

It was decided that the tendering procedure for the work should take the form of a restricted invitation to tender. The criterion chosen for awarding the contract was the one set out in indent (a) (2) of Article 24 of the above-mentioned Law No. 584 of 8 August 1977, namely the tender showing the greatest discount from the basic amount.

The Municipal Council further decided that: "in accordance with Article 4 of Decree Law No. 206 of 25 May 1987, tenders which offer a percentage discount greater than the average percentage divergence of the tenders admitted plus ten percentage points will be considered anomalous and consequently eliminated".

Lastly, the deliberations of the Municipal Council show that the Italian State was financing the work to the extent of Lit 43 000 000 000, on condition that the work was carried out between 15 October 1987 and 31 October 1989.

The call for tenders was published on 3 August 1987 (GURI, Public Notices Issue No. 179, p. 25). The notice set out the various rules

adopted by the Municipal Council, in particular the clause whereby abnormal tenders were to be automatically excluded.

The undertakings admitted to the tendering procedure submitted tenders on average 19.48% higher than the basic amount fixed for the value of the work. In accordance with the call for tenders, any tender which did not exceed the basic amount for the work by at least 9.48% (that is, the average margin - 19.48% - minus 10%) was to be automatically excluded.

Fratelli Costanzo S.p.A. (hereinafter referred to as "Costanzo"), the plaintiff in the main proceedings, is a member of a consortium of several Italian undertakings and one Spanish undertaking which took part in the tendering procedure. The tender submitted by the consortium was 2.16% lower than the basic amount fixed for the work. All the other tenders submitted were, in varying degrees, higher than that amount.

By a decision of 6 October 1987 the Municipal Executive Board [Giunta Municipale] of Milan disqualified the tender submitted by the consortium of which Costanzo is a member. The decision to disqualify it was based on Article 4 of Decree Law No. 393 of 25 September 1987, which in the meantime had replaced Decree Law No. 206 of 25 May 1987, to which the call for tenders refers. By virtue of Article 4 of Decree Law No. 393 the tender was considered to be abnormally low within the meaning of Article 24 of Law No. 584 of 8 August 1977, and was automatically excluded from the tendering procedure.

By the same decision, the Municipal Executive Board awarded the contract to a consortium of undertakings which includes Ing. Lodigiani S.p.A. (hereinafter referred to as "Lodigiani"). The tender received from that consortium exceeded the set figure by 9.85%. It therefore satisfied the condition that it should be at least 9.48% higher than the basic amount

(the average margin of 19.48%, minus 10%) and was thus the lowest tender of those which fulfilled that condition.

The Municipal Council of Milan ratified the decision of the Municipal Executive Board on 26 October 1987.

Costanzo challenged the decisions of the Municipal Executive Board and the Municipal Council in proceedings before the Tribunale Amministrativo Regionale per la Lombardia. It claimed inter alia that the contested decisions were illegal on the grounds that they were based on a decree law which was incompatible with Article 29 (5) of Council Directive 71/305. The decree law could not provide for the automatic exclusion of tenders considered abnormally low because the Council directive allows such expulsion only after the parties concerned have been heard.

Lodigiani intervened in the dispute to uphold the validity of the contested decisions.

After the proceedings had commenced Italy adopted a law which introduces on a permanent basis a rule comparable to the one which the decree laws had established for two years. The new legislation provides for the automatic exclusion of tenders "with a percentage discount greater than the average percentage divergence of the tenders accepted, increased by a percentage figure of not less than 5%, which must be stated in the call for tenders" (Law No. 67 of 11 March 1988, GURI Ordinary Supplement of 14 March 1988, p. 26).

B. The questions referred to the Court

The Tribunale Amministrativo Regionale per la Lombardia, by order of 16 December 1987, stayed the proceedings and submitted the following

questions to the Court of Justice for a preliminary ruling under Article 177 of the EEC Treaty:

A. Given that, under Article 189 of the EEC Treaty, the provisions contained in a directive may relate to the "result to be achieved" (hereinafter referred to as "provisions as to results") or else be concerned with the "form and methods" required to achieve a given result (hereinafter referred to as "provisions as to form and methods"), is the rule contained in Article 29 (5) of Council Directive 71/305/EEC of 26 July 1971 (where it provides that - should a tender be obviously abnormally low - the authority must "examine the details" of the tender and request the tenderer to furnish the necessary explanations, indicating where appropriate which parts it finds unacceptable) a "provision as to results" and therefore of such a nature that the Italian Republic was obliged to "transpose" it without any amendment of substance (as indeed it did, by the third paragraph of Article 24 (3) of Law No. 584 of 8 August 1977) or is it a "provision as to form and methods", with the result that the Italian Republic could derogate from it by providing that where a tender is abnormally low the tenderer must automatically be eliminated from the tendering procedure, without any "examination of the details" and without any request to the tenderer to furnish "explanations" for the "abnormal tender"?

B. If the reply to Question (A) is negative (in the sense that Article 29 (5) of Council Directive 71/305/EEC is held to be a "provision as to form and methods"):

B.1 Did the Italian Republic (after "transposing" the aforesaid provision by way of Law No. 577 of 8 August 1977 without introducing any amendment of substance regarding the procedure to be followed in cases where a tender is abnormally low) retain the power to amend the domestic implementing provision? In particular, could Article 4 of Decree Law No. 206 of 25 May 1987, Decree Law No. 302 of 27 July 1987 and Decree Law No. 393 of 25 September 1987 (whose wording is identical) amend Article 24 of Law No. 584 of 8 August 1977?

B.2 Could the (identically worded) Articles 4 of the decree laws mentioned above amend Article 29 (5) of Council Directive 71/305/EEC, as implemented by Law No. 584 of 5 April 1977, without stating adequate reasons therefor, regard being had to the fact that a statement of reasons - which is necessary for

Community legislation (cf. Article 190 of the EEC Treaty) - appears also to be necessary for domestic legislation introduced to give effect to Community provisions (which is therefore "sub-primary" legislation and, in the absence of indication to the contrary, must also be subject to the rule which requires "primary" legislation to state reasons)?

C Is there, in any event, a conflict between Article 29 (5) of Council Directive 71/305/EEC and the following provisions:

(a) The third paragraph of Article 24 of Law No. 584 of 8 August 1977 (which refers to "abnormally low" tenders, whereas the directive is concerned with tenders which are "obviously" abnormally low and provides for examination of the details only in cases of "obvious" abnormality);

(b) Article 4 of Decree Laws Nos. 206 of 25 May 1987, 302 of 27 July 1987 and 393 of 25 September 1987 (which make no allowance for preliminary examination of the details or a request for clarification to the party concerned, contrary to Article 29 (5) of the directive; furthermore, the decree laws mentioned above do not refer to "obviously" abnormal tenders and to that extent appear to be invalid, as does Law No. 584 of 8 August 1977)?

D If the Court of Justice rules that the aforesaid Italian legislative provisions conflict with Article 29 (5) of Council Directive 71/305/EEC, was the municipal authority empowered, or obliged, to disregard the domestic provisions which conflicted with the aforesaid Community provision (consulting the central authorities if necessary), or does that power or obligation vest solely in the national courts?

C. Procedure before the Court

The order of the Tribunale Amministrativo Regionale per la Lombardia was lodged at the Court Registry on 30 March 1988.

In accordance with Article 20 of the Protocol on the Statute of the Court of Justice of the EEC, written observations were submitted on 6 June 1988 by the Comune di Milano, the defendant in the main proceedings, represented by P. Marchese, C. Lopopolo and S. Ammendola, Avvocati, on 8

July 1988 by the Government of the Kingdom of Spain, represented by J. Conde de Saro and R. Silva de Lapuerta, acting as Agents, on 11 July 1988 by the Commission of the European Communities, represented by G. Berardis, a member of its Legal Department, acting as Agent, on 15 July 1988 by Lodigiani, represented by E. Zauli and G. Pericu, Avvocati, on 20 July 1988 by Costanzo, the plaintiff in the main proceedings, represented by L. Acquarone, M. Ali, F.P. Pugliese, M. Annoni and G. Ciampoli, Avvocati, and on 21 July 1988 by the Government of the Italian Republic, represented by Professor L. Ferrari Bravo, head of the Legal Department of the Ministry of Foreign Affairs, assisted by I.M. Braguglia, Avvocato dello Stato.

Upon hearing the report of the Judge-Rapporteur and the views of the Advocate General the Court decided to open the oral procedure without any preparatory inquiry.

II - Written observations submitted to the Court

First question: obligation to transpose Article 29 (5) of Directive 71/305 without any amendment of substance

According to Costanzo, Article 29 (5) of Directive 71/305 seeks to reconcile two aims: first, that of protecting the awarding authority against tenderers who may, either in error or in bad faith, have submitted inordinately low tenders, and secondly that of enabling exceptionally competitive tenderers to demonstrate that their tender is genuine. The use of an automatic exclusion criterion does not take the second consideration into account. Observance of the aims of Article 29 (5) of Directive 71/305 requires that the national procedure for eliminating abnormally low tenders should include all the stages laid down in that article.

The Comune di Milano points out that a directive is binding upon the Member States only as to the result to be achieved. A directive is therefore validly implemented when national legislation ensures achievement of the aims which that directive pursues. In this case, Article 29 (5) of the directive is designed to ensure that abnormally low tenders are eliminated by way of a procedure offering guarantees of objectivity. It is sufficient for the national legislation implementing that provision to give effect to that aim, without necessarily having to incorporate all the procedural phases envisaged by the Community provision.

Lodigiani emphasizes that the issue in this case is not whether or not Italy has failed to fulfil its obligations in the implementation of Article 29 (5) of the directive. Rather than inquiring into the margin of discretion which that article leaves to Member States, it should therefore be determined whether it fulfils the requisite conditions enabling individuals to rely on it in proceedings before the national courts. Lodigiani adduces three reasons which militate against the view that Article 29 (5) of the directive has direct effect. First, it is not a measure conferring rights or imposing obligations on individuals, but rather a procedural rule. Secondly, it is not a rule which can be removed from its context and applied in isolation, which is the condition required by the Court in its judgment of 19 January 1982 in Case 8/81 (Becker v Finanzamt Münster Innenstadt [1982] ECR 53) before a directive may be held to have direct effect. Lastly, the Court has held provisions in directives to have direct effect only where such recognition operated in favour of individuals. In this case, however, Lodigiani, the successful tenderer, has already undertaken considerable investment in view of the urgency of the work. Its interests would be seriously affected if the contract were subsequently withdrawn from it by virtue of the direct effect of the Community provision in question.

The Italian Government takes the view that in the case of directives no useful purpose is served by distinguishing between "provisions as to results" and "provisions as to form and methods". In general, the case-law of the Court shows that the implementation of a directive does not call for strict, verbatim reproduction of the text in national law. It is enough that it is applied with sufficient clarity and accuracy to enable individuals, where the need arises, to avail themselves of the rights which it confers on them in proceedings before the national courts. It is by reference to that general criterion that the Court should, in reply to the third question, rule on the question whether Italian legislation is compatible with Article 29 (5) of the directive.

The Spanish Government maintains that the careful enumeration in Article 29 (5) of the directive of the various stages in the procedure for eliminating abnormally low tenders means that the national procedure must include all those stages, failing which it is incompatible with the Community provision. It points out that in its judgment of 10 February 1982 in Case 76/81 (Transporoute v Minister of Public Works [1982] ECR 417) the Court held that national legislation which does not require the awarding authority to request a tenderer to supply explanations for a tender which appears abnormally low is incompatible with Article 29 (5) of the directive.

The Commission points out that it would have been more logical to ask the third question first, on the issue whether Italian legislation is compatible with Article 29 (5) of the directive, and then to turn to the first question. That first question, although it focuses on the obligations of the Member States to which the directive is addressed, in fact raises the direct effect of the Community provision in dispute. To ask whether a provision contained in a directive is sufficiently clear, precise and unconditional to be relied on by an individual in court

proceedings is essentially the same as asking whether the Member States to which the directive is addressed are required to implement it without any amendment of substance. In this case, Article 29 (5) of the directive is sufficiently unconditional and precise to have direct effect. The Transporoute judgment of 10 February 1982 (cited above) also confirms that Member States do not enjoy any margin of discretion when implementing that provision.

Second question: the power of a Member State to amend the legislation by which it has implemented a directive, and the obligation to give reasons for such an amendment

In answer to the question whether, subsequent to the adoption of Law No. 584 of 8 August 1977 by which it implemented Article 29 (5) of the directive, the Italian Government was entitled to amend that legislation, Costanzo, the Comune di Milano, Lodigiani and the Italian Government maintain that a Member State may always amend legislation by which it has transposed a directive, on condition that the new legislation represents proper implementation of that directive. The Spanish Government does not deal with the question. The Commission takes the view that it is not necessary to answer the question since it was raised only on the hypothesis - which it considers incorrect - that Article 29 (5) of the directive does not have direct effect.

As regards the obligation on the part of the Member State to give reasons for a measure amending earlier provisions which implement a directive, Costanzo argues that this part of the second question is redundant since, according to its suggested reply to the first part of the question, a Member State is always entitled to amend its legislation provided that the new legislation implements the directive correctly. Lodigiani and the Italian Government contend that the Court has no power to

answer this part of the question, on the grounds that the provisions implementing a directive are national provisions whose validity can be appraised only by reference to the national legal system. The Comune di Milano and the Spanish Government do not deal with the matter. The Commission maintains that there is no reason to answer the question since it was raised only on the hypothesis that Article 29 (5) of the directive does not have direct effect, which is not the case.

Third question: compatibility of Italian legislation with Article 29 (5) of Directive 71/305

The first point is whether the third paragraph of Article 24 of Law No. 584 of 8 August 1977, which provides for the examination of tenders which are abnormally low, is compatible with Article 29 (5) of the directive, which requires examination only of tenders which are obviously abnormally low.

Costanzo, Lodigiani and the Commission take the view that the national provision is compatible with the directive. The discrepancy noted by the national court is merely one of terminology. The directive requires the examination procedure to be commenced only when there are concrete indications that the tender is abnormally low. The national provision satisfies that requirement by making the commencement of the procedure subject to the condition that the tender must appear abnormally low.

The Comune di Milano contends that the national provision is compatible with the directive, while the Spanish Government is of the opinion that it is not. They do not, however, set out any particular arguments on the subject.

The Italian Government considers the first part of the third question to be inadmissible because the contested decision is not based on Article 24 of Law No. 584 of 8 August 1977 but on Article 4 of Decree Law No. 393 of 25 September 1987. It claims that it is therefore unnecessary, for the purpose of settling the dispute before the national court, to establish whether the Law of 1977 is compatible with the directive.

The second point is whether Article 4 of Decree Laws Nos. 206, 302 and 393 are compatible with Article 29 (5) of the directive.

Costanzo observes that Article 4 of the decree laws includes none of the stages of the procedure laid down by Article 29 (5) of the directive giving the tenderer an opportunity to state its views. The article thus disregards one of the aims of Article 29 (5), namely to enable the most competitive tenderers to demonstrate that their tenders are genuine. The ninth recital in the preamble to Directive 71/305 explicitly stresses the need for effective competition in the field of public works contracts. Article 4 of the decree laws jeopardizes the attainment of that aim of the directive and is thus incompatible with it.

The Comune di Milano takes the view that the procedure laid down by Article 29 (5) of the directive is defective because it compels the awarding authority to undertake complex verification for which it is not equipped. It is also the cause of considerable delay. A mathematical criterion for elimination such as the one contained in the Italian legislation, on the other hand, offers the two-fold advantage of absolute objectivity and speed of application. The Italian legislation therefore implements Article 29 (5) correctly, since it ensures impartial treatment of tenderers, more efficiently than the Community provision itself.

Lodigiani argues that it is pointless to inquire into the compatibility of Article 4 of the decree laws with Article 29 (5) of the directive because the reply to be given to the first question shows that the Community provision does not have direct effect. Nevertheless, Lodigiani submits that the decree laws are compatible with the directive. In Article 29 (5), the directive merely outlines a possible model for the elimination procedure and does not compel the Member States to incorporate it in national law without any amendments. Only a regulation could have imposed such a uniform procedure in all Member States, but Article 57 (2) of the EEC Treaty, on which Directive 71/305 is based, provides expressly for the adoption of a directive and not a regulation. The Council was therefore authorized only to co-ordinate national procedures, not to make them uniform. It follows that those procedures are compatible with the directive if, as in this case, they are appropriate for the attainment of its aim.

The Italian Government concedes that it is necessary to safeguard the rights of tenderers by means of procedural guarantees wherever the system for eliminating abnormally low tenders allows the awarding authority a broad margin of discretion. However, when, as in this case, tenders are eliminated by reference to a mathematical criterion that criterion is sufficient to preclude any arbitrary dealings, and it is therefore pointless to add provision for an examination procedure allowing the tenderer to state its views. The Italian Government concludes that Article 4 of the decree laws, which lays down that mathematical criterion, is compatible with Article 29 (5) of the directive. It is in conformity with the aim of Article 29 (5), which, as the Court held in the Transporoute judgment (cited above), is to "protect tenderers against arbitrariness on the part of the authority awarding contracts".

The Spanish Government considers that Article 4 of the contested decree laws is incompatible with Article 29 (5) of the directive because it does not reproduce all the procedural stages envisaged by the Community provision. The protection of tenderers' rights demands that the Community procedure should be incorporated in its entirety into national law.

The Commission also takes the view that national legislation which, in laying down the procedure for eliminating abnormally low tenders, does not make provision for all the stages set out in Article 29 (5) of the directive is incompatible with that article. It bases that assertion on the Transporoute judgment (cited above), in which the Court found national legislation to be incompatible with the directive on the ground that it did not compel the awarding authority to ask the tenderer to explain a tender which appeared abnormally low.

Fourth question: obligation on the part of the national authorities to refrain from applying a provision of national law which is incompatible with a directive having direct effect

In the opinion of Costanzo, individuals must be entitled to avail themselves of the provisions of a directive having direct effect in dealings with the national administrative authorities. The direct effect of such provisions is binding on all State institutions, including administrative bodies.

The Comune di Milano takes the view that directives impose obligations only on the Member States, which must ensure that they are implemented. The national administrative authorities are required to apply only the national implementing provisions; the directive itself cannot be cited against them. That conclusion follows from the distinction which Article 189 of the Treaty draws between directives and regulations, only

regulations being directly applicable. Moreover, the Italian Constitution requires laws to be applied except when they have been held by the Constitutional Court to be to unconstitutional. Lastly, the universally accepted principle that the executive power is subordinate to the legislative power prevents the administrative authorities from refusing to apply the law.

Lodigiani considers the question inadmissible. It is not for the Court of Justice but for the national legal systems to determine whether the administrative bodies must allow a directive having direct effect to take precedence over national law at variance with it.

The Italian Government emphasizes that the fourth question was raised only in the event that the reply to be given to the third question should establish that the decree laws were incompatible with Article 29 (5) of the directive. Since, in its opinion, there is no such incompatibility, the fourth question is devoid of purpose. In the alternative, the Italian Government contends that this fourth question submitted by the national court falls outside the jurisdiction of the Court of Justice because it contains no question regarding the interpretation of Community law and is not needed by the national court in order to resolve the dispute brought before it.

The Spanish Government does not deal with the fourth question.

The Commission points out that the rights which individuals derive from the provisions of a directive having direct effect must be protected by the national legal systems. Nevertheless, it is for each national system to determine whether that protection must be afforded by administrative bodies. In that connexion the Commission observes that it is not easy to ascertain whether the provisions of a directive have direct

effect, and that only a court can refer the matter to the Court of Justice. In any case, Community law requires that individuals should be able to rely on the direct effect of directives in proceedings before the national courts.

/S2/R. Joliet, Judge-Rapporteur
/FIN/

* Language of the case: Italian

DE EUROPÆISKE FÆLLESSKABERS DOMSTOL
GERICHTSHOF DER EUROPAISCHEN GEMEINSCHAFTEN
ΔΙΚΑΣΤΗΡΙΟ ΤΩΝ ΕΥΡΩΠΑΪΚΩΝ ΚΟΙΝΟΤΗΤΩΝ
COURT OF JUSTICE OF THE EUROPEAN COMMUNITIES
TRIBUNAL DE JUSTICIA DE LAS COMUNIDADES EUROPEAS

CVRIA
LUXEMBOURG

COUR DE JUSTICE DES COMMUNAUTÉS EUROPÉENNES
CORTE DI GIUSTIZIA DELLE COMUNITÀ EUROPEE
HOF VAN JUSTITIE VAN DE EUROPESE GEMEENSCHAPPEN
TRIBUNAL DE JUSTIÇA DAS COMUNIDADES EUROPEIAS

Translation

/TCDA/Order of 27.9.88 - Case 194/88 R

@Order of the President of the Court

@27 September 1988 *

@(Award of a public-works contract - Incinerator)

/P3/

In Case 194/88 R

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

applicant,

@v

Italian Republic, represented by Mr. Luigi Ferrari Bravo, Head of the Department for Contentious Diplomatic Affairs, acting as Agent, assisted by Ivo Braguglia and Pier Giorgio Ferri, Avvocati dello Stato, with an address for service in Luxembourg at the Italian Embassy, 5, Rue Marie-Adelaïde,

defendant,

APPLICATION for interim measures for the suspension of the award by the Consorzio per la Costruzione e la Gestione di un Impianto per l'Incenerimento e Trasformazione dei Rifiuti Solidi Urbani ((Consortium for the Construction and Management of the Incinerator and Processing Plant for Solid Urban Refuse)), whose headquarters are at the offices of the City of La Spezia, of a public-works contract in connexion with the consortium's incinerator,

Judge Koopmans, acting for the President of the Court in accordance with the second paragraph of Article 85 and Article 11 of the Rules of Procedure,

makes the following

@Order

/P5/

1 By an application lodged at the Court Registry on 18 July 1988, the Commission of the European Communities brought an action before the Court under Article 169 of the EEC Treaty for a declaration that as a result of the failure of the Consorzio per la Costruzione e la Gestione di un Impianto per l'Incenerimento e Trasformazione dei Rifiuti Solidi Urbani (hereinafter referred to as "the Consortium"), whose headquarters are at the Town Hall of La Spezia, to publish in the Official Journal of the European Communities a notice concerning the award of a contract for

works connected with the Consortium's incinerator, the Italian Republic had failed to fulfil its obligations under Council Directive 71/305/EEC of 26 July 1971 concerning the co-ordination of procedures for the award of public works contracts (Official Journal, English Special Edition 1971 (II), p.682).

2 By an application lodged at the Court Registry on the same date, the Commission also applied, under Article 186 of the EEC Treaty and Article 83 of the Rules of Procedure, for an interim order requiring the Italian Republic to adopt all the necessary measures to suspend the award of the contract in question in this case until the Court has given judgment in the main action. In the alternative, should the contract already have been awarded, the Court is requested to order the Italian Republic to adopt all the measures which are appropriate in order to cancel the award of the contract or, at the very least, to preserve the status quo until final judgment is given.

3 By an order of 20 July 1988, the President of the Court, by way of an interlocutory decision, provisionally ordered that the Italian Republic should adopt all the necessary measures to suspend the award of the public works contract in question until 15 September 1988 or such other date as might be fixed by a subsequent order of the Court. By an order of 13 September 1988, the President of the Court, by way of an interlocutory decision, extended those protective measures until the date of the final order in these interlocutory proceedings.

4 The Italian Republic submitted its written obserations on 2 September 1988. The parties' oral submissions were heard on 23 September 1983.

5 The Consortium is an association of municipalities situated in the province of La Spezia, in Liguria, which is responsible for the disposal of solid urban waste. For that purpose, it operates an incinerator in Boscalino di Arcola. On 31 December 1986, the Pretore ((Magistrate)) of La Spezia ordered the incinerator to be closed down and made its re-opening subject to its renovation. The disputed contract relates to the carrying out of that renovation work.

6 The burden of the Commission's charge against the Italian Republic is that in the course of awarding the contract the Consortium infringed the advertising rules laid down in Directive 71/305/EEC by failing to publish a contract notice in the Official Journal of the European Communities, without providing evidence of circumstances of such a nature as to justify a derogation under the provisions of the Directive, in particular Article 9 thereof. It requests that the award of the contract be suspended immediately in order to prevent it causing immediate and serious damage to the Commission, as protector of the Community's interests, and to the undertakings which would have been able to take part in the tendering procedure had a contract notice been published in accordance with the Directive.

7 It is an established and undisputed fact that no notice of the contract in question was published in the Official Journal of the European Communities.

8 Article 186 of the Treaty provides that the Court may prescribe any interim measures requested in cases before it. In order for such a measure to be granted, an application for interim measures must, according to Article 83 (2) of the Rules of Procedure, state the circumstances giving rise to urgency and the factual and legal grounds establishing a prima facie case for the interim measure applied for.

9 First of all, the Italian Government takes the view that there is no prima facie case for granting the interim measure sought, since Directive No. 71/305/EEC does not apply to the contract in question. In the first place, the contract is only exploratory and does not come within the definition of public works contracts laid down in Article 1 of the Directive. Secondly, should that not be the case, the Directive itself states in Article 9 (d) that the provisions relating to advertising do not apply when extreme urgency prevents the time-limit from being adhered to. The Italian Government goes on to dispute the urgency of the interim measure applied for, since in its view the start of renovation work on the incinerator is much more urgent that any compliance with the formal requirements laid down by the Directive. Finally, the balance of interests tilts in favour of having a rapid start made on the works, given the public health interests at stake when solid refuse can no longer be satisfactorily disposed of.

10 The argument that the contested invitation to tender was exploratory must be rejected straight away. The Italian Government explained in this respect that, under Italian legislation, works contracts may be awarded on the basis of exploratory invitations to tender intended to identify the economically and technically most advantageous tender, in accordance with predetermined conditions; in such a case, the public authorities are not in fact required to award the contracts so that the invitation to tender cannot be regarded as relating to a "public works contract" within the meaning of the Directive. This argument must be rejected since, as the Commission has rightly stated, the Directive governs the procedure for awarding contracts for certain works whenever such contracts are awarded by public authorities; the scope of the Directive does not, and cannot, depend on the particular rules laid down by national legislation as regards the duties of the awarding authorities.

11 Consequently, the Italian Government's other arguments should be examined together; they are all based on the urgency of the renovation works on the incinerator in question and on the emergency situation which the Consortium was in at the time when the invitation to tender was issued. In order to weigh the importance of these arguments for the purposes of these interlocutory proceedings, they must be considered with reference to the chronological order of the facts underlying the dispute in the main proceedings.

12 The documents and oral explanations provided by both parties enable the Court to regard the following facts as agreed for the purpose of the interlocutory proceedings:

(a) On 15 December 1982, a Presidential Decree was brought into force relating to waste disposal; the Consortium was aware of the fact that the incinerator at Boscalino di Arcola did not comply with the technical specifications laid down in that decree;

(b) In May and June 1986, the Consortium approved plans for renovating the incinerator;

(c) Meanwhile, the Regional Council of Liguria gave its authorization, on 26 April 1984, for the opening of a dump at Vallescura, in the municipality of Riccò del Golfo, for the disposal of solid urban refuse from a number of municipalities in the province of La Spezia;

(d) In December 1986, the Pretore of La Spezia ordered the incinerator at Boscalino di Arcola to be closed down, making its reopening subject to renovation; in July 1987, the Pretore stated that the technical requirements had to be met in full;

(e) During the first few months of 1987, the Ligurian regional authorities found that the dumping of waste in Vallescura had led to seepage into a stream situated below the tip; in July, the Vallescura dump was closed; an old dump in Saturnia was temporarily used, but with great hygiene problems and dangers to public health; a second tip in Vallescura was brought into use, at first for a few months;

(f) On 27 November 1987, the Consortium applied for a loan from the Cassa Depositi e Prestiti in order to finance the works for renovating the incinerator;

(g) In December 1987, the Consortium decided to issue an exploratory invitation to tender for the award of a contract for the renovating work; the award was subject to the grant of a loan by the Cassa; the Consortium expressly stated that shortness of time did not allow another system of awarding contracts to be used, which would necessarily have taken longer; the Consortium sent a letter to seven Italian undertakings, appearing on national lists of specialised construction companies, and invited them to submit tenders;

(h) In February 1988, work was started on a third dump at Vallescura;

(i) On 2 June 1988, a ministerial decree was adopted which included the renovation of the incinerator in Boscalino di Arcola among the 17 priority projects for which the Cassa Depositi e Prestiti was authorised to grant loans;

(j) On 15 July 1988, an order made by the Ligurian regional authorities laid down the conditions for the tipping of refuse on the second and third dumps at Vallescura; the limits set for the use of the second dump were almost reached.

13 To complete this summary of the facts, it should be added that, on the day of the hearing, the loan for the financing of the renovation work on the incinerator had still not been granted by the Cassa Depositi e Prestiti.

14 The chronology of the facts shows first that, however urgent the works to be undertaken may be, that urgency is not due to unforeseeable events, since the Consortium has known since 1982 that the renovation of the incinerator was necessary. In order that the exception provided for in Article 9 (d) of Directive 71/305/EEC may be relied on, the "extreme urgency" brought about by events unforeseen by the authorities awarding contracts must prevent the time-limit laid down for the application of the Directive from being kept. There are, therefore, sufficient factual and legal elements for assuming that, prima facie, the Directive applies.

15 At the interlocutory hearing, the argument between the parties in fact concentrated mainly on the urgency relied on by the Commission, on the one hand, and the urgent need to complete the renovation of the incinerator quickly, on the other. The Commission argued that the length of time needed in order to comply with the advertising requirements of the Directive was quite relative, since compliance with the advertising rules laid down in Article 12 et seq. of the Directive requires a period of only about forty days, and in urgent cases 25 days, whereas the invitation to tender itself dated from December 1987. The

Italian Government emphasised the serious risks to public health which additional delays would entail, particularly in view of the uncertainty about the future possibility of using the tip at Vallescura.

16 Given those arguments, it must be recognized that the observance of further time-limits in the completion of the renovation works on the incinerator might entail serious risks for public health and the environment. However, it should also be borne in mind that the Consortium, which is responsible for the work, brought about this situation itself by its slowness in meeting the new technical requirements. Furthermore, the Commission's argument that a failure to comply with the Directive constitutes a serious breach of Community law, particularly since a declaration of illegality by the Court obtained under Article 169 of the Treaty cannot make good the damage suffered by undertakings established in other Member States whch were excluded from the tendering procedure, must be accepted.

17 Whilst being aware of the difficulties in which the Consortium now finds itself, the Court considers that the Commission has established the urgency of the interim measure applied for and that in the final analysis the balance of interests tilts in its favour. In this regard, the Court has taken into account in particular the fact that the dumping of refuse at Vallescura must continue for quite a considerable period in any case. In fact, the Italian legislation laying down urgent provisions governing the disposal of waste, which is applicable in this case, allows a period of 120 days between the grant of the loan and the beginning of the works, which must be completed within the ensuing 18 months. In comparison with those periods, those entailed in complying with the Directive appear to be negligible.

18 Consequently, the suspension already ordered must be extended until the date of delivery of the judgment in the main action.

/P3/

On those grounds,

Judge Koopmans, replacing the President of the Court in accordance with the second paragraph of Article 85(2) and Article 11 of the Rules of Procedure,

by way of interlocutory decision,

hereby orders as follows:

1. **The Italian Republic shall adopt all the necessary measures to suspend the award of a public works contract by the Consorzio per la Costruzione e la Gestione di un Impianto per l'Incenerimento e Trasformazione dei Rifiuti Solidi Urbani, whose headquarters are at the offices of the City of La Spezia, until the date of delivery of the judgment determining the main action;**

2. **Costs are reserved.**

Luxembourg, 27 September 1988

/S2/J.-G. Giraud, Registrar - T. Koopmans, acting for the President

/FIN/

* Language of the case: Italian

TRIBUNAL DE JUSTICIA
DE LAS
COMUNIDADES EUROPEAS

DE EUROPÆISKE FÆLLESSKABERS
DOMSTOL

GERICHTSHOF
DER
EUROPÄISCHEN GEMEINSCHAFTEN

ΔΙΚΑΣΤΗΡΙΟ
ΤΩΝ
ΕΥΡΩΠΑΪΚΩΝ ΚΟΙΝΟΤΗΤΩΝ

COURT OF JUSTICE
OF THE
EUROPEAN COMMUNITIES

CVRIA
LUXEMBOURG

COUR DE JUSTICE
DES
COMMUNAUTÉS EUROPÉENNES

CÚIRT
BHREITHIÚNAIS NA
gCOMHPHOBAL EORPACH

CORTE DI GIUSTIZIA
DELLE
COMUNITÀ EUROPEE

HOF VAN JUSTITIE
VAN DE
EUROPESE GEMEENSCHAPPEN

TRIBUNAL DE JUSTIÇA
DAS
COMUNIDADES EUROPEIAS

Translation

/TCDA/Judgment of 5.12.1989 - Case C-3/88

Judgment of the Court
5 December 1989 *

(Failure of a Member State to fulfil its obligations - Public supply contracts in the data-processing sector - Undertakings partly or wholly in public ownership - National legislation not in compliance with obligations under Community law)

/P3/

In Case C-3/88

Commission of the European Communities, represented by Guido Berardis, a member of its Legal Department, acting as Agent, with an address for service in Luxembourg at the office of Georgios Kremlis, a member of the Commission's Legal Department, Wagner Centre, Kirchberg,

applicant,

v

Italian Republic, represented by Professor Luigi Ferrari Bravo, Head of the Diplomatic Legal Department of the Ministry of Foreign Affairs, acting

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* Language of the case: Italian

as Agent, assisted by Ivo Braguglia, Avvocato dello Stato, with an address for service in Luxembourg at the Italian Embassy, 5 Rue Marie-Adélaïde,

defendant,

APPLICATION for a declaration that the Italian Republic has failed to fulfil its obligations under Articles 52 and 59 of the EEC Treaty and Council Directive 77/62/EEC of 21 December 1976 coordinating procedures for the award of public supply contracts (Official Journal 1977 No. L 13, p. 1),

THE COURT,

composed of: O. Due, President, Sir Gordon Slynn and F.A. Schockweiler (Presidents of Chambers), G.F. Mancini, R. Joliet, J.C. Moitinho de Almeida and G.C. Rodríguez Iglesias, Judges,

Advocate General: J. Mischo
Registrar: D. Louterman, Principal Administrator,

having regard to the Report for the Hearing and further to the hearing on 21 June 1989,

after hearing the Opinion of the Advocate General delivered at the sitting on 4 October 1989,

gives the following

Judgment

/P5/

1 By an application lodged at the Court Registry on 6 January 1988 the Commission of the European Communities brought an action under Article 169

of the EEC Treaty seeking a declaration that, by adopting provisions under which only companies in which all or a majority of the shares are either directly or indirectly in public or State ownership may conclude agreements with the Italian state for the development of data-processing systems for the public authorities, the Italian Republic has failed to fulfil its obligations under Articles 52 and 59 of the EEC Treaty and Council Directive 77/62/EEC of 12 December 1976 coordinating procedures for the award of public supply contracts (Official Journal 1977 No. L 13, p. 1, hereinafter referred to as "the directive").

2 It had come to the Commission's notice that the legislation in force in Italy authorized the State to conclude agreements, in a number of sectors of public activity (taxation, health, agriculture and urban property), only with companies in which all or a majority of the shares were directly or indirectly in public or State ownership. The Commission considered that those rules were contrary to the above-mentioned provisions of Community law, and on 3 December 1985 it addressed a letter of formal notice to the Italian Government, thus setting in motion the procedure provided for in Article 169 of the Treaty.

3 On 1 July 1986, as no communication had been received from the Italian Government, the Commission delivered the reasoned opinion provided for in the first paragraph of Article 169 of the Treaty.

4 At the request of the Italian Government, two meetings were held with officials of the Commission, one in Rome on 25 to 27 January 1987 and the other in Brussels on 10 March 1987, with a view to clarifying the situation. On 5 May 1987, the Italian Government stated its position on the reasoned opinion. The Commission considered that position unsatisfactory and decided to bring the present action.

5 Reference is made to the Report for the Hearing for a fuller account of the Italian legislation in issue, the course of the procedure and the

submissions and arguments of the parties, which are mentioned or discussed hereinafter only in so far as is necessary for the reasoning of the Court.

Failure to comply with Articles 52 and 59 of the EEC Treaty

6 In the Commission's view, by providing that only companies in which all or a majority of the shares are directly or indirectly in public or State ownership may conclude agreements for the development of data-processing systems for the public authorities, the Laws and Decree-Laws in issue, although applicable without distinction to Italian undertakings and to those of other Member States,, are discriminatory and constitute a barrier to the freedom of establishment and the freedom to provide services laid down in Articles 52 and 59 of the Treaty.

7 The Italian Government claims first of all that the Laws and Decree-Laws in dispute make no distinction on the basis of the nationality of companies which may conclude the agreements in issue. Consequently, since the Italian State owns all or a majority of the share capital not only in certain Italian companies but also in certain companies of other Member States, both types of company may take part without any discrimination in the establishment of the data-processing systems in issue.

8 According to the Court's case-law the principle of equal treatment, of which Articles 52 and 59 of the Treaty embody specific instances, prohibits not only overt discrimination by reason of nationality but also all covert forms of discrimination which, by the application of other criteria of differentiation, lead in fact to the same result (see, in particular, the judgment of 29 October 1980 in Case 22/80, Boussac v Gerstenmeier [1980] ECR 3427).

9 Although the Laws and Decree-Laws in issue apply without distinction to all companies, whether of Italian or foreign nationality, they essentially favour Italian companies. As the Commission has pointed out,

without being contradicted by the Italian Government, there are at present no data-processing companies from other Member States all or the majority of whose shares are in Italian public ownership.

10 In justification of the public ownership requirement, the Italian Government claims that it is necessary for the public authorities to control the performance of the contracts in order to adapt the work to meet developments which were unforeseeable at the time when the contracts were signed. It also claims that for certain types of activity which the companies have to carry out, particularly in strategic sectors, which involve, as in the present case, confidential data, the State must be able to employ an undertaking in which it can have complete confidence.

11 In that regard it must be stated that the Italian Government had sufficient legal powers at its disposal to be able to adapt the performance of contracts to meet future and unforeseeable circumstances and to ensure compliance with the general interest, and that in order to protect the confidential nature of the data in question the Government could have adopted measures less restrictive of freedom of establishment and freedom to provide services than those in issue, in particular by imposing a duty of secrecy on the staff of the companies concerned, breach of which might give rise to criminal proceedings. There is nothing in the documents before the Court to suggest that the staff of companies none of whose share capital is in Italian public ownership could not comply just as effectively with such a duty.

12 The Italian Government also maintains that in view of their confidential nature the activities necessary for the operation of the data-processing systems in question are connected with the exercise of official authority within the meaning of Article 55.

13 As the Court has already held (see the judgment of 21 June 1974 in Case 2/74, Reyners v Belgium [1974] ECR 631), the exception to freedom of

establishment and freedom to provide services provided for by the first paragraph of Article 55 and by Article 66 of the EEC Treaty must be restricted to those of the activities referred to in Articles 52 and 59 which in themselves involve a direct and specific connexion with the exercise of official authority. That is not the case here, however, since the activities in question, which concern the design, programming and operation of data-processing systems, are of a technical nature and thus unrelated to the exercise of official authority.

14 Finally, the Italian Government claims that in view of the purpose of the data-processing systems in question and the confidential nature of the data processed, the activities necessary for their operation concern Italian public policy within the meaning of Article 56 (1) of the Treaty.

15 That argument must also be dismissed. It need merely be pointed out that the nature of the aims pursued by the data-processing systems in question is not sufficient to establish that there would be any threat to public policy if companies from other Member States were awarded the contracts for the establishment and operation of those systems. It must also be borne in mind that the confidential nature of the data processed by the systems could be protected, as stated above, by a duty of secrecy, without there being any need to restrict freedom of establishment or freedom to provide services.

16 It follows from the foregoing considerations that the claim based on failure to comply with Articles 52 and 59 of the Treaty must be upheld.

Failure to comply with Directive 77/62/EEC

17 The Commission considers that the Laws and Decree-Laws in issue infringe the provisions of the directive as regards the purchase by the public authorities of the equipment necessary for the establishment of the

data-processing systems in question. Since such equipment is to be regarded as "products" within the meaning of Article 1 (a) of the directive and since the value of the relevant public supply contracts exceeds the amount fixed in Article 5, the competent authorities should have followed the award procedures prescribed in the directive and complied with the obligations laid down in Article 9, which requires notices of such contracts to be published in the Official Journal of the European Communities.

18 The Italian Government objects, first, that in addition to the purchase of the hardware a data-processing system comprises the creation of software, the planning, installation, maintenance and technical commissioning of the system and sometimes its operation. The interdependence of those activities means that complete responsibility for the establishment of the data-processing systems provided for by the Laws and Decree-Laws in issue must be given to a single company. Therefore, and bearing in mind that the hardware is an ancillary element in the establishment of a data-processing system, the directive is inapplicable. The Italian Government adds that according to Article 1 (a) of the directive the concept of public supply contracts covers only contracts the principal object of which is the delivery of products.

19 That argument cannot be accepted. The purchase of the equipment required for the establishment of a data-processing system can be separated from the activities involved in its design and operation. The Italian Government could have approached companies specializing in software development for the design of the data-processing systems in question and, in compliance with the directive, could have purchased hardware meeting the technical specifications laid down by such companies.

20 The Italian government then claims that Council Decision 79/783/EEC of 11 September 1979 adopting a multiannual programme (1979 to 1983) in the field of data-processing (Official Journal 1979 No. L 231, p. 23), as

amended by Decision 84/559/EEC of 22 November 1984 (Official Journal 1984 No. L 308, p. 49), should be interpreted as meaning that until such time as the programme is completed the temporary exemption referred to in Article 6 (1) (h) of the directive is to remain in force.

21 Under that provision, contracting authorities need not apply the procedures provided for in Article 4 (1) and (2) "for equipment supply contracts in the field of data-processing, and subject to any decisions of the Council taken on a proposal from the Commission and defining the categories of material to which the present exception does not apply. There can no longer be recourse to the present exception after 1 January 1981 other than by a decision of the Council taken on a proposal from the Commission to modify this date".

22 The decisions mentioned by the Italian Government were adopted on the basis of Article 235 of the Treaty and not pursuant to Article 6 (1) (h) of the directive. They relate to the implementation of a programme in the field of data processing which does not concern, either directly or indirectly, the rules applicable to contracts for the supply of data-processing equipment.

23 In the Italian Government's submission, the supply contracts in issue also fall within the exceptions provided for in Article 6 (1) (g) of the directive, which authorizes contracting authorities not to follow the procedures referred to in Article 4 (1) and (2) "when supplies are declared secret or when their delivery must be accompanied by special security measures in accordance with the provisions laid down by law, regulation or administrative action in force in the Member State concerned, or when the protection of the basic interests of that State's security so requires". It refers, in that regard, to the secret nature of the data involved, which is essential in the fight against crime, particularly in the areas of taxation, public health and fraud in agricultural matters.

24 That objection concerns the confidential nature of the data entered in the data-processing systems in question. As has already been pointed out, however, observance of confidentiality by the staff concerned is not dependent on the public ownership of the contracting company.

25 The Italian Government also claims that the activities to be carried out by the specialized companies chosen for the development of the data-processing systems in question constitute a public service activity. Agreements concluded between the State and the companies chosen to carry out those activities are therefore excluded from the scope of the directive, Article 2 (3) of which provides:

> "When the State, a regional or local authority or one of the legal persons governed by public law or corresponding bodies specified in Annex I grants to a body other than the contracting authority - regardless of its legal status - special or exclusive rights to engage in a public service activity, the instrument granting this right shall stipulate that the body in question must observe the principle of non-discrimination by nationality when awarding public supply contracts to third parties".

26 That argument cannot be accepted. The supply of the equipment required for the establishment of a data-processing system and the design and operation of the system enable the authorities to carry out their duties but do not in themselves constitute a public service.

27 Finally, the Italian Government claims that the derogation provided for in Article 6 (1) (e) of the directive should be applied in the case of the data-processing system at the Finance Ministry. Under that subparagraph, contracting authorities need not apply the procedures referred to in Article 4 (1) and (2) "for additional deliveries by the original supplier which are intended either as part replacement of normal

supplies or installations, or as the extension of existing supplies or installations where a change of supplier would compel the contracting authority to purchase equipment having different technical characteristics which would result in incompatibility or disproportionate technical difficulties of operation or maintenance".

28 In that regard it is sufficient to note that such cases of additional deliveries cannot justify a general rule that only companies in which all or a majority of the share capital is in Italian public ownership may be awarded supply contracts.

29 It follows from the foregoing that the claim based on failure to comply with Directive 77/62/EEC must also be upheld.

30 It must therefore be held that by providing that only companies in which all or a majority of the shares are either directly or indirectly in public or State ownership may conclude agreements for the development of data-processing systems for the public authorities, the Italian Republic has failed to fulfil its obligations under Articles 52 and 59 of the EEC Treaty and Council Directive 77/62/EEC of 21 December 1976.

/P6/

Costs

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

/P3/

On those grounds,

THE COURT

hereby:

1. **Declares that by providing that only companies in which all or a majority of the shares are either directly or indirectly in public or State ownership may conclude agreements for the development of data-processing systems for the public authorities, the Italian Republic has failed to fulfil its obligations under Articles 52 and 59 of the EEC Treaty and Council Directive 77/62/EEC of 21 December 1976;**

2. **Orders the Italian Republic to pay the costs.**

/S1/Due, Slynn, Schockweiler, Mancini, Joliet, Moitinho de Almeida, Rodríguez Iglesias

Delivered in open court in Luxembourg on 5 December 1989.

/S2/J.-G. Giraud, Registrar - O. Due, President

/FIN/

Report for the Hearing
in Case C-3/88 *

/P2/

I - Facts and procedure

A. Facts

The Commission considered that certain Italian Laws and Decree-Laws were contrary to Community law inasmuch as they provided that only companies in which all or a majority of the share capital was in public ownership could be awarded certain contracts involving the purchase of equipment and supplies required for the establishment of data-processing systems, and the design and, in some cases, the technical management of such systems. The Commission communicated its observations to the Italian Government by a telex message of 30 January 1985.

The Government's reply, received on 24 April 1985, was deemed unsatisfactory, and the Commission addressed a letter of formal notice to the Italian authorities on 3 December 1985. As no communication was received from the Italian Government, the Commission delivered a reasoned opinion on 1 July 1986 calling on the Italian Republic to take the measures required to comply with that opinion within a period of 30 days.

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* Language of the case: Italian

On 16 September 1986, the Italian Government asked for an extension of the period laid down, and stated that co-ordination meetings were being held with the competent authorities. On 11 October following, the Italian Government requested a meeting with officials of the Commission in order to clarify the matter.

Two meetings were held, one in Rome on 25 to 27 January 1987, and the other in Brussels on 10 March 1987.

On 5 May 1987, the Italian Government stated its position on the reasoned opinion. The Commission considered that position unsatisfactory and brought the present action.

B. Procedure

The Commission's application was lodged at the Court Registry on 6 January 1988.

The written procedure followed the normal course.

Upon hearing the report of the Judge-Rapporteur and the views of the Advocate General, the Court decided to open the oral procedure without any preparatory inquiry. The parties were, however, asked to provide a written answer to a question put by the Court. They complied with that request within the prescribed period.

II - The Italian legislation in issue

The Italian legislation in issue is as follows:

1. Decree-Law No. 8 of 30 January 1976, which, after amendment, became Law No. 60 of 27 March 1976, laying down rules for the establishment of a data-processing system at the Finance Ministry and the operation of the central tax records.

Article 3 of that Decree states:

> "The following tasks may be entrusted to a specialized company under a special agreement concluded for such a period as may be necessary for the proper operation of the data-processing system referred to in Article 1 hereof, but not to exceed five years:
>
> (a) The development of the data-processing system (...);
>
> (b) The technical operation of the data-processing system, including: the research and development required to establish a flowchart of procedures as defined by data-processing centres, and subsequently to convert this into sets of instructions forming the machine programs; the definition of file structures and operational standards for access to the information contained therein in compliance with procedures carried out by the central units; the planning and execution of all the steps required to enable the central units to operate in accordance with the requirements imposed by the central and peripheral services.

/B/

The State must hold, at least indirectly, a majority of the shares in the company responsible. The directors and the members of its supervisory board may not be connected with companies which operate undertakings

producing electronic equipment, or have any working relationship with such companies, even in an independent capacity.

The Finance Ministry is authorized to conclude the agreement in accordance with the fourth and tenth paragraphs of Article 17 of Law No. 825 of 9 October 1971, as subsequently amended.

The company responsible is to organize its activities in accordance with the criteria and objectives laid down by the financial authorities under the supervision of the Directorates-General for whom the data-processing centres are intended (...).

2. Decree-Law No. 688 of 30 September 1962, which, after amendment, became Law No. 873 of 27 November 1982, providing for emergency measures to counteract tax evasion.

Article 7 of that Law states, inter alia:

"With a view to effecting the necessary reinforcement of the structures of financial administration in order to counteract fraud, the ordinary budget is increased by an appropriation of 500 thousand million lire to be entered in the estimate for the Finance Ministry for the financial year 1983, for the conclusion of contracts and agreements for the purpose of (...)

purchasing goods and services (budget category IV) up to the amount of 116 thousand million lire, including: purchasing and hiring technical aids and equipment, including electronic data-processing equipment; procuring supplies and services, including those necessary

for the automation of procedures, as well as the ordinary supplies provided for under existing provisions.

The Finance Ministry is also authorized to enter into one or more contracts or agreements with one or more specialized companies which are entirely publicly-owned - at least indirectly - for the development and completion of new installations and the technical operation, under the direction and supervision of the administrative bodies, of the data-processing system of the central and peripheral structures of the Finance Ministry (...).

In order to cover the expenditure involved in concluding the contracts and agreements provided for in the second paragraph, the following expenditure is authorized for the five-year period from 1983 to 1987:

130 thousand million lire for 1983;

215 thousand million lire for each year from 1984 to 1987 inclusive.

/B/

On the basis of the appropriations referred to in the preceding paragraphs, the Finance Ministry is to conclude the contracts and agreements referred to in this article, notwithstanding Articles 3 to 9 of Royal Decree No. 2440 of 18 November 1923 as amended and extended, the regulatory provisions relating thereto contained in Royal Decree No. 827 of 23 May 1924 as amended and extended, and Article 14 of Law No. 1140 of 28 September 1942. No off-budget operations are permitted. (...)"

3. Law No. 181 of 26 April 1982, laying down rules for analysis, planning and assistance concerning the development, commissioning and, if appropriate, temporary operation of the health data-processing system.

Article 15 of the Law states:

"The Government of the Republic is authorized to adopt, within a period of 120 days from the entry into force of this Law, by one or more Decrees having the status of ordinary Laws, measures to reinforce the structures of the Central Health Planning Department."

The second and third paragraphs of Article 15 state:

"In accordance with the requirements of national health planning and supervision of the use of the National Health Fund, the Ministry of Health is authorized to conclude one or more agreements with specialized companies in which the majority of the share capital is held (at least indirectly) by the State, in accordance with the criteria and objectives laid down by the Minister himself and under the direction and supervision of the competent bodies, for analysis and development work in a system meeting the requirements of the central health authorities, including the National Health Council, the Higher Institute of Health and the Higher Institute for Health and Safety at Work, for the purpose of developing, commissioning and, if appropriate, temporarily operating the health data-processing system at a central or local level, at the request of local health units and regions or by substitution in the event of their persistent failure to act.

The agreements referred to in the preceding paragraph, the duration of which may not exceed five years, may be concluded and the relevant expenditure implemented notwithstanding the rules of budgetary procedure and Article 14 of Law No. 1140 of 28 September 1942; no off-budget operations are permitted."

4. Law No. 194 of 4 June 1984, which provides for the establishment of a national data-processing system for agriculture.

Article 15 of the Law states, inter alia:

"For the purposes of the exercise of State power with regard to the orientation and coordination of agricultural activities and the necessary collection and monitoring of all data relating to the national agricultural sector, the Minister of Agriculture and Forestry is authorized to set up a national data-processing system for agriculture and to conclude for that purpose one or more agreements with companies in which the majority of the share capital is held (at least indirectly) by the State for the development, commissioning and, if appropriate, temporary operation of that data-processing system in compliance with the criteria and budgetary guidelines adopted by the Minister."

5. Decree-Law No. 853 of 19 December 1984, which authorizes the Finance Minister to set up a programme for the automation of the urban property tax register.

Article 4 (20) and (26) provide, inter alia:

"With a view to setting up a programme for the automation of the urban property tax register, the Finance Minister may avail himself of the authorization provided for in the second paragraph of Article 7 of Decree-Law No. 688 of 30 September 1982, which, after amendment, became Law No. 873 of 27 November 1982 (that is to say the authorization to conclude one or more agreements with one or more specialized companies which are entirely publicly-owned, at least indirectly - see point 2, above). For this purpose the expenditure authorized by the sixth paragraph of the said Article 7 shall be increased by 65 thousand million lire, 10 thousand million of which shall be for 1985, 20 thousand million for 1986 and 35 thousand million for 1987. The provisions of the third, fifth and seventh paragraphs of the said Article 7 shall be applicable".

"For 1985 the expenditure of 10 thousand million lire, to be entered in the relevant chapter of the estimate for the Finance Ministry, is authorized for the purpose of technical and other equipment, the carrying out of all the work required to implement security measures, the purchase of technical aids and equipment, including electronic data-processing equipment and the procurement of supplies and services, including those necessary for the automation of procedures, as well as the ordinary supplies provided for under existing provisions. The provisions referred to in the seventh paragraph of Article 7 of Decree-Law No. 688 of 30 September 1982, which, after amendment, became Law No. 873 of 27 November 1982, shall be applicable".

III - Conclusions of the parties

The Commission, the applicant, claims that the Court should:

1. declare that, by adopting provisions under which only companies in which all or a majority of the shares are, either directly or indirectly, in public or State ownership may conclude agreements with the Italian State for the development of data-processing systems on behalf of the public authorities, the Italian Republic has failed to fulfil its obligations under Articles 52 and 59 of the EEC Treaty and Council Directive 77/62/EEC of 12 December 1976 co-ordinating procedures for the award of public supply contracts;

2. order the Italian Republic to pay the costs.

/B/

The Italian Republic, the defendant, contends that the Court should:

1. dismiss the application;

2. order the Commission to pay the costs.

IV - Submissions and arguments of the parties

(1) Breach of Articles 52 and 59 of the EEC Treaty

The Commission considers that in so far as it concerns design, software and the possibility of operational management, the Italian legislation is contrary to Articles 52 and 59 of the EEC Treaty.

By providing that only companies in which all or a majority of the shares are in public or State ownership may conclude agreements for the development of data-processing systems, thereby precluding any possibility of access for companies from other Member States established either in Italy (Article 52) or in another Member State (Article 59), the legislation in issue, although it is applicable without distinction to Italian companies and to those of other Member States, is discriminatory and constitutes a barrier to freedom of establishment and freedom to provide services.

The provisions of Articles 55, 56 (1) and 66 of the Treaty may not be relied upon, inasmuch as the concepts of public policy, public security and public health must be interpreted restrictively and may not, in any event, be used for economic purposes.

A company responsible for developing a data-processing system does not exercise any public authority, and there is no proof that the technicians of the company entrusted with the development of the system could have access to confidential or secret data. They develop the system but do not necessarily have access to State secrets.

The Italian Republic contests this reasoning.

The Laws and Decree-Laws in dispute, it claims, in no way make any distinction on the basis of nationality with regard to companies entitled to conclude the contracts and agreements in issue.

The requirement of public ownership is explained by the type of services which the company is called upon to provide in the management of the data-processing system, particularly in strategic sectors such as

taxation, organized crime, public health, etc., which the State must entrust to a company in which it can have full confidence.

2. In any event Articles 52 and 59 of the EEC Treaty may not be applied, since the exceptions provided for in Articles 55, 56 (1) and 66 of the Treaty are applicable.

Activities necessary for the operation of the data-processing system partake of the exercise of official authority within the meaning of Article 55 of the EEC Treaty, in view of the confidential nature of the information.

This confidentiality is confirmed by the third sub-paragraph of Article 7 (c) of Decree-Law No. 688 of 30 September 1982, which provides that "employees and staff of companies awarded contracts who are involved in any manner in the operations provided for in the contracts shall be bound by a duty of official secrecy. Any breach of that duty shall be punishable under Article 326 of the Italian Criminal Code".

In establishing these data-processing systems, the Italian State is pursuing aims which are not solely economic but also involve the public interest: counteracting tax evasion and fighting organized crime (Finance Ministry); supervising the use of the appropriations in the "Fondo Nazionale", implementing therapeutic measures for drug-addiction and counteracting fraud in the pharmaceutical sector (Ministry of Health); and counteracting fraud in agricultural matters (Ministry of Agriculture).

These are requirements of public policy, public security and public health which the State has a duty to look after.

(2) Breach of Council Directive 77/62/EEC of 21 December 1976

The Commission considers that the Italian regulations are contrary to the provisions of Directive 77/62/EEC with regard to the purchase of the necessary equipment by the public authorities.

The establishment of a data-processing system of the type provided for by the Italian regulations involves a complex series of activities and the purchase of a substantial quantity of equipment. Such equipment constitutes "products" within the meaning of the directive (see Article 6 (1)(h)) and may be dissociated from the activities involved in the development of a data-processing system. First of all, the principles laid down in the directive have not been observed in the procedures for the award of the public supply contracts in question; secondly, the competent authorities have never complied with their obligations under Article 9 of the Directive, which requires the publication of notices in the Official Journal of the European Communities.

In the Commission's view, the exceptions provided for in the directive and relied upon by the Italian Government are not applicable in this case.

With regard to the exception contained in Article 6 (1)(e) (additional deliveries where a change of supplier would have meant the purchase of different equipment resulting in incompatibility or disproportionate technical difficulties of operation or maintenance), the Commission points out that no evidence has been adduced with regard either to the necessity of purchasing equipment having different technical characteristics or to the incompatibility or disproportionate technical difficulties to which its use would give rise.

With regard to the exception contained in Article 6 (1) (g) of the directive (supplies which are declared secret or whose delivery must be accompanied by special security measures), the Commission points out that in this case the contracts and agreements in issue have not been declared secret and that deliveries thereunder have not been accompanied by security measures, and adds that it cannot see how the supply of equipment may be considered to fall within the protection of the essential interests of State security.

With regard, finally, to the rule in Article 2 (3) of the directive (when the State, a regional or local authority or one of the legal persons governed by public law or corresponding bodies specified in Annex I grants to a body other than the contracting authority - regardless of its legal status - special or exclusive rights to engage in a public service activity, the instrument granting this right must stipulate that the body in question is to observe the principle of non-discrimination by nationality when awarding public supply contracts to third parties), the Commission maintains that the award to specialized companies of contracts for the establishment of data-processing systems for the authorities in no way involves the granting of "special or exclusive rights to engage in a public service activity".

On the contrary, it merely involves providing the authorities with a sophisticated technical tool to be used in the exercise of the public powers conferred upon them.

Contrary to what the Italian Government maintains, Decisions 79/783/EEC of 11 September 1979 (Official Journal 1979 No. L 231 p. 23) and 84/559/EEC of 22 November 1984 (Official Journal 1984 No. L 308, p. 49) did

not implicitly extend the temporary exception to the procedure provided for in the directive in respect of public supply contracts for equipment in the field of data-processing (Article 6 (1) (h)). Both decisions are consistent with the application of the directive to the sector in question as from 1 January 1981.

The Italian Republic considers that the contracts and agreements in issue do not fall within the scope of application of the directive:

(a) A data-processing system cannot be considered as a product. Such a system comprises, in addition to the purchase of hardware, the creation of software, the planning, installation, maintenance and technical commissioning of the system and sometimes its operation. The complexity and interdependence of these activities mean that "turnkey" contracts, under which all the responsibility is given to a single company, are required for the establishment of the system.

In a case such as the present one, the Commission's interpretation would require a general tender procedure covering the entire system (the hardware, the software and all the other services), which would be an absurd result.

Article 6 (1) (h) of the directive, relating to "equipment supply contracts in the field of data-processing ..." should be interpreted as referring to the hardware considered in itself, not as an ancillary and secondary element in a complex data-processing system.

(b) Decisions 79/783/EEC of 11 September 1979 and 84/559/EEC of 22 November 1984, cited above, relating to a multiannual programme in the field of data-processing, should be interpreted as meaning that until such

time as the programme is completed the temporary exemption referred to in Article 6 (1) (h) of the directive is to remain in force.

(c) The exception provided for in Article 6 (1) (e) of the directive should be applied in regard to the data-processing system at the Finance Ministry, as the system was set up under Decree-Law No. 8 of 30 January 1976, which came into force before the adoption of Directive 77/62/EEC.

(d) In the view of the Italian Republic, the supply contracts in issue fall within the exceptions provided for in Article 6 (1) (g):

The data-processing system at the Finance Ministry contributes to the fight against organized crime by permitting investigation of suspects' assets.

The data-processing system of the National Health Service poses delicate problems as to the boundary between the protection of the private interests of citizens and that of the higher interests of the Community, inasmuch as procedures have been developed to:

record data relating to treatment and rehabilitation in the field of drug addiction;

record and process data relating to pharmaceutical prescriptions, referrals to specialists and orders for laboratory tests;

obtain initial laboratory analyses concerning the adulteration of foodstuffs.

/B/

The national agricultural data-processing system also involves the recording and preparation of data relating to the prevention of fraud in agricultural matters. Provision has been made for linking this system to the health data-processing system, with a view to the exchange of information relating to fraudulent practices with regard to foodstuffs.

(e) For all these reasons, the work which the specialized companies are called upon to carry out should be considered to constitute a public service activity. Article 2 (3) of the directive is thus applicable, which means that the procedures provided for by the directive are inapplicable to the contracts and agreements concluded between the State and the companies to which the right to engage in that public service activity has been granted.

/S2/J.C. Moitinho de Almeida, Judge-Rapporteur
/FIN/

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DE LAS
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DE EUROPÆISKE FÆLLESSKABERS
DOMSTOL

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DER
EUROPÄISCHEN GEMEINSCHAFTEN

ΔΙΚΑΣΤΗΡΙΟ
ΤΩΝ
ΕΥΡΩΠΑΪΚΩΝ ΚΟΙΝΟΤΗΤΩΝ

COURT OF JUSTICE
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EUROPEAN COMMUNITIES

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TRIBUNAL DE JUSTIÇA
DAS
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Translation

/TCDA/Judgment of 20 March 1990 -- Judgment C-21/88

Judgment of the Court
20 March 1990 *

(Public supply contracts -- Reservation of 30% of such contracts to undertakings located in a particular region)

/P3/
In Case C-21/88

REFERENCE to the Court under Article 177 of the EEC Treaty by the Tribunale Amministrativo Regionale della Toscana [Regional Administrative Tribunal for Tuscany] for a preliminary ruling in the proceedings pending before that court between

Du Pont de Nemours Italiana S.p.A.

and

Unità Sanitaria Locale No. 2 di Carrara [Local Health Authority No. 2, Carrara]

on the interpretation of Articles 30, 92 and 93 of the EEC Treaty,

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* Language of the case: Italian

THE COURT,

composed of: O. Due, President, C.N. Kakouris, F.A. Schockweiler and M. Zuleeg (Presidents of Chambers), T. Koopmans, G.F. Mancini, R. Joliet, J.C. Moitinho de Almeida, G.C. Rodríguez Iglesias, F. Grévisse and M. Díez de Velasco, Judges,

Advocate General: C.O. Lenz
Registrar: B. Pastor, Administrator,

after considering the written observations submitted on behalf of:

-- the plaintiff in the main proceedings, supported by Du Pont de Nemours Deutschland GmbH, by Gian Paolo Zanchini and Mario Siragusa, of the Rome Bar, and by Giuseppe Scassellati Sforzolini, of the Bologna Bar,

-- 3M Italia S.p.A., intervening in the main proceedings, by Enrico Raffaelli, Cosimo Rucellai and Carlo Lessona, of the Florence Bar,

-- the Government of the Italian Republic, by Pier Giorgio Ferri, Avvocato dello Stato, acting as Agent,

-- the Government of the French Republic, by Claude Chavance, Attaché Principal d'Administration Centrale in the Ministry of Foreign Affairs, acting as Agent,

-- the Commission of the European Communities, by Guido Berardis, a member of its Legal Department, acting as Agent,

/B/
having regard to the Report for the Hearing and further to the hearing on 18 October 1989,

after hearing the Opinion of the Advocate General delivered at the sitting on 28 November 1989,

gives the following

Judgment

/P5/

1 By order of 1 April 1987, which was received at the Court on 20 January 1988, the Tribunale Amministrativo Regionale della Toscana [Regional Administrative Tribunal for Tuscany] referred three questions to the Court pursuant to Article 177 of the EEC Treaty for a preliminary ruling on the interpretation of Articles 30, 92 and 93 of the EEC Treaty in order to determine the compatibility with those provisions of Italian rules reserving to undertakings established in the Mezzogiorno [Southern Italy] a proportion of public supply contracts.

2 Those questions were raised in a dispute between Du Pont de Nemours Italiana S.p.A., supported by Du Pont de Nemours Deutschland GmbH, and Unità Sanitaria Locale No. 2 di Carrara [Local Health Authority No. 2, Carrara, hereinafter referred to as "the local health authority"], supported by 3M Italia S.p.A., concerning the conditions governing the award of contracts for the supply of radiological films and liquids.

3 Under Article 17 (16) and (17) of Law No. 64 of 1 March 1986 (Disciplina Organica dell'Intervento Straordinario nel Mezzogiorno - system of rules governing special aid for Southern Italy), the Italian State extended to all public bodies and authorities, as well as to bodies and companies in which the State has a shareholding, and including local health authorities situated throughout Italy, the obligation to obtain at least 30% of their supplies from industrial and agricultural undertakings and small businesses established in Southern Italy in which the products concerned undergo processing.

4 In accordance with the provisions of that national legislation, the local health authority laid down by decision of 3 June 1986 the conditions governing a restricted tendering procedure for the supply of radiological films and liquids. According to the special terms and conditions set out in the annex, it divided the contract into two lots, one, equal to 30% of the total amount, being reserved to undertakings established in Southern Italy. Du Pont de Nemours Italiana challenged that decision before the Tribunale Amministrativo Regionale della Toscana, on the ground that it had been excluded from the tendering procedure for that lot because it did not have an establishment in Southern Italy. By decision of 15 July 1986 the local health authority proceeded to award the contract for the lot corresponding to 70% of the total amount in question. Du Pont de Nemours Italiana also challenged that decision before the same court.

5 In the course of its consideration of the two actions the national court decided to request the Court to give a preliminary ruling on the following questions:

(1) Must Article 30 of the EEC Treaty, in so far as it imposes a prohibition on quantitative restrictions on imports and all measures having equivalent effect, be interpreted as precluding the national legislation in question?

(2) Is the reserved quota which is provided for by Article 17 of Law No. 64 of 1 March 1986 in the nature of "aid" within the meaning of Article 92 inasmuch as it is intended "to promote the economic development" of a region "where the standard of living is abnormally low" by leading to the establishment of undertakings so as to contribute to the socio-economic development of such areas?

(3) Does Article 93 of the EEC Treaty confer exclusively on the Commission the power to determine whether aid within the meaning of Article 92 of the EEC Treaty is permissible, or is that power also vested in the national court to be exercised in connexion with the examination of any conflicts arising between national law and Community law?

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

A -- First question

7 In its first question, the national court seeks to ascertain whether national rules reserving to undertakings established in certain regions of the national territory a proportion of public supply contracts are contrary to Article 30, which prohibits quantitative restrictions on imports and all measures having equivalent effect.

8 It must be stated in limine that, as the Court has consistently held since the judgment in Dassonville (judgment of 11 July 1974 in Case 8/74, Procureur du Roi v Dassonville [1974] ECR 837, paragraph 5), Article 30, by prohibiting as between Member States measures having an effect equivalent to quantitative restrictions on imports, applies to all trading rules which are capable of hindering, directly or indirectly, actually or potentially, intra-Community trade.

9 It must be pointed out, moreover, that according to the first recital in the preamble to Council Directive 77/62/EEC of 21 December 1976 co-ordinating procedures for the award of public supply contracts (Official Journal 1977 No. L 13, p. 1), which was in force at the material time, "restrictions on the free movement of goods in respect of public supplies are prohibited by the terms of Articles 30 et seq. of the Treaty".

10 Accordingly, it is necessary to determine the effect which a preferential system of the kind at issue in this case is likely to have on the free movement of goods.

11 It must be pointed out in that regard that such a system, which favours goods processed in a particular region of a Member State, prevents the authorities and public bodies concerned from procuring some of the supplies they need from undertakings situated in other Member States. Accordingly, it must be held that products originating in other Member States suffer discrimination in comparison with products manufactured in the Member State in question, with the result that the normal course of intra-Community trade is hindered.

12 That conclusion is not affected by the fact that the restrictive effects of a preferential system of the kind at issue are borne in the same measure both by products manufactured by undertakings from the Member State in question which are not situated in the region covered by the preferential system and by products manufactured by undertakings established in other Member States.

13 It must be emphasized in the first place that, although not all the products of the Member State in question benefit by comparison with products from abroad, the fact remains that all the products benefiting by the preferential system are domestic products; secondly, the fact that the restrictive effect exercised by a State measure on imports does not benefit all domestic products but only some cannot exempt the measure in question from the prohibition set out in Article 30.

14 Furthermore, it must be observed that, on account of its discriminatory character, a system such as the one at issue cannot be justified in the light of the imperative requirements recognized by the Court in its case-law; such requirements may be taken into consideration only in relation to measures which are applicable to domestic products and to imported products without distinction (judgment of 17 June 1981 in Case 113/80, Commission v Ireland [1981] ECR 1625).

15 It must be added that neither does such a system fall within the scope of the exceptions exhaustively listed in Article 36 of the Treaty.

16 However, the Italian Government has invoked Article 26 of Directive 77/62 (cited above), which provides that "this Directive shall not prevent the implementation of provisions contained in Italian Law No. 835 of 6 October 1950 (Official Gazette No. 245 of 24 October 1950 of the Italian Republic) and in modifications thereto in force on the date on which this Directive is adopted; this is without prejudice to the compatibility of these provisions with the Treaty".

17 It should be pointed out in that regard, first, that the content of the national legislation to which the national court refers (Law No. 64/86) is in some respects different and more extensive than it was at the time of the adoption of the directive (Law No. 835/50) and, secondly, that Article 26 specifies that the directive is to apply "without prejudice to the compatibility of these provisions with the Treaty". In any event, the directive cannot be interpreted as authorizing the application of national legislation whose provisions are contrary to those of the Treaty and, consequently, as impeding the application of Article 30 in a case such as this.

18 It must therefore be stated in answer to the national court's first question that Article 30 must be interpreted as precluding national rules which reserve to undertakings established in particular regions of the national territory a proportion of public supply contracts.

B -- Second question

19 In its second question, the national court seeks to establish whether in the event that the rules in question might be regarded as

aid within the meaning of Article 92 that might exempt them from the prohibition set out in Article 30.

20 In that regard, it is sufficient to recall that, as the Court has consistently held (see, in particular, the judgment of 5 June 1986 in Case 103/84, Commission v Italy [1986] ECR 1759), Article 92 may in no case be used to frustrate the rules of the Treaty on the free movement of goods. It is clear from the relevant case-law that those rules and the Treaty provisions relating to State aid have a common purpose, namely to ensure the free movement of goods between Member States under normal conditions of competition. As the Court made clear in the judgment cited above, the fact that a national measure might be regarded as aid within the meaning of Article 92 is therefore not a sufficient reason to exempt it from the prohibition contained in Article 30.

21 In the light of that case-law - there being no need to consider whether the rules in question are in the nature of aid - it must be stated in answer to the national court's second question that the fact that national rules might be regarded as aid within the meaning of Article 92 cannot exempt them from the prohibition set out in Article 30.

C -- Third question

22 It follows from the answers given to the preceding questions that, in a case such as this, the national court must ensure the full application of Article 30. Accordingly, the third question, which is concerned with the rôle of the national court in assessing the compatibility of aid with Article 92, has become otiose.

/P6/

Costs

23 The costs incurred by the Italian Government, the French Government and the Commission of the European Communities, which have submitted observations to the Court, are not recoverable. As these proceedings are, in so far as the parties to the main proceedings are concerned, in the nature of a step in the proceedings before the national court, the decision on costs is a matter for that court.

/P3/
On those grounds,

THE COURT,

in answer to the questions submitted to it by the Tribunale Amministrativo Regionale della Toscana, by order of 1 April 1987, hereby rules:

(1) Article 30 of the EEC Treaty must be interpreted as precluding national rules which reserve to undertakings established in particular regions of the national territory a proportion of public supply contracts.

(2) The fact that national rules might be regarded as aid within the meaning of Article 92 of the Treaty cannot exempt them from the prohibition set out in Article 30 of the Treaty.

/S1/Due, Kakouris, Schockweiler, Zuleeg, Koopmans, Mancini, Joliet, Moitinho de Almeida, Rodríguez Iglesias, Grévisse, Díez de Velasco

Delivered in open court in Luxembourg on 20 March 1990.

/S2/J.-G. Giraud, Registrar -- O. Due, President
/FIN/

Report for the Hearing
in Case C-21/88 *

I -- Legal background

1. National provisions

1. The facts which gave rise to the main proceedings are essentially concerned with Italian rules under which a percentage of public supply contracts is reserved to undertakings located in the regions of the Mezzogiorno [Southern Italy].

2. The principle of the "reserved quota" was already to be found in Decreto Legge C.P.d.S. No. 40 of 18 February 1947 which authorized the State authorities to obtain up to one-sixth of their supplies from undertakings located in certain regions of Southern Italy. Subsequently, Law No. 835 of 6 October 1950 made the reserved quota system no longer optional but mandatory.

3. The reserved quota system was confirmed and maintained in force by the various laws governing the question of assistance for Southern Italy; the most recent such provision is Law No. 64 of 1 March 1986 (Disciplina Organica dell'Intervento Straordinario nel Mezzogiorno, hereinafter referred to as "Law No. 64/86").

4. Article 17 (16) and (17) of Law No. 64/86 provides as follows:

> "16. The requirement relating to the reserved quota of supplies and services referred to in Article 113 (1) of the aforementioned consolidated instrument shall extend to all public authorities, regions, provinces, municipalities, local health authorities, mountain communities, companies and bodies in which the State has a shareholding, universities and independent hospital establishments.
>
> 17. Such bodies, undertakings and authorities are required to obtain at least 30% of their supplies of the material which they require from industrial, agricultural and small-scale undertakings which have establishments and fixed plant in the areas referred to in Article 1

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* Language of the case: Italian

of the aforementioned consolidated instrument in which the requisite products must have undergone at least partial processing."

5. The consolidated instrument to which the provision refers is Decree No. 218 of 6 March 1978 of the President of the Republic (Consolidated Laws on the Mezzogiorno), Article 113 (1) of which required certain authorities to reserve each financial year 30% of the contracts for supplies and services, with the exception of contracts which were technically not divisible, to undertakings with the necessary technical capacity which were based or in any event had establishments in Southern Italy.

6. Law No. 64/86 significantly extended the scope of Article 113 (1) of Decree No. 218, first by extending the obligation to reserve a proportion of public contracts to a number of bodies not originally covered by the system, including the local health authorities, and secondly by imposing the reserved quota (no longer 30% but at least 30%) not only as regards industrial undertakings but also agricultural undertakings and small businesses, and by stipulating that the undertakings must at least have establishments in the areas concerned in which at least partial processing of the relevant products takes place.

2. Community provisions

7. The Council has adopted in this field Directive 77/62/EEC of 21 December 1976 co-ordinating procedures for the award of public supply contracts (Official Journal 1977 No. L 13, p. 1) with a view to eliminating, in respect of public supplies contracts, restrictions on free movement of goods contrary to Article 30 of the EEC Treaty.

Article 26 of that directive provides as follows:

"This Directive shall not prevent the implementation of provisions contained in Italian Law No. 835 of 6 October 1950 (Official Gazette No. 245 of 24 October 1950 of the Italian Republic) and in modifications thereto in force on the date on which this Directive is adopted; this is without prejudice to the compatibility of those provisions with the Treaty."

8. Article 16 of Council Directive 88/295/EEC of 22 March 1988 amending Directive 77/62/EEC relating to the co-ordination of procedures on the award of public supply contracts and repealing certain provisions of Directive 80/767/EEC (Official Journal 1988 No. L 127, p. 1) replaced Article 26 of Directive 77/62/EEC by the following provision:

"Article 26

1. This Directive shall not prevent, until 31 December 1992, the application of existing national provisions on the award of public supply contracts which have as their objective the reduction of regional disparities and the promotion of job creation in the most disadvantaged regions and in declining industrial regions, on condition that the provisions concerned are compatible with the Treaty and with the Community's international obligations.

2. ..."

II -- Facts and main proceedings

The dispute which is the subject of the main proceedings arises from a measure of 3 June 1986 of Unità Sanitaria Locale No. 2 di Carrara [Local Health Authority No. 2, Carrara, hereinafter referred to as "the local health authority"] laying down the conditions governing a restricted tendering procedure for the supply of radiological films and liquids and - according to the terms and conditions set out in the annex - dividing the contract into two lots, one, equal to 30% of the total amount, being reserved to undertakings located in Southern Italy.

By application No. 2026/86, notified on 16 and 17 September 1986 and lodged with the Tribunale Amministrativo Regionale della Toscana, Du Pont de Nemours Italiana S.p.A. challenged that measure on the ground that the system of the reserved quota for supply and works contracts provided for in Article 113 (1) of Decree No. 218 of 6 March 1978 of the President of the Republic, as extended by Article 17 (16) and (17) of Law No. 64/86, was incompatible with Articles 3, 7, 8, 30, 31, 32, 59 and 62 of the Treaty and with Council Directive 77/62.

In the meantime, the local health authority awarded the contract for the lot of 70% by Decision No. 1044 of 15 July 1986. Du Pont de Nemours Italiana S.p.A. brought an action against that decision before the Tribunale Amministrativo Regionale della Toscana by application no. 3491/86, which was notified on 20 and 24 November 1986 and reiterated the conclusions set out in the first action.

3M Italia, which also had an interest in the outcome of the case in so far as it was the successful tenderer for the lot of 30%, applied to intervene in support of the defendant. Du Pont de Nemours Deutschland GmbH subsequently intervened in support of the plaintiff's claims.

In considering the grounds put forward by Du Pont de Nemours the Tribunale Amministrativo took the view that the Court of Justice should be requested to give a preliminary ruling. Although the Tribunale Amministrativo did not formulate specific questions it raised the following issues:

1. Must Article 30 of the EEC Treaty, in so far as it imposes a prohibition on quantitative restrictions on imports and all measures having equivalent effect, be interpreted as precluding the national legislation in question?

2. Is the reserved quota which is provided for by Article 17 of Law No. 64 of 1 March 1986 in the nature of "aid" within the meaning of Article 92 inasmuch as it is intended "to promote the economic development" of a region "where the standard of living is abnormally low" by leading to the establishment of undertakings so as to contribute to the socio-economic development of such areas?

3. Does Article 93 of the EEC Treaty confer exclusively on the Commission the power to determine whether aid within the meaning of Article 92 of the EEC Treaty is permissible, or is that power also vested in the national court to be exercised in connexion with the examination of any conflicts arising between national law and Community law?

/B/

The request for a preliminary ruling was received at the Court Registry on 20 January 1988.

Pursuant to Article 20 of the Protocol on the Statute of the Court of Justice, written observations were lodged by the plaintiff in the main proceedings, supported by Du Pont de Nemours Deutschland GmbH, both represented by Gian Paolo Zanchini and Mario Siragusa, of the Rome Bar, and by Giuseppe Scassellati Sforzolini, of the Bologna Bar; 3M Italia S.p.A., intervener in the main proceedings, represented by Enrico Raffaelli, Cosimo Rucellai and Carlo Lessona, of the Florence Bar; the Government of the Italian Republic, represented by Pier Giorgio Ferri, acting as Agent; and the Commission of the European Communities, represented by Guido Berardis, acting as Agent.

Upon hearing the report of the Judge-Rapporteur and the views of the Advocate General the Court decided to open the oral procedure without any preparatory inquiry.

III -- Written observations submitted to the Court

1. The plaintiff in the main proceedings, Du Pont de Nemours Italiana S.p.A., considers with regard to the first question that it is clear from the case-law of the Court that the prohibition imposed by Article 30 applies to all rules enacted by Member States which are capable of hindering, directly or indirectly, actually or potentially, intra-Community trade whether the national rules apply only to imported products or to national products as well.

It further maintains that the provisions of Article 17 (16) and (17) of Law No. 64/86 constitute a discriminatory measure having an effect equivalent to a quantitative restriction on imports in so far as they prevent authorities and public bodies or bodies in which the State is a shareholder from obtaining supplies of goods from other parts of the Common Market.

In that respect it claims that it is clear from abundant decisions of the Court of Justice that any discrimination based on the origin of goods or on the place where they are processed infringes Article 30.

Moreover, Du Pont de Nemours considers that it is not possible in this case to apply one of the exceptions to Article 30 provided for in Article 36, since the Court has always held that that article may not be relied on to justify measures of an economic nature; it also considers that it is not possible to justify the restrictive measures at issue on the basis of the "imperative requirements" set out in the case-law of the Court, since those imperative requirements do not apply to measures of a discriminatory nature.

In the plaintiff's view, the system of the reserved quota of public supply contracts provided for by Law No. 64/86 is contrary to Directive 77/62. Since that directive applies superior principles of the Treaty, it

prohibits any discrimination, irrespective as to whether it is based on the origin of the product which is to be supplied or on the place where any supplier is established.

The plaintiff further claims that it is not possible to rely on Article 26 of Directive 77/62 in order to justify the reserved quota system. That article merely provides that the directive is not to prevent the implementation of provisions contained in Law No. 835, without prejudice to the compatibility of those provisions with the Treaty.

It submits in addition that in so far as the reserved quota system covers not only supplies of products but also services Article 17 of Law No. 64/86 infringes Article 59 of the Treaty, since it reserves to undertakings in Southern Italy an appreciable proportion of the necessary supplies and clearly discriminates against potential suppliers established in other regions of Italy or in other Member States.

As regards the second question raised by the national court, the plaintiff states that the Court of Justice has consistently held that Article 92 cannot be used to circumvent the prohibition set out in Article 30. In addition, it considers that the proposition that the reservation of public supplies to undertakings in Southern Italy is capable of being in the nature of aid is very doubtful, if not out of the question. In its view, the fact that the provisions relating to the reserved quota system may be intended to foster productive activities in Southern Italy does not necessarily make the provisions classifiable as State aid governed by Article 92 et seq. of the Treaty.

In the event that it should be considered that the reserved quota system can be equated with State aid within the meaning of Article 92 (1) the plaintiff states that such "aid" does not have the necessary characteristics

in order to be considered to be compatible with the Common Market within the meaning of Article 92 (3).

In support of that argument, Du Pont de Nemours refers to the criteria which the Commission applies in order to determine whether a given system of aid is compatible with the Common Market and which it published in a communication on 3 February 1979 (Official Journal 1979 No. C 31, p. 9).

For those reasons Du Pont de Nemours asks that the Court should declare that the reserved quota system for public contracts for supplies and services provided for in Article 17 of Law No. 64/86 is not to be classified as financial aid to undertakings within the meaning of Article 92 but must be regarded as a discriminatory measure designed to channel demand towards national products and hence as falling within the scope of Article 30.

In the alternative, the plaintiff asks that the Court should declare that since Article 92 may in no event be used to circumvent the provisions of the Treaty relating to the free movement of goods, the fact that a national measure may be classified as aid is not sufficient reason for exempting it from the prohibition set out in Article 30.

In the further alternative, the plaintiff asks that the Court should declare that aid such as the reservation of a quota of public supply contracts to undertakings located in Southern Italy is incompatible with the Common Market within the meaning of Article 92 (1) of the Treaty and that such aid cannot be declared compatible with the Common Market within the meaning of Article 92 (3) (a).

As regards the third question, the plaintiff points out that, as the Court held in the judgment of 22 March 1977 in Case 78/76 (Steinike und Weinlig v Federal Republic of Germany [1977] ECR 595), the Commission alone

is responsible for determining the compatibility of a plan of aid even if its decision may subsequently be reviewed by the Court following an application for annulment.

In the plaintiff's view, a national court cannot therefore rule on the compatibility of a plan of aid with the Common Market within the meaning of Article 92, since according to the case-law of the Court of Justice Article 92 does not have direct effect.

However, that does not preclude the possibility that a national court may have to rule on whether a particular measure is in the nature of aid for the purpose of establishing whether it was adopted in breach of the procedural rules laid down in Article 93 (3). In that regard, the plaintiff considers that the Italian State has infringed Article 93 (3) in two respects. In the first place, it notified the aid plan on 2 May 1986, that is to say after it became the law of the State (1 March 1986) and thus not as a plan or in time for the Commission to be able to submit its observations; on the contrary the Commission was presented with a fait accompli. Secondly, it implemented the provision requiring reservation of a quota of public contracts before the Commission reached a final decision on its compatibility with the Common Market. The plaintiff states that the infringement continued also after the Commission initiated the interlocutory procedure laid down in Article 93 (2), despite the fact that in the opinion initiating that procedure the Commission itself drew the parties' attention to the fact that the initiation of the procedure had a suspensory effect and hence aid could be granted only if and when the Commission approved it (notice of 29 September 1987, Official Journal 1987 No. C 259, p. 2).

The obligation not to implement the planned measure continues to bind the Italian State even after the publication (on 2 March 1988) of the decision, which was not final, in which the Commission reserved the right

subsequently to consider the provisions relating to the reserved quota system.

Du Pont de Nemours further considers that the national court has no jurisdiction to determine whether aid is lawful even where the Commission has not given a determination on that question. However, in this case there was no such omission on the part of the Commission.

Du Pont de Nemours concludes that, as it is provided for in Law No. 64/86, the reserved quota system falls within the definition of aid incompatible with the Common Market within the meaning of Article 92 (1) and does not fulfil the conditions necessary in order for it to be authorized under Article 92 (3). For those reasons, it asks the Court to declare that aid such as the reserved quota system cannot be regarded as being compatible with the Common Market.

2. In the view of 3M Italia, intervening in support of the defendant, in order to answer the question whether application of the reserved quota system is contrary to Article 30 of the Treaty it is necessary first of all to identify the purpose of Article 30 in the system of the EEC Treaty. Article 30 is intended to eliminate all trading rules enacted by Member States which are capable of hindering, directly or indirectly, actually or potentially, intra-Community trade.

However, in this case, even if it is accepted that the reserved quota system may affect intra-Community trade, nevertheless the restrictive effects of the rules governing that system extend equally to national undertakings not located in Southern Italy and to undertakings based in other Member States of the Community. Accordingly, those rules do not have protectionist aims but are rooted in the need to help to eliminate the economic and social disequilibrium affecting the regions of Southern Italy.

3M Italia submits that in that context the prohibition set out in Article 30 does not automatically apply. It is clear from the case-law of the Court of Justice that even State measures which are objectively likely to hinder free trade may be regarded as justified, not only where the grounds set out in Article 36 of the Treaty apply, but also where the measures serve a purpose which is in the general interest and such as to take precedence over the requirements of the free movement of goods. In this case, the Italian rules at issue are intended to achieve an aim which is in the general interest, not only from the point of view of the Italian State, but also from the Community point of view, as has been expressly and repeatedly recognized by the Member States of the Community as a whole.

In that connexion, the intervener refers to the Protocol on Italy which is annexed to the EEC Treaty and points out that in the final analysis the rules relating to the reserved quota for undertakings from Southern Italy, which were already in force at the time when the Treaty was concluded, were regarded as being intended to pursue the fundamental objective of the Community set out in Article 2 of the Treaty.

It therefore considers that national rules intended to correct structural disequilibria in the economies of certain regions, and thus pursuing an object of Community interest, may derogate from the requirements of the free movement of goods and must therefore be regarded as being compatible with Article 30 of the Treaty.

In the view of 3M Italia the reserved quota is part of the aid intended for Southern Italy and falls within the category of aid referred to in Article 92 (3) (a). By means of that system, the State channels to undertakings in the South revenue amounting to 30% of public supply contracts.

3M Italia further considers that the reserved quota constitutes State aid and cites in that respect the judgment in Steinike and Weinlig, cited above, according to which the prohibition contained in Article 92 (1) covers all aid granted by a Member State or through State resources without its being necessary to make a distinction whether the aid is granted directly by the State or by public or private bodies established or appointed by it to administer the aid.

3M Italia states that the procedure laid down in Article 93 of the Treaty was complied with, in particular inasmuch as on 2 January 1985 the Italian Government notified the Commission of the plan provided for in Law No. 64/86 (Commission Notice 87/C 259/02 of 29 September 1987, Official Journal No. C 259, p. 2) and the Commission initiated that procedure in respect of only certain provisions of Law No. 64/86. However, 3M Italia points out that the Commission did not initiate a procedure with regard to Article 17 of Law No. 64/86 on the reserved quota, but merely stated that it reserved the right to define its position thereon.

3M Italia considers that the fact that there was no decision taken by the Commission on that aspect although it had been notified more than two years before, amounts to a tacit recognition of the lawfulness of the aid. In support of that argument 3M Italia refers to the judgment of 11 December 1973 in Case 120/73 (Lorenz v Germany [1973] ECR 1471), in which the Court of Justice stated that the Commission had two months to make its position known, by analogy with Articles 173 and 175 of the Treaty.

Accordingly, 3M Italia maintains that the Court should declare as follows:

"(1) The prohibition of measures having effect equivalent to quantitative restrictions (Article 30 of the EEC Treaty)

does not preclude national rules reserving a specific percentage of tenders for public supplies to undertakings located in regions where the standard of living is abnormally low, in order to facilitate their development, provided that that measure of aid has been notified to the Commission and the latter has not expressed an adverse opinion within two months.

(2) A reserved quota such as that provided for in Article 17 of Italian Law No. 64 of 1 March 1986 has the characteristics of aid within the meaning of Article 92 (3) (a) of the Treaty.

(3) Under Article 93 of the Treaty, the Commission is solely responsible for determining the compatibility of the aid referred to in Article 92 of the Treaty, but on the expiry of the period intended for the preliminary examination (which may be fixed at two months by analogy with the provision contained in Articles 173 and 175 of the Treaty) the Member State concerned may implement the proposed scheme of aid.

(4) If the Commission, after being notified by a Member State of the confirmation of an earlier aid plan, reserved its right to determine the compatibility of such aid with the Treaty and unjustifiably prolonged the period intended for consideration of the plan, a derogation from the prohibition of impediments to trade and competition must be deemed to have been granted, at least until such time as the Commission adopts a decision to the effect that the aid is not compatible with the Treaty.

(5) Aid such as the reserved quota provided for in Article 17 (16) and (17) of Italian Law No. 64/86 is not such as to affect the conditions of trade to an extent contrary to the common interest of the Member State or to distort or threaten to distort competition."

3. In the Italian Government's view, the reserved quota of public supply contracts provided for in Article 17 of Law No. 64/86 has the characteristics of aid within the meaning of Article 92 of the Treaty in so far as it is a measure adopted by the State, the burden of the benefit is borne by the

public authorities and the benefit is granted to a category of producers which is defined in terms of the location of their activity.

The Italian Government argues that, since the reserved quota system has the characteristics of aid, it must be subjected to the procedure provided for in Article 93 of the Treaty; as a result, the Commission's decision cannot be anticipated and replaced by a judgment of the Court of Justice under Article 177 of the Treaty.

Moreover the legitimacy under Community law of the aid in question is derived from Article 92 (3) (a) and that provision, unlike Article 92 (3) (c), does not make the lawfulness of aid subject to the condition that it "does not adversely affect trading conditions to an extent contrary to the common interest". In the Italian Government's view, that means that State aid to promote the development of under-developed regions has a primary, positive value in the Community context and is not subordinated to other Community objectives.

The Italian Government considers that although the reserved quota of public supply contracts is a measure of domestic law which benefits national undertakings, it does not fall within the scope of Article 30 of the Treaty, since it gives preference only to undertakings located in certain regions which are determined on the basis of a criterion (under-development) which is objectively verifiable and of importance to the Community.

In addition, it observes that the national measures contemplated by Article 30 of the Treaty are those which are likely to give rise to discrimination between national products and the products of other Member States. That situation does not arise in this case because the reserved quota system grants a privileged position only to economic operators established in Southern Italy, whereas the corresponding position of

disadvantage extends to all Community undertakings, including undertakings established in Italy but outside Southern Italy.

According to Article 2 (3) (k) of Commission Directive 70/50/EEC of 22 December 1969, in order for a measure having an effect equivalent to a quantitative restriction on imports to be involved the measure hindering imports must affect imported products as such and give preference to domestic products.

4. The Commission refers first of all to the case-law of the Court according to which measures encouraging the purchase of national products constitute measures having an effect equivalent to quantitative restrictions contrary to Article 30 of the Treaty in so far as they are capable of hindering, directly or indirectly, actually or potentially, intra-Community trade. The same is true where national rules provide that the public authorities should reserve certain orders for supplies to national producers.

The Commission goes on to refer to several provisions of Commission Directive 70/32 of 17 December 1969 on provision of goods to the State, to local authorities and to official bodies, which provides, inter alia, for the abolition of national provisions under which supplies are reserved to national products or national products are given preference other than aid within the meaning of Article 92 of the Treaty.

In addition, the Commission relies on Directive 77/62, which, in its view, is based on the principle that restrictions to the free movement of goods in the sphere of public supply contracts are prohibited by Article 30 et seq. of the Treaty.

In the light of the foregoing the Commission considers whether national provisions which reserve a proportion of public supply contracts to

undertakings located in particular regions are measures which, owing to their selective character, are not measures having equivalent effect within the meaning of Article 30, but rather aid within the meaning of Article 92.

In that respect, the Commission takes the view, first, that such provisions have the same effects on imports as provisions reserving a quota for all national producers. Moreover, the extent of those effects is not determined by the number of products benefiting by the measure, but by the magnitude of the requirements of the public authorities whose satisfaction by imported products is excluded, limited or made more difficult.

Secondly, it considers that for the purposes of determining the legal classification of the provisions in question the objectives pursued by the Member States - such as regional or social policies - are irrelevant, since the free movement of goods is a fundamental principle of the Treaty, infringement of which may be tolerated only for the reasons set out in Article 36 and for certain "imperative" reasons defined by the case-law of the Court: neither seem capable of applying in this case.

It is not possible to cast doubt on whether a measure having equivalent effect is involved simply because the reserved quota system affects not only products from other Member States but also other national products which do not benefit by the system. The essential test is whether there is a restrictive effect on trade.

As regards the concept of aid within the meaning of Article 92 of the Treaty, the Commission states that it follows from the actual wording of that article and the relevant decisions of the Court of Justice that that concept of aid covers not only positive benefits in the form of financial payments, but also intervention alleviating the burdens to which the budget of an undertaking is normally subject which therefore, without being strictly

subsidies, are of the same nature and have identical effects. Such intervention is achieved by the use of the financial resources of the State.

The Commission adds that it is inconceivable that Article 92 should prohibit measures which are already prohibited by other provisions of the Treaty. It concludes that the aid prohibited by Article 92 must necessarily be measures other than customs duties and charges or measures having equivalent effect. Consequently, the scope of Article 92 is confined to measures of public authorities which involve the use of the financial resources of the State to benefit the recipient undertakings.

It follows, in the Commission's view, that the Italian provisions cannot be regarded as "aid" within the meaning of Article 92, since they do not involve, either directly or indirectly, the use of the financial resources of the State in so far as the State merely requires the public sector to obtain supplies from certain undertakings, thereby restricting the possibility of obtaining such supplies from other undertakings. The Commission points out in addition that the money spent by the State in such cases is only the price paid for the goods acquired on the terms of the market. It is thus not gratuitous but in the nature of consideration.

The Commission therefore considers that the Italian measures in question constitute a direct obstacle to the importation of competing products and are not "aid" within the meaning of Article 92 of the Treaty.

In the event that the measures could be regarded as aid within the meaning of Article 92, the Commission submits that the aid would not then necessarily have to be regarded as being compatible with Article 30. In support of that contention it cites the established case-law of the Court, ranging from the judgment of 22 March 1977 in Case 74/76 (Iannelli & Volpi v Ditta Paolo Meroni [1977] ECR 557) and the judgment of 5 June 1986 in Case

103/84 (Commission v Italy [1986] ECR 1759) according to which Article 92 et seq. of the Treaty may not be used to frustrate the rules of the Treaty on the free movement of goods.

The Commission points out that preferential schemes of the type in question are also incompatible with the provisions of Directive 77/62. It concedes that Article 26 of the directive provides that it "shall not prevent the implementation of provisions contained in Italian Law No. 835 of 6 October 1950 ... and in modifications thereto in force on the date on which this directive is adopted".

Nevertheless, the content of the national legislation to which the national court refers (Law No. 64/86) is to some extent different and more extensive than it was when the directive was adopted, and secondly the directive applies in any event "without prejudice to the compatibility of these provisions with the Treaty".

The Commission concludes that the Court should reply as follows:

"1. Article 30 of the Treaty must be interpreted as meaning that the reservation - even the partial reservation - of orders for public supplies to particular national undertakings constitutes a measure having an effect equivalent to quantitative restrictions contrary to that article.

2. Article 92 of the Treaty must be interpreted as meaning that such reservation does not constitute 'aid' within the meaning of that article."

IV -- Oral proceedings

The French Government, which had not submitted written observations in this case, took part in the oral proceedings on 18 October 1989, when it was

represented by Mr Claude Chavance. It argued essentially that the Italian preferential system was incompatible with Article 30 of the Treaty.

After pointing out that as Italian law stood all Italian public or semi-governmental bodies were under a legal obligation to reserve a percentage of public supply contracts solely for the benefit of undertakings located in Southern Italy and that, as a result, the measure in question constituted a national measure, the French Government stated that such a measure could not be justified under Article 36 or on the ground of imperative requirements of a general nature.

It also pointed to the disproportionate nature of the preferential system owing to the considerable number of bodies concerned, to the fact that the reserved quota could not be under 30% yet was subject to no legally defined limit and, lastly to the fact that it came on top of the various aids actually paid in respect of the products concerned.

It also referred to the Court's case law finding that incentives to purchase national products were unlawful. It stated that even if aid were involved and the system could be construed as a system of aid, Article 30 had to be complied with.

/S2/M. Díez de Velasco, Judge-Rapporteur
/FIN/

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Translation

/TCDA/Judgment of 27.3.1990 - Case C-113/89

Judgment of the Court (Sixth Chamber)
27 March 1990

(Act of Accession - Transitional period - Freedom of movement for workers - Freedom to provide services)

/P3/
In Case C-113/89,

REFERENCE to the Court under Article 177 of the EEC Treaty by the Tribunal Administratif [Administrative Court], Versailles, for a preliminary ruling in the proceedings pending before that court between

Rush Portuguesa Lda

and

Office National d'Immigration [National Immigration Office],

on the interpretation of Article 5 and Articles 58 to 66 of the EEC Treaty and Regulation (EEC) No. 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community (Official Journal, English Special Edition 1968 (II), p. 475), and Articles 2, 215, 216 and 221 of the Act concerning the conditions of accession of the Kingdom of Spain and the Portuguese Republic and the adjustments to the Treaties,

THE COURT (Sixth Chamber),

composed of: C.N. Kakouris, President of the Chamber, T. Koopmans, G.F. Mancini, T.F. O'Higgins and M. Díez de Velasco, Judges,

Advocate General: W. Van Gerven

Registrar: H. A. Rühl, Principal Administrator,

after considering the observations submitted on behalf of

the applicant, Rush Portuguesa Lda, by A. Desmazières de Séchelles, of the Paris Bar,

the French Government, by G. de Bergues, Legal Adviser, assisted by G.A. Delafosse, Director at the Ministry of Employment, Paris, acting as Agents,

the Portuguese Government, by Mrs M. L. Duarte, Legal Adviser, and L.I. Fernandes, Director of Legal Affairs, acting as Agents,

the Commission, by E. Lasnet, Legal Adviser, acting as Agent,

/B/

having regard to the Report for the Hearing and further to the hearing on 11 January 1990,

after hearing the Opinion of the Advocate General delivered at the sitting on 7 March 1990,

gives the following

Judgment

/P5/

1 By an order of 2 March 1989, which was received at the Court on 7 April 1989, the Tribunal Administratif, Versailles, referred to the

Court under Article 177 of the EEC Treaty three questions on the interpretation of Article 5 and Articles 58 to 66 of the EEC Treaty and Articles 2, 215, 216 and 221 of the Act concerning the conditions of accession of the Kingdom of Spain and the Portuguese Republic and the adjustments to the Treaties (hereinafter referred to as the "Act of Accession"), and of Regulation (EEC) No. 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community (Official Journal, English Special Edition 1968 (II), p. 475).

2 Those questions arose in proceedings between Rush Portuguesa Lda, an undertaking established in Portugal specializing in construction and public works, and the Office National d'Immigration. Rush Portuguesa entered into a subcontract with a French undertaking for the carrying out of works for the construction of a railway line in the west of France. For that purpose it brought its Portuguese employees from Portugal. However, by virtue of the exclusive right conferred on it by Article L 341.9 of the French Labour Code, only the Office National d'Immigration may recruit in France nationals of third countries.

3 After establishing that Rush Portuguesa had not complied with the requirements of the Labour Code relating to the activities of employed persons, carried on in France by nationals of non-member countries, the Director of the Office National d'Immigration notified Rush Portuguesa of a decision by which he required payment of a special contribution, which an employer employing foreign workers in breach of the provisions of the Labour Code is liable to pay.

4 In the proceedings for the annulment of that decision, which it brought before the Tribunal Administratif, Versailles, Rush Portuguesa submitted that it had freedom to provide services within the Community and that, accordingly, the provisions of Articles 59 and 60 of the EEC Treaty precluded the application of national legislation having the effect of prohibiting its staff from working

in France. The Office National d'Immigration maintained that the freedom to provide services did not extend to all the employees of the provider of services, since such persons remained subject to the arrangements applicable to workers from non-member countries under the transitional provisions laid down in the Act of Accession as regards freedom of movement for workers.

5 The Tribunal Administratif considered that the solution of the dispute depended on the interpretation of Community law. It therefore stayed the proceedings and referred the following questions to the Court for a preliminary ruling:

"1. Does Community law taken as a whole, and in particular Article 5 and Articles 58 to 66 of the Treaty of Rome and Article 2 of the Act of Accession of Portugal to the European Community, authorize a founding Member State of the Community, such as France, to preclude a Portuguese company whose registered office is in Portugal from providing services in the building and public works sector on the territory of that Member State by going there with its own Portuguese workforce so that the workforce may carry out work there in its name and on its account in connexion with those services, on the understanding that the Portuguese workforce is to return, and does in fact return, immediately to Portugal once its task has been carried out and the provision of the services has been completed?

2. May the right of a Portuguese company to provide services throughout the Community be made subject by the founding Member States of the EEC to conditions, in particular relating to the engagement of labour in situ, the obtaining of work permits for its own Portuguese staff or the payment of fees to an official immigration body?

3. May the workforce, which has been the subject of the disputed special contributions, and whose names and qualifications are mentioned in the list appearing in the annex to the reports drawn up by the labour inspector recording the breaches committed by Rush Portuguesa, be regarded as 'specialized staff or employees occupying a post of a confidential nature' within the meaning of the provisions of the Annex to Regulation No. 1612/68 of the Council of 15 October 1968?"

6 Reference is made to the Report for the Hearing for a fuller

account of the facts of the case, the course of the procedure and the written observations submitted to the Court, which are mentioned or discussed hereinafter only in so far as is necessary for the reasoning of the Court.

7 The first two questions relate to the situation of an undertaking established in Portugal which provides services in the building and public works sector in a Member State belonging to the Community prior to 1 January 1986, the date of Portugal's accession, and which for that purpose brings its own labour force from Portugal for the duration of the works. The first question seeks to ascertain whether, in such a case, the person providing the services may claim a right under Articles 59 and 60 of the Treaty and Article 2 of the Act of Accession to move with his own staff. The second question seeks to ascertain whether the Member State on whose territory the works are to be carried out may impose conditions on the person providing services as regards the engagement of personnel in situ and the obtaining of work permits for the Portuguese labour force. It is appropriate to examine those two questions together.

8 In accordance with Article 2 of the Act of Accession, the provisions of the Treaty on freedom to provide services apply to relations between Portugal and the other Member States as from the date of the accession by Portugal to the Community. Only in respect of activities falling within the travel and tourist agencies sector and the cinema sector does Article 221 of the Act of Accession provide for transitional measures.

9 The Act of Accession lays down different arrangements as regards freedom of movement for workers. According to Article 215 of the Act of Accession, the provisions of Article 48 of the Treaty are only to apply to the freedom of movement of workers between Portugal and the other Member States subject to the transitional provisions laid down in Articles 216 to 219 of the Act of Accession. Article 216 delays the application of Articles 1 to 6 of Regulation

(EEC) No. 1612/68 until 1 January 1993. During that period, national provisions or provisions of bilateral arrangements making prior authorization a requirement for immigration with a view to pursuing an activity as an employed person and/or taking up paid employment may be maintained in force. Article 218 of the Act of Accession states that that derogation entails the non-application of the Community rules regarding the movement and residence within the Community of workers of Member States and their families, in so far as the application of those rules may not be dissociated from the application of Articles 1 to 6 of Regulation No. 1612/68.

10 The questions submitted for a preliminary ruling thus raise the problem of the relationship between the freedom to provide services as guaranteed by Articles 59 and 60 of the Treaty and the derogations from the freedom of movement for workers provided for in Articles 215 et seq. of the Act of Accession.

11 In that connexion, it should be observed first of all that the freedom to provide services laid down in Article 59 of the Treaty entails, according to Article 60 of the Treaty, that the person providing a service may, in order to do so, temporarily pursue his activity in the State where the service is provided "under the same conditions as are imposed by that State on its own nationals".

12 Articles 59 and 60 of the Treaty therefore preclude a Member State from prohibiting a person providing services established in another Member State from moving freely on its territory with all his staff and preclude that Member State from making the movement of staff in question subject to restrictions such as a condition as to engagement in situ or an obligation to obtain a work permit. To impose such conditions on the person providing services established in another Member State discriminates against that person in relation to his competitors established in the host country who are able to use their own staff without restrictions, and moreover affects his ability to provide the service.

13 It should also be recalled that Article 216 of the Act of Accession is intended to prevent disturbances on the employment market following Portugal's accession, both in Portugal and in the other Member States, due to large and immediate movements of workers, and that for that purpose it introduces a derogation from the principle of freedom of movement for workers laid down in Article 48 of the Treaty. According to the Court's case-law, that derogation must be interpreted in the light of the above-mentioned purpose (see the judgment of 27 September 1989 in Case 9/88, Lopes da Veiga v Staatssecretaris van Justitie [1989] ECR .

14 The derogation provided for in Article 216 of the Act of Accession relates to Title I of Regulation No. 1612/68 on eligibility for employment. The national provisions or those provisions in agreements which remain in force during the period of application of that derogation are those relating to the authorization of immigration and eligibility to take up employment. It must accordingly be inferred that the derogation contained in Article 216 applies when access by Portuguese workers to the employment market of other Member States and the entry and residence arrangements for Portuguese workers seeking such access and for members of their families are at issue. The application of that derogation is in fact justified since in such circumstances there is a risk that the employment market of the host Member State may be disrupted.

15 The situation is different, however, in a case such as that in the main proceedings where there is a temporary movement of workers who are sent to another Member State to carry out construction work or public works as part of a provision of services by their employer. In fact, such workers return to their country of origin after the completion of their work without at any time gaining access to the labour market of the host Member State.

16 It should be stated that, since the concept of the provision of

services as defined by Article 60 of the Treaty covers very different activities, the same conclusions are not necessarily appropriate in all cases. In particular, it must be acknowledged, as the French Government has argued, that an undertaking engaged in the making available of labour, although a supplier of services within the meaning of the Treaty, carries on activities which are specifically intended to enable workers to gain access to the labour market of the host Member State. In such a case, Article 216 of the Act of Accession would preclude the making available of workers from Portugal by an undertaking providing services.

17 However, that observation in no way affects the right of a person providing services in the building and public works sector to move with his own labour force from Portugal for the duration of the work undertaken. Nevertheless, Member States must in such a case be able to ascertain whether a Portuguese undertaking engaged in construction or public works is not availing itself of the freedom to provide services for another purpose, for example that of bringing his workers for the purposes of placing workers or making them available in breach of Article 216 of the Act of Accession. However, such checks must observe the limits imposed by Community law and in particular those stemming from the freedom to provide services which cannot be rendered illusory and whose exercise may not be made subject to the discretion of the authorities.

18 Finally, it should be stated, in response to the concern expressed in this connexion by the French Government, that Community law does not preclude Member States from extending their legislation, or collective labour agreements entered into by both sides of industry, to any person who is employed, even temporarily, within their territory, no matter in which country the employer is established; nor does Community law prohibit Member States from enforcing those rules by appropriate means (judgment of 3 February 1982 in Joined Cases 62 and 63/81 Seco S.A. and Another v EVI [1982] ECR 223).

19 It follows from all the foregoing considerations that the reply to the first and second questions should be that Articles 59 and 60 of the EEC Treaty and Articles 215 and 216 of the Act of Accession of the Kingdom of Spain and the Portuguese Republic must be interpreted as meaning that an undertaking established in Portugal providing services in the construction and public works sector in another Member State may move with its own labour force which it brings from Portugal for the duration of the works in question. In such a case, the authorities of the Member State in whose territory the works are to be carried out may not impose on the supplier of services conditions relating to the recruitment of manpower in situ or the obtaining of work permits for the Portuguese workforce.

20 In view of the reply given to the first two questions, there is no need to give a ruling on the third question.

/P6/

Costs

21 The costs incurred by the French and Portuguese Governments and the Commission of the European Communities, which submitted observations to the Court, are not recoverable. As these proceedings are, in so far as the parties to the main proceedings are concerned, in the nature of a step in the proceedings pending before the national court, the decision on costs is a matter for that court.

/P3/

On those grounds,

THE COURT (Sixth Chamber),

in answer to the questions submitted to it by the Tribunal Administratif, Versailles, by order of 2 March 1989, hereby rules:

Articles 59 and 60 of the EEC Treaty and Articles 215 and 216 of the Act of Accession of the Kingdom of Spain and the Portuguese Republic must be interpreted as meaning that an undertaking established in Portugal providing services in the construction and public works sector in another Member State may move with its own workforce which it brings from Portugal for the duration of the works in question. In such a case, the authorities of the Member State in whose territory the works are to be carried out may not impose on the supplier of services conditions relating to the recruitment of manpower in situ or the obtaining of work permits for the Portuguese workforce.

/S1/Kakouris, Koopmans, Mancini, O'Higgins, Díez de Velasco

Delivered in open court in Luxembourg on 27 March 1990.

/S2/ J.-G. Giraud, Registrar, C. N.Kakouris, President of the Sixth Chamber
/FIN/

Language of the case: French.

Report for the Hearing in Case C-113/89 *

/P2/

I - Facts and procedure

1. Legal background

According to Article 2 of the Act concerning the conditions of accession of the Kingdom of Spain and the Portuguese Republic and the adjustments to the Treaties (Official Journal 1985 No. L 302, p. 23) ("the Act of Accession"), the provisions of the original Treaties and the acts adopted by the institutions of the Communities before accession are to be binding on the new Member States and are to apply in those States under the conditions laid down in those Treaties and in the Act of Accession.

With respect to the free movement of persons, services and capital, Articles 215 to 232 of the Act of Accession lay down special conditions concerning the accession of Portugal.

Article 215 of the Act of Accession provides that:

> "Article 48 of the EEC Treaty shall only apply, in relation to the freedom of movement for workers between Portugal and the other Member States subject to the transitional provisions laid down in Articles 216 to 219 of this Act".

Article 216 (1) provides that:

> "Articles 1 to 6 of Regulation (EEC) No. 1612/68 on the freedom of movement of workers within the Community shall apply in Portugal with regard to nationals of the other Member States and in the other Member States with regard to Portuguese nationals only as from 1 January 1993.
>
> The Portuguese Republic and the other Member States may maintain in force until 31 December 1992, with regard to nationals of other Member States and to Portuguese nationals respectively, national provisions or those resulting from bilateral arrangements making prior authorization a requirement for immigration with a view to pursuing an activity as an employed person and/or taking up paid employment.

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* Language of the case: French

However, the Portuguese Republic and the Grand Duchy of Luxembourg may maintain in force until 31 December 1995 the national provisions referred to in the preceding subparagraph in force on the date of signing of this Act with regard to Luxembourg nationals and Portuguese nationals respectively".

Apart from Article 221 thereof, the Act of Accession contains no transitional measures or other special conditions concerning the right of establishment and the freedom to provide services. Article 221 authorizes Portugal to maintain restrictions on activities falling within the travel and tourist agencies sector until 31 December 1988 and on activities in the cinema sector until 31 December 1990.

2. Facts

Rush Portuguesa Limitada ("Rush"), a company governed by Portuguese law whose registered office is in Portugal, is a building and public works undertaking. Rush entered into a sub-contract with a French company for works on several TGV Atlantique sites in France. In order to carry out the works, Rush brought its Portuguese workforce from Portugal.

The French Labour Inspectorate carried out checks on two of the sites at which Rush was working under a sub-contract, and noted a number of infringements of the Code du Travail [French Labour Code]. The infringements involved 46 workers on the first site and 12 on the second. They were engaged on various tasks; 46 were engaged in the application of concrete and reinforced concrete and 7 were site foremen. The remainder were a managing engineer, a team leader, a general site worker, a crane operator and a mason.

According to the reports made by the Labour Inspector, the workers concerned did not have the work permits prescribed by Article L 341.6 of the Code du Travail for foreign nationals employed in France. It also appeared

that the Portuguese workers had not been recruited by the Office National d'Immigration, on which Article L 341.9 of the Code du Travail confers the exclusive right to recruit nationals of third States for work in France.

The reports were forwarded to the Public Prosecutor's Office by the Director of the Office National d'Immigration for the purpose of legal proceedings. He also initiated the procedure provided for in Article 341.7 of the Code du Travail - which provides that without prejudice to such legal proceedings as may be commenced against him, any employer who has employed a foreign worker in breach of Article L 341.6(1) is required to pay a special contribution to the Office National d'Immigration.

By decisions of 28 January and 26 March 1987, the Director of the Office National d'Immigration informed Rush that it was required to pay the above-mentioned special contribution and served enforcement notices on it for the relevant amounts.

On 17 March 1987, Rush wrote to the Office National d'Immigration challenging the validity and basis of the enforcement notice served on it on 28 January 1987. Rush received no reply to that letter.

3. The proceedings before the national court

Rush asked the Tribunal Administratif, Versailles, to annul the decisions of the Director of the Office National d'Immigration notified to it on 28 January and 26 March 1987, and the implied decision rejecting its objection of 17 March 1987.

In support, Rush claimed that Articles 59 to 66 of the EEC Treaty prevented the application of the Code du Travail to its employees. Since 1 January 1986, those provisions had been applicable to relations between

Portugal and the previous Member States. According to Rush, the effect of those provisions is that a provider of services may move from one Member State to another with his employees and transitional rules on freedom of movement for workers, such as those contained in Articles 215 and 216 of the Act of Accession, cannot be applied to him. Rush claims that the sub-contract work carried out by it in France is a service within the meaning of Articles 59 to 66 of the EEC Treaty.

The Office National d'Immigration contends that the freedom to provide services does not extend to all the employees of the supplier of services and that such employees remain generally subject to the requirement of a work permit until 1 January 1993, the date on which the transitional period ends. In its view, that freedom certainly does not extend to the jobs of the Portuguese workers concerned. They are not specialist jobs and do not call for special relations of trust between worker and company. In that regard, the Office National d'Immigration refers to the Annex to Regulation No. 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community, which defines posts requiring specialist qualifications and posts of a confidential nature.

4. The questions

The Tribunal Administratif, Versailles, considered that the decision to be given depended on the interpretation of the applicable Community law. It therefore stayed the proceedings and, by judgment of 2 March 1989, referred the following three questions to the Court of Justice for a preliminary ruling:

"1. Does Community law taken as a whole, and in particular Article 5 and Articles 58 to 66 of the Treaty of Rome and Article 2 of the Act of Accession of Portugal to the European Community, authorize a founding Member State of the Community, such as France, to preclude a Portuguese company whose registered office is in

Portugal from providing services in the building and public works sector on the territory of that Member State by going there with its own Portuguese workforce so that the workforce may carry out work there in its name and on its account in connexion with those services, on the understanding that the Portuguese workforce is to return, and does in fact return, immediately to Portugal once its task has been carried out and the provision of the services has been completed?

2. May the right of a Portuguese company to provide services throughout the Community be made subject by the founding Member States of the EEC to conditions, in particular relating to the engagement of labour in situ, the obtaining of work permits for its own Portuguese staff or the payment of fees to an official immigration body?

3. May the workforce, which has been the subject of the disputed special contributions and whose names and qualifications are mentioned in the list appearing in the annex to the reports drawn up by the Labour Inspector recording the breaches committed by Rush Portuguesa, be regarded as 'specialized staff or employees occupying a post of a confidential nature' within the meaning of the provisions of the Annex to Regulation No. 1612/68 of the Council of 15 October 1968?"

5. Procedure

The order for reference from the Tribunal Administratif, Versailles, was received at the Court Registry on 7 April 1989.

Pursuant to Article 20 of the Protocol on the Statute of the Court of Justice of the EEC, written observations were submitted by Rush, the plaintiff in the main proceedings, represented by Alain Desmazières de Sechelles, of the Paris Bar, by the Government of the French Republic, represented by Edwige Belliard and Geraud de Bergues, acting as Agents; by the Government of the Portuguese Republic, represented by Luis Fernandez and Maria Luisa Duarte, acting as Agents; and by the Commission, represented by its legal adviser, Etienne Lasnet, acting as Agent.

By decision of 18 October 1989, the Court assigned the case to the Sixth Chamber.

Upon hearing the report of the Judge-Rapporteur and the views of the Advocate General, the Court decided to open the oral procedure without any preparatory inquiry.

II -- Summary of the written observations submitted to the Court

1. The first two questions

Rush observes that the Act of Accession lays down no transitional period for the application of Articles 59 to 66 of the Treaty with respect to building and public works. Those articles guarantee both to natural and to legal persons unconditional freedom to provide services. It follows, in Rush's view, that a person providing services may go from one Member State to another with his workforce. The application to that workforce of the restrictive provisions of the Code du Travail is therefore contrary to Community law.

Articles 215 to 219 of the Act of Accession concerning the transitional period for the free movement of workers cannot serve as a barrier to the freedom to provide services. Rush points out in that respect that, as the Court has consistently held, those provisions are to be interpreted strictly and may not be extended to areas which they do not regulate.

The French Government does not deny that Rush is entitled to freedom to provide services. It asserts. however, that that right does not impede the application of all national rules concerning the economic activity in question. That is shown in particular by the judgment of the Court of Justice in Case 279/80, Webb, [1981] ECR 3305. Thus, an undertaking cannot be

allowed, under the cloak of sub-contract work, to evade national provisions concerning the supply of labour, in particular those relating to temporary work.

The French Government also states that, with respect to the provision of services, a distinction must be drawn between the activity of the undertaking, which is entitled to freedom to provide services, and the status of the undertaking's employees. It is apparent from Webb that those employees may still be subject to Articles 48 to 51 of the Treaty.

The fact that an undertaking enjoys freedom to provide services does not therefore necessarily mean that all its workers are to be treated as suppliers of services. According to the French Government, it is thus necessary to identify, within the undertaking concerned, those employees who, as workers, are subject to Article 48 of the EEC Treaty, of which the application is subject to the derogations envisaged in Articles 215 to 220 of the Act of Accession, and those who, as suppliers of services, are subject to the last paragraph of Article 60 of the EEC Treaty. The latter category comprises only employees in posts of a confidential nature within the undertaking. The French Government defines as such those employees who are entrusted with tasks inherent in company management and are able to bind the company in dealings with third parties.

The Portuguese Government also considers that it is necessary to define, in the light of the transitional provisions of the Act of Accession, the freedom to provide services in relation to the free movement of workers. However, it rejects any definition based on the nature of the work performed by the employees of an undertaking providing services. The availability of such an undertaking's workforce as a whole determines its production capacity and therefore its capacity to provide the service in question. Any condition restricting the use of a company's workers consequently limits its freedom to

provide services.

In order to define that right in relation to the right contemplated in Article 48 of the Treaty, the proper course is to refer to the basis of the transitional provisions of the Act of Accession regarding the free movement of workers. Article 216 of the Act of Accession imposes the transitional period only with respect to the first six articles of Regulation No. 1612/68 of the Council, which concern the entry and residence of workers. There is thus no derogation from the articles of that regulation regarding performance of work and equality of treatment. Portuguese workers who reside, or have been authorized to reside, in the other Member States therefore benefit from those articles.

In the view of the Portuguese Government, those transitional provisions are accounted for by the concern to obviate any flood of labour towards certain Member States, which might upset the employment market in those States. The provision of services and the temporary access of workers for that purpose cannot have that effect. Workers accompanying the provider of services return to their Member State of origin after the service has been provided; accordingly they do not come on to the employment market in the host Member State. The terms of their employment are, moreover, governed entirely by Portuguese law.

The Commission shares Rush's view that the application of the French Code du Travail to its workforce makes the provision of services difficult. However, it considers that Rush's argument goes too far, in so far as it would result, if upheld, in evasion of the transitional provisions of the Act of Accession. Even where a service is provided, the fact nevertheless remains that Rush's employees are workers moving within the EEC; and Portuguese workers' freedom of movement is specifically subject to the transitional conditions.

In order to reconcile the requirements of the freedom to provide services with those of the Act of Accession, the Commission considers it appropriate to rely on the provisions for the 1962 General Programme for the Abolition of Restrictions on Freedom to Provide Services. The second title of that programme refers to the abolition of restrictions on entry, exit and residence, which are liable to hinder the provision of services by the provider himself or by specialized workers or by staff possessing special skills or holding positions of responsibility accompanying the person providing the services or carrying out the services on his behalf. When that programme was adopted, the same type of problem as the one at issue in this case could have arisen, in so far as the free movement of workers and of services had not yet been established.

The objective criterion of employees occupying confidential posts and having specialist qualifications is such that services can be freely provided whilst at the same time account is taken of the transitional provisions of the Act of Accession. That criterion, which is also defined in another context by the annex to Regulation No. 1612/68, should be appraised in relation to the nature and the type of the services in question.

In those circumstances, the Commission suggests the following answers to the first and second questions submitted by the national court:

> "The provisions of Community law on freedom to provide services (Article 59 et seq.) prohibit a Member State other than Spain or Portugal from disallowing, whilst the service is being provided, the entry or residence of the employees of a supplier of services who come in particular from Portugal in order to carry out a service on behalf of the supplier of services established in Portugal or to accompany the latter for the purposes of the provision of the service, provided that those employees occupy posts of a confidential nature with the supplier of services or are to be regarded as specialized workers.
>
> On the other hand, in view of the transitional provisions of the Act

concerning the conditions of accession of Portugal and adjustments to the Treaties (Articles 215 and 216), the same provisions (on the freedom to provide services) do not mean that, except in the circumstances described above, a Member State other than Spain or Portugal in which the service is provided cannot, until 31 December 1992, deny entry into and residence in its territory to employees, in particular Portuguese employees established in Portugal, even for the purpose of a temporary stay for the provision of services, provided that those employees do not hold posts of a confidential nature with the supplier of services and cannot be regarded as specialized workers.

The conditions referred to in this question, concerning the requirements of the Member State in which the service is provided, may be allowed under the above-mentioned transitional provisions of the Act of Accession (until 31 December 1992), provided, of course, that those requirements are applied to those Portuguese employees of the supplier of services who do not hold posts of a confidential nature and cannot be regarded as workers with specialist qualifications".

2. The third question

Rush and the French and Portuguese Governments consider that an answer to the third question is not relevant to the outcome of the main proceedings. The Annex to Regulation No. 1612/68 relates only to the operation of intra-Community clearing-house machinery for the posts referred to in Articles 15 and 16 of that regulation with respect to nationals of non-member countries.

The Portuguese Government also observes that the application of the criteria set out in the Annex to workers of a Member State who cross a frontier in order to provide a service would constitute a restriction of the rights conferred by Articles 59 to 66 of the Treaty.

The Commission considers, on the other hand, that the definitions of the terms "specialist" and "confidential nature of the post" given in the Annex make it possible to define the criteria which it proposes for reconciling the freedom to provide services with the transitional provisions of the Act of Accession. In the present case, those terms cover works superintendents,

team leaders and the operators of particularly complex machines. The Commission considers that, subject to a case-by-case appraisal of the facts by the national court, the criteria of workers with "specialist qualifications" or holding posts of a "confidential nature" as used in the General Programme for the Abolition of Restrictions on the Freedom to Provide Services and the Annex to Regulation No. 1612/68 must be clarified having regard to the nature and intrinsic characteristics of each type of service provided. However, the criteria must include in any event, for persons occupying posts of a confidential nature, the principal executives of the undertaking providing the service and, for specialized workers, persons with qualifications which are of a high level or are in short supply and relate to a task or trade that calls for special knowledge.

/S2/T. Koopmans, Judge-Rapporteur
/FIN/