JUDGMENT OF THE COURT,

12 January 1994 *

In Case C-296/92,

Commission of the European Communities, represented by Antonio Aresu and Rafael Pellicer, members of the Legal Service, acting as Agents, with an address for service in Luxembourg at the office of Nicola Annecchino, a member of the Legal Service, Wagner Centre, Kirchberg,

applicant,

v

Italian Republic, represented by Professor Luigi Ferrari Bravo, Head of the Legal Department of the Ministry of Foreign Affairs, acting as Agent, assisted by Pier Giorgio Ferri, Avvocato dello Stato, with an address for service in Luxembourg at the Italian Embassy, 5 Rue Marie-Adélaïde,

defendant,

APPLICATION for a declaration that, by allowing the provincial administration of Ascoli Piceno to award a private contract for the 11th and 12th supplementary reports for the completion of the section of rapid transit highway 'Ascoli — Mare', entitled 'Stage IV — Project 5134' and to fail to publish a notice of invitation to tender in the *Official Journal of the European Communities*, and by not taking

* Language of the case: Italian.

steps to preclude at the outset the legal effects thereof which infringe Community law, the Italian Republic has failed to fulfil its obligations under 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 COURT,

composed of: G.F. Mancini, President of the Second and Sixth Chambers, acting for the President, J.C. Moitinho de Almeida and D.A.O. Edward (Presidents of Chambers), R. Joliet, F.A. Schockweiler (Rapporteur), G.C. Rodríguez Iglesias, F. Grévisse, M. Zuleeg and J.L. Murray, Judges,

Advocate General: C. Gulmann,
Registrar: Lynn Hewlett, Administrator,

having regard to the Report for the Hearing,

after hearing oral argument from the parties at the hearing on 29 September 1993,

after hearing the Opinion of the Advocate General at the sitting on 18 November 1993,

gives the following

Judgment

1 By application lodged at the Court Registry on 6 July 1992, the Commission of the European Communities brought an action under Article 169 of the EEC

Treaty for a declaration that, by allowing the provincial administration of Ascoli Piceno to award a private contract on 21 May 1990 for the 11th and 12th supplementary reports for the completion of the section of rapid transit highway 'Ascoli — Mare', entitled 'Stage IV — Project 5134' and to fail to publish a notice of invitation to tender in the *Official Journal of the European Communities*, and by not taking steps to preclude at the outset the legal effects thereof which infringe Community law, the Italian Republic has failed to fulfil its obligations under 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).

2 At the beginning of the 1970s the provincial administration of Ascoli Piceno awarded various public works contracts for the construction of a rapid transit highway to link the town of Ascoli Piceno to the A14 motorway and national highway No 16 which runs along the Adriatic coast. The work was divided into four stages.

3 Stage IV was awarded to the undertaking Rozzi Costantino. Twelve supplementary reports were subsequently carried out on the work relating to this stage which resulted in a substantial extension of the initial path of the road. The work envisaged by those reports was also awarded to Rozzi Costantino. On 21 May 1990 the provincial administration of Ascoli Piceno awarded to that undertaking a private contract for work envisaged by the 11th and 12th reports for a total amount of LIT 36 250 million.

4 The Commission considered that the award of the public works contracts envisaged in those two reports fell within the scope of the said Directive 71/305 and did not fall within any of the cases referred to in Article 9 and that consequently a notice of invitation to tender should have been published in the *Official Journal of the European Communities* in accordance with that directive and by letter of 17 January 1991 it called on the Italian Government, pursuant to Article 169 of the Treaty, to submit its observations on the alleged infringement within 30 days.

5 Having received no reply from the Italian Government within that period the Commission reiterated its views in the reasoned opinion which it sent to the Italian Republic on 1 August 1991 in which it found that 'in so far as the provincial administration of Ascoli Piceno has awarded a private contract for the construction of a section of rapid transit highway "Ascoli — Mare" entitled "Stage IV", and failed to publish a notice of invitation to tender in the *Official Journal of the European Communities*, the Italian Republic has failed to fulfil its obligations under Directive 71/305/EEC'. The Commission called on the Italian Republic to comply with that reasoned opinion within two months.

6 By letter of 30 December 1991 the Italian Government forwarded to the Commission a note of 31 October 1991 in which the provincial administration of Ascoli Piceno gave some details of the contract in question and relied on Article 5(b) of Law No 584 of 8 August 1977 which transposed into Italian law Article 9(b) of Directive 71/305 to justify the award of the contract at issue to the undertaking Rozzi Costantino.

7 The Commission considered that that letter represented a belated response to its reasoned opinion which was unsatisfactory and therefore brought the present action which seeks, as mentioned in paragraph 1 of this judgment, a declaration that the Italian Republic has failed to fulfil its obligations under Directive 71/305 by allowing without demur the provincial administration of Ascoli Piceno to utilize the procedure for the award of a private contract.

8 In its defence the Italian Government merely claims that the obligation incumbent on Member States to ensure that Directive 71/305/EEC is applied is different from the actual obligation to apply that directive which is incumbent on the awarding authorities. It adds that a Member State can be found to have failed to fulfil its supervisory obligation only if the breach of a directive by an awarding authority is clear and manifest to the point that there is no justification for that State not to intervene.

9 In its rejoinder the Italian Government has submitted documents intended to prove the existence as regards the works in question of 'technical reasons' within the meaning of Article 9(b) of Directive 71/305 justifying the award of the work in question to a given undertaking and therefore, recourse to the procedure for the award of a private contract. It further maintains first that it had already pleaded Article 9(b) of Directive 71/305 in the course of the pre-litigation procedure and that, secondly, it had not placed further reliance in its defence on those 'technical reasons' because in the form of order sought in its application the Commission's complaint against the Italian Republic related not to the conduct of the provincial administration of Ascoli Piceno which was allegedly contrary to Directive 71/305 but to the failure to take steps to prevent such conduct or to remedy its effects.

10 In the written observations which it was permitted to submit in response to the rejoinder, the Commission primarily claims that the technical documents submitted by the Italian Government were 'new pleas in law' the introduction of which in the course of proceedings is prohibited by Article 42(2) of the Rules of Procedure. In the alternative the Commission maintains that the technical arguments based on those documents are without foundation.

11 It should be noted first that the Court has consistently held (see in particular Case 76/86 *Commission* v *Germany* [1989] ECR 1021, paragraph 8) that the scope of an action brought under Article 169 of the Treaty is delimited by the pre-litigation procedure provided for by that article. Consequently the action cannot be founded on any complaints other than those formulated in the reasoned opinion (see Case C-157/91 *Commission* v *Netherlands* [1992] ECR I-5899, paragraph 17).

12 In its reasoned opinion the Commission complained that the Italian Republic had failed to comply with its obligations under Directive 71/305 in so far as the provincial administration of Ascoli Piceno had awarded the public works at issue by a private contract and had failed to publish a notice of invitation to tender in the *Official Journal of the European Communities*. In its application, on the other hand, the Commission asks the Court to declare that the Italian Republic has failed to comply with those obligations by allowing the provincial administration

of Ascoli Piceno to act in that way and by not taking steps to preclude the effects thereof.

13 While it is true that each Member State is responsible vis-à-vis the Community for any breach of Community law by one of its bodies it must nevertheless be emphasized that in this case the subject-matter of the action is not a declaration of such a breach and in any event the application is founded on a complaint which is different from that formulated in the reasoned opinion; that difference has given rise to the dispute referred to in paragraphs 9 and 10 of this judgment regarding the presentation by the Italian Government of its defence.

14 Consequently the Commission's application must be dismissed.

Costs

15 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs. Since the Commission has been unsuccessful, it must be ordered to pay the costs.

On those grounds,

THE COURT,

hereby:

1. Dismisses the application as inadmissible;

2. Orders the Commission to pay the costs.

Mancini Moitinho de Almeida Edward

Joliet Schockweiler Rodríguez Iglesias

Grévisse Zuleeg Murray

Delivered in open court in Luxembourg on 12 January 1994.

J.G. Giraud

Registrar
for the President

G.F. Mancini

President of the Second and Sixth Chambers