OPINION OF ADVOCATE GENERAL MAZÁK

delivered on 22 September 2009 [1]

1. By its present action, brought under Article 226 EC, the Commission is asking the Court to declare that, by adopting and keeping in force Articles 73 and 74-IV of the Code des marchés publics [2] ('the contested provisions'), inasmuch as those provisions lay down a procedure for the award of so-called *marchés de définition* [3] under which it is possible for the contracting authority to award an ulterior *marché d'exécution* (a public works, supply or service contract) to one of the holders of the initial *marchés de définition* without opening it afresh to competition or, at most, by opening it to competition limited to those holders, the French Republic has failed to fulfil its obligations under Articles 2, 28 and 31 of Directive 2004/18/EC. [4]

I — Legal context

A — *Community law*

2. Article 2 of the Directive provides under 'Principles of awarding contracts' that 'contracting authorities shall treat economic operators equally and non-discriminatorily and shall act in a transparent way'.

3. Article 28 of the Directive, under 'Use of open, restricted and negotiated procedures and of competitive dialogue', provides:

'In awarding their public contracts, contracting authorities shall apply the national procedures adjusted for the purposes of this Directive.

1 — Original language: English.

2 — Public Procurement Code as adopted by Decree No 2006-975 of 1 August 2006 (*Official Journal of the French Republic* No 179 of 4 August 2006, p. 11627) and which entered into force on 1 September 2006 ('the CMP 2006').

3 — These are public contracts for designing the parameters, including the purpose, of a public works, supply or service contract, and are also referred to as 'design solutions tenders' or 'project definition contracts'. I note that only a procedure with several *marchés de définition* is at issue here — applicable where the conditions in Article 73(3) of the CMP 2006 are met — and not one where a single *marché de définition* is awarded.

4 — Directive 2004/18 of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (OJ 2004 L 134, p. 114) ('the Directive' or 'Directive 2004/18').

They shall award these public contracts by applying the open or restricted procedure. In the specific circumstances expressly provided for in Article 29, contracting authorities may award their public contracts by means of the competitive dialogue. In the specific cases and circumstances referred to expressly in Articles 30 and 31, they may apply a negotiated procedure, with or without publication of the contract notice.'

4. The Member States had to bring into force the laws, regulations and administrative provisions necessary to comply with the Directive no later than 31 January 2006.

B — *National law*

5. The CMP 2006, which entered into force on 1 September 2006, provides inter alia as follows:

'Article 73

If the public entity is unable to specify the aims and performances the contract must meet, the techniques to be used, and the human and material resources required, it may resort to *marchés de définition*.

The purpose of such contracts is to explore the possibilities and conditions for establishing a contract subsequently, if necessary through production of a model or demonstrator. They must also enable the price level of the provisions to be estimated and calculated, as well as the different phases of the performance schedule.

In the framework of a single procedure, the performance of the contract following several *marchés de définition* having the same subject-matter and awarded simultaneously are awarded after being opened to competition limited to the holders of the initial *marchés de définition*, in accordance with the following provisions:

1 The public contract notice defines the subject-matter of the *marchés de définition* awarded simultaneously and the subject-matter of the subsequent *marché d'exécution*;

2 The public contract notice defines the criteria for the selection of applications. Those criteria take into account the capacities and competences required of

the candidates both for the *marchés de définition* and for the subsequent *marché d'exécution*;

3 The public contract notice defines the criteria for the selection of offers for the *marchés de définition* awarded simultaneously and the criteria for the selection of offers for the subsequent *marché d'exécution*;

4 The amount of the provisions to be compared with the thresholds takes account of the cost of the definition studies and the estimated amount of the fulfilment contract;

5 The number of *marchés de définition* awarded simultaneously in the framework of the present procedure may not be lower than three, subject to a sufficient number of candidates.

The contract or framework agreement is awarded by the tenders committee for the local authorities or after the opinion of the tenders committee for the State, for the public health bodies and the public social or medical-social bodies.'

'Article 74

IV. In the framework of a single procedure, the contract or framework agreement of project-management following several *marchés de définition* having the same subject-matter and awarded simultaneously may be awarded after being opened to competition limited to the holders of the initial *marchés de définition*, under the conditions laid down in the third paragraph of Article 73.'

II — Procedure

6. On 18 October 2004, the Commission sent the French Republic a first letter of formal notice and on 12 December 2006, it sent an additional letter of formal notice. As the Commission was not satisfied with the French Republic's replies, it issued a reasoned opinion on 27 June 2007. Since the Commission considered that the failure to fulfil obligations was persisting and it was not satisfied with the replies it received, the Commission decided to bring this action. Both parties submitted oral argument at the hearing, which took place on 10 June 2009.

III — Assessment

A — *Principal arguments of the parties*

7. The Commission submits that France permits the award of contracts on the basis of mutual agreement, or with limited competition, in situations not provided for by the Directive. In the Commission's view, it is impossible by definition for the subject-matter and criteria for the award of a public procurement contract to be known precisely at a moment where the project has not yet been defined and where the *marchés de définition* have not yet been executed. The *marché de définition* and the *marché d'exécution* are two entirely distinct types of public procurement contract and may not be awarded by way of a single procedure. According to the Commission, the procedure for the award of *marchés de définition* comes neither under the competitive dialogue nor under the framework agreement within the meaning of Articles 29 and 32 of the Directive and it cannot be analysed as a derivation of the competitive dialogue.

8. The French Government submits that the contested provisions are not incompatible with the Directive, which is merely a coordinating directive. In its view, it is possible for the subject-matter and criteria of the ulterior *marché d'exécution* to be established from the launch of the *marchés de définition*. Furthermore, the French Government submits that the Directive has foreseen two procedures with characteristics analogous to those of the French procedure for the award of *marchés de définition* — the framework agreement and the competitive dialogue. Thus the Community legislature itself instituted complex procedures where contracts are opened to competition in two stages, without however being exhaustive.

B — *Appraisal*

1. General remarks

9. The Commission argues that, by drawing a distinction between *marchés de définition* and *marchés d'exécution* and by allowing, in certain circumstances, the award of the latter to one of the holders of the initial *marchés de définition* without again opening them to competition or, at the very least, by opening them to competition limited only to those holders, the French legislation disregards the fundamental principles of equality and transparency inherent to the Directive. Here it should be pointed out that the argument concerning the *marchés de définition* not being opened to any competition would appear to pertain to the wording of the provisions in the CMP 2004. [5] Thus, I will consider the Commission's argument as it pertains to the contested provisions — that is to say the CMP 2006 which was meant to transpose the Directive into national law — to the effect that these open the *marchés d'exécution* to competition limited only to holders of the initial *marchés de définition* and that in situations not provided for by the Directive.

5 — The Public Procurement Code as adopted by Decree No 2004-15 of 7 January 2004 (*Official Journal of the French Republic* No 6 of 8 January 2004, p. 703) ('the CMP 2004') which since has been replaced by the CMP 2006.

2. On the exhaustive nature of Article 28 of the Directive

10. In that regard, in their submissions the parties have discussed at length whether or not the list of procedures for the award of public contracts, contained in Article 28 of the Directive, is exhaustive in nature since it clearly does not make provision for the *marchés de définition*.

11. Here the French Government argues that, in view of the third recital in the preamble to the Directive and Article 28, the Directive did not mean to abolish all the specific national procedures. Referring to the Court's ruling in *CEI and Others*, [6] concerning Council Directive 71/305/EEC, [7] the French Government claims that 'the Member States remain free to maintain or adopt substantive and procedural rules in regard to public … 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'. [8]

12. Indeed, it is quite clear from the title of the Directive and from the second and third recitals in its preamble that the Directive's aim is to coordinate national procedures for the award of public contracts. Therefore, it does not lay down a uniform and exhaustive body of Community rules on the matter. Hence, 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 contracts on condition that they comply with all the relevant provisions of Community law. However, the fact that the Directive has not brought about a complete harmonisation of the rules governing procedures for the award of public contracts does not mean that some of its provisions should not be understood as having exhaustively regulated certain matters.

13. First, suffice it to note that the French Government cannot rely on the *CEI and Others* case-law because Article 28 of Directive 2004/18 substantially differs from Article 2 of Directive 71/305 — the Community legislature has complemented Article 28 of the Directive with a completely new second paragraph which plays a decisive role for the case at hand.

14. Secondly, there are certain factors which convincingly suggest that the procedures referred to in Article 28 of the Directive are to be regarded as exhaustive. In general, the wording of that paragraph exhibits none of the features to be observed in what is commonly known as an open list. On the contrary, that paragraph enumerates not only the two standard procedures but also two exceptional

6 — Joined Cases 27/86 to 29/86 [1987] ECR 3347.

7 — Directive of 26 July 1971 concerning the co-ordination of procedures for the award of public works contracts (OJ, English Special Edition 1971(II), p. 682).

8 — *CEI and Others*, cited in footnote 6, paragraph 15. See also Case 31/87 *Beentjes* [1988] ECR 4635, paragraph 20. The French Government submits that that case-law may be transposed to Directive 2004/18 notably because the second recital in the preamble to Directive 71/305 has become the third recital in the preamble to Directive 2004/18 and Article 2 of Directive 71/305 has become Article 28 of Directive 2004/18.

procedures thus leaving no room for another kind of interpretative completion of the list of procedures. Nor does the Directive as a whole contain any provision which would allow such a completion.

15. As I will explain below, the procedure for the award of *marchés de définition* clearly differs from the procedures set out in the Directive and cannot be assimilated to any provision of the Directive. In fact, the French Government explicitly recognised in its defence and in its rejoinder that the *marchés de définition* have not been provided for in the Directive.

16. The procedures which the Directive does provide for are the following. As is clear from the second paragraph of Article 28 of the Directive, the Community legislature has set out two procedures which should, as a general rule, be followed by contracting authorities. These are the open and the restricted procedures and they may be referred to as standard or normal procedures. Next, the competitive dialogue may be considered to constitute a special or exceptional procedure whose implementation and conditions are specified in Article 29 of the Directive. [9] Likewise, the negotiated procedure, with or without publication of the contract notice, may be considered as special or exceptional in nature with conditions specified in Articles 30 and 31 of the Directive. [10]

17. However, the French Government submits that, in fact, there are certain specific award procedures provided for by the Directive in Chapter V under 'Procedures' which are not mentioned in Article 28 of the Directive. The French Government refers to framework agreements, dynamic purchasing systems and public works contracts: particular rules on subsidised housing schemes. These are provided for in Articles 32, 33 and 34 of the Directive respectively.

18. In that regard, first, framework agreements and dynamic purchasing systems constitute specific forms of contracts or variations of existing procedures. They are not distinct new forms of award procedures for public contracts which are, as such, provided for in Article 28 of the Directive. In addition, it follows from the wording of Articles 32(2) and 33(2) of the Directive that the contracting authorities are obliged to follow the rules of procedure referred to in Article 28 of the Directive. Secondly, with regard to the rules on subsidised housing schemes, the title of Article 34 clearly shows it concerns 'particular rules' and not rules of procedure as such. Rather, it constitutes an

9 — Cf. Trepte, P., *Public procurement in the EU. A Practitioner's Guide*, 2nd edition, Oxford 2007, p. 427, footnote 187.

10 — That reading is confirmed by the *travaux préparatoires* for the Directive. The proposal for the Directive explained, to justify the wording of Article 28 of the Directive, that 'a new paragraph 2 has been added, which explicitly states the principle that the open procedure and the restricted procedure are the standard procedures. A new paragraph 3 [which was eventually merged with paragraph 2] describes the exception, which is that contracting authorities may only use the negotiated procedure in the specific cases and under the specific conditions listed in Articles 29, 30 and 31'.

exception to the provisions pertaining to the general procedure. Indeed, the very existence of Article 34 of the Directive and of the particular rules which it sets out would militate in favour of the view that the list of award procedures in Chapter V of the Directive should be considered to be exhaustive.

19. In this context it may be noted in passing that in its submissions the French Government also argues the merits and the *raison d'être* of the procedure for the award of *marchés de définition* notably with regard to complex contracts where contracting authorities are 'unable to specify the aims and performances the contract must meet, the techniques to be used, and the... resources required'. [11] It is apparent from the *travaux préparatoires* for the Directive that the Community legislature was aware of such concerns. [12] As a result, the Community legislature did include among the award procedures for public contracts a new procedure in the form of the competitive dialogue but it did not decide to include the procedure for the award of *marchés de définition*. [13]

20. In addition, the French Government also tries to defend its case by arguing that the *marchés de définition* should be considered analogous to two procedures which are provided for in the Directive — the framework agreement and the competitive dialogue. As regards the former, its opening to competition may be divided into two stages where the last stage is open to competition limited to the successful holders of the first contract and which allows it to further specify the terms of the second contract. As regards the latter, the procedure for the award of *marchés de définition* allows a contracting authority to draw up the conditions of a contract whose selection criteria had been established. Thus, according to the French Government, the Community legislature instituted complex procedures where contracts are opened to competition in two stages, without however being exhaustive.

21. That argumentation shall not prosper. Suffice it to point out that it is not disputed by the French Government that the procedure for the award of *marchés de définition* comes neither under the competitive dialogue nor under the framework agreement within the meaning of Articles 29 and 32 of the Directive. Competitive dialogue and framework agreements are forms of contracts subject to specific provisions. Recognising their specificity, the Community legislature provided for rules which guarantee that principles set out in Article 2 of the Directive remain respected.

22. Should the list in Article 28 of the Directive be held to be exhaustive, the French Government submits, in the alterna-

11 — See Article 73 of the CMP 2006.

12 — The proposal for the Directive, page 6, stated that 'in the case of particularly complex contracts ... purchasers are well aware of their needs but do not know in advance what ... the best technical solution for satisfying those needs [is]. Discussion of the contract and dialogue between purchasers and suppliers is therefore necessary in such cases. But the standard procedures laid down by the public sector Directives ... leave very little scope for discussion during the award of contracts and are therefore regarded as lacking in flexibility in situations of this type.'

13 — One of the reasons for that could be that the inclusion of *marchés de définition* was considered as not necessary since that procedure is similar in nature to the new competitive dialogue procedure — transposed into French law in Article 67 of the CMP 2006 as a completely autonomous procedure — which appears to address the same concerns.

tive, that the procedure for the award of *marchés de définition* should be analysed as a derivation of the competitive dialogue procedure. It would appear that the French Government raised this argument in the alternative for the first time in its defence before the Court. Prior to that that government had defended the opposite thesis to the effect that *marchés de définition* did not come under the competitive dialogue procedure and were not provided for by the Directive. Indeed, those very submissions have raised numerous differences between the two procedures. In any event, I consider that that argument is not helpful to the French Government's case. Suffice it to point out that the two procedures differ in important aspects, not least because the competitive dialogue is a procedure for the award of a single contract, while the procedure for the award of *marchés de définition* is aimed at awarding two contracts where the second is awarded after being opened to competition limited to the holders of the initial contract.

3. Treating economic operators equally and non-discriminatorily and in a transparent way

23. In any event, even if we were to accept the consideration that one may, under certain conditions, adjust the procedures enumerated in Article 28 of the Directive, having regard to the nature and functioning of the procedure for the award of *marchés de définition*, it is to be noted that this procedure not only cannot be classified under Article 28 of the Directive but is contrary to the principles referred to in the second recital in the preamble to the Directive and in Article 2 of the Directive. [14]

24. Contrary to what the French Government argues, in my view the Commission is correct when it submits that it is virtually impossible by definition for the subject-matter and criteria for the award of a public procurement contract (*marché d'exécution*) to be known precisely at a moment where the project has not yet been defined and where the *marchés de définition* have not yet been executed. The *marchés de définition* and the *marché d'exécution* are two entirely distinct types of public procurement contract, which, it would appear, has never been contested by the French Government. Each has its own subject-matter and award criteria and, on those grounds, both contracts must comply with the stipulations of the Directive and may not be awarded by way of a single procedure. In other words, since the *marché d'exécution* has its own subject-matter and award criteria it should be subjected to competition and not simply reserved for the holders of the initial *marchés de définition*.

14 — My position would appear to be supported by the French legal doctrine. See, most recently, for instance, Monjal, P.-Y., 'Le droit communautaire applicable aux marchés publics locaux français: quelques interrogations en forme d'inquiétude', *Revue du Droit de l'Union européenne*, No 4, 2008, pp. 729-738. For a case pertaining to *marchés de définition*, see also, for instance, judgment of the French Conseil d'État of 3 March 2004, No 258272, in 'Société Mak System'.

25. The Court held in *Commission* v *France* ('*Le Mans*') [15] that 'the French Government submits … that the option, set out in the notice …, of awarding the contract relating to the second phase to the successful candidate in the design contest releases the contracting authority from the obligation to publish another notice prior to the award of that contract'. The Court then stated that 'that argument cannot be accepted. The principle of equal treatment of service providers … and the principle of transparency which flows from it … *require the subject-matter of each contract and the criteria governing its award to be clearly defined*'. [16]

26. In the same judgment, the Court continued: 'that obligation exists where the subject-matter of a contract and the criteria selected for its award must be regarded as decisive for the purposes of determining which of the procedures provided for in the Directive is to be implemented and assessing whether the requirements related to that procedure have been observed.' Thus the Court concluded that 'in the present case the mere option of awarding the contract relating to the second phase according to criteria laid down in respect of a different contract, that is the one related to the first phase, does not amount to awarding the contract in accordance with one of the procedures laid down in the Directive.'

15 — Case C-340/02 [2004] ECR I-9845, also referred to as the '*La Chauvinière*' case, paragraphs 33 to 36 and the case-law cited.

16 — Emphasis added.

27. In the case which concerns us here, in its defence before the Court, the French Government has recognised itself that in the above judgment 'the Court gave a negative verdict on a procedure which is analogous [to the *marchés de définition*]'. In my view, it is clear that the *marchés de définition* do not, as a general rule, allow the second contract's (i.e. *marché d'exécution*) subject-matter, criteria for the selection and award to be initially established with sufficient precision in order to meet the requirements specified in the above judgment. The reason for that is the fact that the aim of the initial *marchés de définition* is in fact precisely to define the subject-matter and the tender conditions of the ulterior *marché d'exécution*.

28. Therefore, the procedure for the award of *marchés de définition*, pursuant to the contested provisions, runs counter to the principle of transparency laid down in Article 2 of the Directive. This procedure creates a situation of legal uncertainty both for contracting authorities and for economic operators, because of the risk of litigation which is inherent to it.

29. The French Government contests the argument in point 27 above and submits that the aim of the *marchés de définition* is to only define all the technical specifications of the ulterior contract and not its subject-matter. However, suffice it to state that the very wording of Article 73 of the CMP 2006 does not support that: its second paragraph

provides that 'the purpose of such contracts is to explore the possibilities and conditions for establishing a contract subsequently, if necessary through production of a model or demonstrator'. Moreover, even though it may be the case in certain situations that the *marchés de définition* merely define the technical specifications, the procedure in question in fact certainly allows the tender conditions of the *marché d'exécution* to be completed or even drawn up in their entirety.

30. Furthermore, the French Government insists that it is possible for the subject-matter and criteria of the ulterior *marché d'exécution* to be established from the launch of the *marchés de définition*. The argument goes, there are many cases where the criteria for selection of candidatures for *marché d'exécution* are sufficiently independent from the *marchés de définition* in order for the former to be defined already at the stage of the *marchés de définition*. In its submissions to the Court, the French Government has furnished three examples of such cases.

31. In any event, it should be pointed out, first, that the French Government has accepted at the hearing that in fact problems do arise — clearly there are cases where the *marchés de définition* do not merely serve to define technical specifications but are instead used to complete or draw up the tender conditions of the *marché d'exécution*. Three examples of such cases were provided by the Commission before the Court. I consider that the French Government has failed to prove that the contested provisions allow in all cases and at all times transparency and sufficient clarity to be guaranteed to the effect that 'the subject-matter of [the *marché d'exécution*] and the criteria governing its award [are] clearly defined'. [17] In any event, a mere general definition such as 'urban development of city district X' — which it would appear is very often the only possible definition that may be given at the stage of invitations for tenders for the *marchés de définition* — most certainly does not meet the standard required by the Court in *Commission* v *France* ('*Le Mans*'). [18]

32. Last but not least, I consider it important to point out that the procedure for the award of *marchés de définition* is based on a bias. While the whole tenor of the Directive is that the promotion of competition between economic operators should be protected, the *marchés de définition* address only a certain type of economic operators — those and only those that have both design and construction capabilities. By its nature, the procedure for the award of *marchés de définition* makes such a pre-selection among all the potential economic operators. I consider that to be contrary to the spirit of Community public

17 — Cited in footnote 15, paragraph 34.

18 — Case cited in footnote 15. Cf. Arrowsmith, S., *The Law of Public and Utilities Procurement*, Thomson, Sweet & Maxwell, London, 2005, p. 448: 'the current directives … contain no express requirement for precise specifications in open or restricted procedures. However, the transparency principle may imply such a requirement. For example, it is probably not acceptable simply to state a requirement for tenders for "a school" without giving a clear indication of, for example, the number of pupils and the main type of facilities required. Reasonable precision needs to be established at the latest at the time of invitation to tenders'.

procurement rules. It is clear that regardless of how the *marchés de définition* develop in a particular case, the solution provided by the procedure will always result in a tender that is limited in nature.

33. It follows from the above considerations that the contested provisions permit the award of contracts with limited competition in situations not provided for by the Directive and they cannot be justified by any of the exceptions laid down by the Directive.

IV — Costs

34. Article 69(2) of the Rules of Procedure provides that the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Commission has applied for costs and the French Republic has been unsuccessful, the latter must be ordered to pay the costs.

V — Conclusion

35. In the light of the foregoing considerations, I propose that the Court:

(1) declare that, by adopting and keeping in force Articles 73 and 74-IV of the Code des marchés publics (Public Procurement Code) adopted by Decree No 2006-975 of 1 August 2006, inasmuch as those provisions lay down a procedure for the award of *marchés de définition* (public contracts for designing the parameters, including the purpose, of a public works, supply or service contract) under which it is possible for the contracting authority to award a public works, supply or service contract to one of the holders of the initial *marchés de définition* by opening it to competition limited to those holders, the French Republic has failed to fulfil its obligations under

Articles 2, 28 and 31 of Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts;

(2) order the French Republic to pay the costs.