4. 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.

REPORT FOR THE HEARING
delivered in Case 31/87 *

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 coordination 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 . . . ';

* Language of the Case: Dutch.

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 Article 92 *et seq.*'

2. *National law*

The relevant national legislation is, in substance, as follows:

(i) Article 51 of the Ruilverkavelingswet 1954 (Land Consolidation Law), which governs the composition and functions of local land consolidation committees;

(ii) 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;

(iii) 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 connection 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 was 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 estab-

lishment 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 abovementioned 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 is 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 abovementioned 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 in 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.

G. C. Rodríguez Iglesias
Judge-Rapporteur