OPINION OF ADVOCATE GENERAL

Jacobs

delivered on 2 June 2005 [1]

1. In the present case, the Commission alleges that, by adopting certain provisions authorising recourse to a negotiated procedure without publication of a tender notice for the acquisition of forest firefighting equipment and services, the Italian Republic has failed to fulfil its obligations under Council Directive 93/36/EEC [2] and Articles 43 and 49 EC.

Relevant legislation

Community legislation

2. Directive 93/36 coordinates procedures for the award of public supply contracts, and Directive 92/50 [3] coordinates procedures for the award of public service contracts, by State, regional or local authorities, bodies governed by public law, associations formed by one or several of such authorities or bodies governed by public law. [4]

3. The directives provide for three types of procedure:

— 'open procedures', in which all interested suppliers may submit tenders;

— 'restricted procedures', in which only those suppliers invited by the contracting authorities may submit tenders; and

1 — Original language: English.

2 — Of 14 June 1993 coordinating procedures for the award of public supply contracts (OJ 1993 L 199, p. 1).

3 — Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts (OJ 1992 L 209, p. 1).

4 — See Article 1(b) of each directive.

— 'negotiated procedures', in which contracting authorities consult suppliers of their choice and negotiate the terms of the contract with one or more of them. [5]

4. As a general rule, contracting authorities are to award supply and service contracts by an open or a restricted procedure. [6]

5. However, in a number of exceptional cases, they may award contracts by negotiated procedure, without prior publication of a tender notice.

6. For supply contracts, those cases are set out in Article 6(3) of Directive 93/36 and include, in so far as is relevant:

'...

(c) when, for technical or artistic reasons, or for reasons connected with protection of exclusive rights, the products supplied may be manufactured or delivered only by a particular supplier;

(d) in so far as is strictly necessary when, for reasons of extreme urgency brought about by events unforeseeable by the contracting authorities in question, the time-limit laid down for the open, restricted or negotiated procedures referred to in paragraph 2 [7] cannot be kept. The circumstances invoked to justify extreme urgency must not in any event be attributable to the contracting authorities;

(e) for additional deliver[ie]s by the original supplier which are intended either as a partial replacement of normal supplies or installations or as the extension of existing supplies or installations where a change of supplier would oblige the contracting authority to acquire material having different technical characteristics which would result in incompatibility or disproportionate technical difficulties in operation and maintenance. The length of such contracts as well as that of recurrent contracts may, as a general rule, not exceed three years.'

5 — Article 1(d), (e) and (f), respectively, of each directive.

6 — Articles 6(4) of Directive 93/36 and 11(4) of Directive 92/50.

7 — The negotiated procedures are those carried out following a difficulty with an open or restricted procedure and either preceded by a tender notice or open to all those who submitted tenders in the prior procedures.

7. For service contracts, they are set out in Article 11(3) of Directive 92/50, in slightly different terms:

'(b) when, for technical or artistic reasons, or for reasons connected with the protection of exclusive rights, the services may be provided only by a particular service provider;

...

(d) in so far as is strictly necessary when, for reasons of extreme urgency brought about by events unforeseeable by the contracting authorities in question, the time-limit for the open, restricted or negotiated procedures [8] referred to in Articles 17 to 20 cannot be kept. The circumstances invoked to justify extreme urgency must not in any event be attributable to the contracting authorities;

...

(f) for new services consisting in the repetition of similar services entrusted to the service provider to which the same contracting authorities awarded an earlier contract, provided that such services conform to a basic project for which a first contract was awarded according to the procedures referred to in paragraph 4. As soon as the first project is put up for tender, notice must be given that the negotiated procedure might be adopted and the total estimated cost of subsequent services shall be taken into consideration by the contracting authorities when they apply the provisions of Article 7. This procedure may be applied solely during the three years following the conclusion of the original contract.'

8. However, even where such exceptions apply, or where the value of contracts falls below the threshold for the application of the directives, [9] the Court has held that the procedure used must comply with the fundamental principles of Community law, in particular the principle of non-discrimination as it follows from the provisions of the Treaty on the right of establishment and the freedom to provide services, namely Articles 43 and 49 EC. [10] That principle implies an obligation of transparency which in turn

8 — The latter are certain negotiated procedures with prior publication of a tender notice except in cases analogous to those referred to in the previous footnote.

9 — That is to say, pursuant to Article 5(1)(a) of Directive 93/36 and Article 7(1) of Directive 92/50, where the estimated value of the contract net of VAT is at least 200 000 special drawing rights (SDR) or, for central government authorities and in the context of Directive 93/36, 130 000 SDR- equivalent in 2002 to EUR 249 681 and EUR 162 293 respectively — see OJ 2001 C 332, p. 21.

10 — See Joined Cases C-20/01 and C-28/01 *Commission* v *Germany* [2003] ECR I-3609, paragraph 62

requires a degree of advertising sufficient to enable the market to be opened up to competition and the impartiality of procurement procedures to be reviewed. [11]

National legislation

9. Article 23 quinquies of Law No 61 of 30 March 1998 [12] allocated certain sums for the Corpo Forestale dello Stato (National Forest Rangers, hereinafter 'Corpo Forestale') to purchase helicopters to combat forest fires in the years 1998 to 2000.

10. Article 5(1) of Law No 225 of 24 February 1992 on national service and civil protection [13] authorises the President of the Council of Ministers to declare a state of emergency in a specified area for a specified period in the case of natural calamities, catastrophes or other events of such magnitude and extent as to require exceptional measures and powers. Article 5(2) allows ordinances to be adopted in such cases, derogating from provisions in force but in compliance with general principles of law, for the purpose of ensuring emergency intervention consequent upon such a declaration.

11. By decree of 28 June 2002, [14] taken on the basis of Article 5(1) of Law No 225 following the outbreak of numerous forest fires, the President of the Council of Ministers declared a state of emergency for the whole of Italy, for the purpose of aerial forest firefighting. The state of emergency was to last until 31 October 2002. By another decree of the same date, [15] a more limited state of emergency was declared in the province of Verbano-Cusio-Ossola, to last until 31 December 2002. The latter state of emergency, but apparently not the former, was subsequently extended until 30 December 2003 [16] and again until 31 July 2004. [17]

12. On 24 July 2002, the President of the Council of Ministers adopted Ordinance No 3231 ('the contested ordinance'), [18] concerning aerial forest firefighting, on the basis of: Law No 225, in particular Article 5 thereof;

11 — See Case C-324/98 *Telaustria and Telefonadress* [2000] ECR I-10745, paragraph 62.

12 — GURI, 31 March 1998.

13 — GURI, 17 March 1992.

14 — GURI, 11 July 2002.

15 — GURI, 10 July 2002.

16 — Decree of the President of the Council of Ministers of 20 December 2002, GURI, 27 December 2002.

17 — Decree of the President of the Council of Ministers of 24 October 2003, GURI, 4 November 2003.

18 — GURI, 30 July 2002.

Decree-Law No 343 of 7 September 2001, as converted into Law No 401 of 9 November 2001; [19] and the two abovementioned Decrees of 28 June 2002. [20]

13. Articles 1(2) and 2(1), (2) and (3) of the ordinance ('the contested provisions') are the object of the present proceedings.

14. Article 1(2) reads as follows:

'In order to improve the operational capacity of airborne units employed in forest firefighting, the Department of Civil Protection is authorised to draw up and implement a special emergency programme to reinforce its technological and computing resources, and may acquire necessary equipment by procedures including privately negotiated contracts.'

15. Article 2(1), (2) and (3) read as follows:

'1. In order to respond adequately and with the necessary immediacy to the forest fires occurring throughout the national territory, in pursuance of the aims set out in Article 7 (2) of Law No 353 of 21 November 2000, [21] in a context of substantial and stable reinforcement of the fleet of aircraft at the disposal of the Department of Civil Protection, having regard to the great variety of emergency situations, and at the same time in order to meet the essential needs of preventing the possible spread of such fires, likely to endanger seriously both persons and property, the Department of Civil Protection is authorised to specify with the utmost urgency such aircraft as are deemed most suitable for the accomplishment of its tasks, concluding, by private negotiation, by derogation from the statutory provisions listed in Article 4 below, [22] contracts for the acquisition or implementation of aerial forest firefighting services.

2. In pursuance of the aims set out in Article 7(2) of Law No 353 of 21 November 2000, for the reinforcement of the operational capacity of the airborne units of the Corpo Forestale dello Stato employed in forest

19 — GURI, 10 November 2001, Law introducing urgent provisions to ensure operational coordination of civil protection agencies.

20 — The reference to the second state of emergency, in the province of Verbano-Cusio-Ossola, seems puzzling, at least in the context of the contested provisions, which all deal with forest firefighting. That state of emergency in fact relates apparently not to the whole province named but to a small part of it, and concerns an increase in the volume of melted glacier water, a matter which may be linked to unusually hot weather but not obviously to forest fires. However, it appears as one of the legal bases for the contested ordinance, and is referred to by the Commission.

21 — Framework law concerning forest firefighting, GURI, 30 November 2000; Article 7(2) requires the relevant authorities to ensure effective firefighting and to improve and modernise the national fleet of firefighting aircraft.

22 — The list includes, in addition to legislation transposing Community procurement directives, Article 23 quinquies of Law No 61/98.

firefighting, and in subsequent action dealing with possible civil protection emergencies, the Corpo Forestale is authorised to specify with the utmost urgency such aircraft as are deemed most suitable for the accomplishment of its tasks and of other duties flowing from Article 11 of Law No 225/1992, [23] to be acquired by privately negotiated contract, by derogation from the statutory provisions listed in Article 4 below. For that purpose, the Corpo Forestale may also acquire and evaluate the results of tests performed by, and civil protection experience of, other State, regional or local entities, and of any technical research that may have been carried out, in order to achieve the most profitable functional and operational integration possible and the most economical management of the entire State fleet of forest firefighting aircraft. For the acquisition of the aircraft referred to in this paragraph and by derogation from the general rules on government accounting, the Corpo Forestale may also enter into agreements for trading in aircraft in its possession which are intended to be but have not yet been sold.

3. In order to allow the chief fire officer to ensure coordination between ground teams and firefighting aircraft, the Corpo Forestale is authorised to acquire, also by privately negotiated contracts, such radio transceiving equipment and accessories as are necessary for ground-to-air communication with those aircraft when employed in firefighting operations.'

23 — This article lays down the general duties of all the civil protection agencies, including the Corpo Forestale.

16. The preamble to the ordinance mentions as reasons for its adoption the climatic and meteorological conditions prevailing since the beginning of 2002, with exceptionally high temperatures in June, increasing the risk of forest fires, and the urgent need for aerial firefighting equipment.

Procedure

17. In December 2000, pursuant to Article 23 quinquies of Law No 61/98, the Italian Ministry of Agriculture and Forestry issued two invitations to tender for the supply of a total of 49 helicopters. Those procedures were subsequently suspended and then withdrawn, a matter which gave rise to a complaint to the Commission. Questioned by the Commission, the Italian authorities replied that the step had been taken following the attack on the World Trade Centre in September 2001, since there was a need to ensure that the helicopters could be used in anti-terrorist as well as forest firefighting operations. On 22 July 2002, the Italian authorities informed the Commission that

they intended to purchase the helicopters in question, and considered that the contracts were not subject to Community law, being matters of national security.

18. The contested ordinance was adopted on 24 July 2002, and it appears to be common ground that the only relevant acquisition made pursuant to it was of two AB 412 helicopters, supplied by the Italian company Agusta Bell SpA ('Agusta') following a negotiated procedure culminating in a contract signed on 28 October and approved on 31 October 2002.

19. The Commission took the view however that the authorisations contained in the contested ordinance were contrary to Community law and, on 19 December 2002, sent the Italian Government a letter of formal notice, asking it to submit its observations in accordance with Article 226 EC. The Government replied stressing the seriousness of the forest fires in Italy in 2002.

20. The Commission then, on 3 April 2003, sent the Italian Government a reasoned opinion pursuant to Article 226 EC, in which it concluded that the adoption of Articles 1 (2) and 2(1), (2) and (3) of the contested ordinance was contrary to Community law. It requested Italy to comply with the opinion within one month.

21. Although the Italian authorities made a number of replies after the expiry of that period, the Commission considers that it has not been informed of any measures taken to comply with the reasoned opinion.

22. It has therefore brought the present action, in which it asks the Court to:

— declare that, by adopting Articles 1(2) and 2(1), (2) and (3) of Ordinance No 3231 of the President of the Council of Ministers of 24 July 2002, which allow for private negotiations by way of derogation from the provisions of the Community directives on public supply and service contracts, and in particular, from the common rules on advertising and participation laid down by Titles III and IV of Directive 93/36 and III and V of Directive 92/50, for the acquisition of aircraft to combat forest fires and for the acquisition of firefighting services and which similarly allow for such negotiations for the acquisition of technical and computer equipment and two-

way radios, without any of the lawful conditions for derogation from those common rules being satisfied and, in any event, without ensuring any form of direct advertising such as to permit a competitive comparison between potential tenderers, the Italian Republic has failed to fulfil its obligations under Council Directive 93/36 of 18 June 1992 and Articles 43 and 49 EC;

— order the Italian Republic to pay the costs.

23. Italy contends that the Court should declare the proceedings devoid of purpose or should dismiss the action as unfounded.

Admissibility

24. Italy points out in its written pleadings that the contested ordinance related to a limited period, defined by the duration of the state of emergency which was declared until 31 October 2002.

25. That factor gave rise to some discussion at the hearing as to whether the Commission's action could be regarded as admissible, since the reasoned opinion was not sent until 3 April 2003, and it might be questioned whether the alleged infringement was still in existence at the end of the period of one month laid down for compliance in that opinion.

26. The Commission argued, first, that the contested ordinance did not contain any provision limiting its effects in time or expire by operation of any other legal rule; second, that one of the measures on which it was based, namely the decree declaring a state of emergency in the province of Verbano-Cusio-Ossola, was extended until 31 July 2004; third, that the contract for the supply of two helicopters, concluded on the basis of the contested ordinance, had not been completed by the end of that period, since technical verifications were still being carried out; and, fourth, that if the Court were to find the action inadmissible on the ground envisaged Member States could adopt temporary measures authorising unjustified derogations from the Community procurement rules but escape censure by ensuring that they lapsed or were repealed before the Commission could take legal action.

27. The agent for the Italian Republic agreed that the action was admissible. He expressly acknowledged that, if that were not so, there would be no way of obtaining the requisite judicial scrutiny in cases of this kind.

28. In those circumstances I do not propose to examine the question of the expiry of the contested ordinance as a factor affecting the admissibility of the action. I agree however with both parties that short-term infringements of Community law, of the kind alleged in the present case, should not be immune from the procedure laid down in Article 226 EC merely because of their limited duration.

29. In any event, whether the contested ordinance was still in force or not at the end of the period laid down for compliance in the reasoned opinion, and whatever the situation as regards the procedures commenced on the basis of the ordinance, it is clear that no step was taken by Italy to remedy the alleged infringement, the existence of which it continues to deny.

30. In those circumstances, Italy cannot be considered to have complied with the reasoned opinion and the action cannot be held inadmissible. [24]

24 — See Case 199/85 *Commission* v *Italy* [1987] ECR 1039, at paragraphs 7 to 9 of the judgment and points 19 and 20 of the Opinion of Advocate General Lenz. See also Advocate General Lenz's Opinions in Case C-110/89 *Commission* v *Greece* [1991] ECR I-2659, at point 10; in Case 103/84 *Commission* v *Italy* [1986] ECR 1759, at point 1(c); and in Case C-247/89 *Commission* v *Portugal* [1991] ECR I-3659, at point 36 (here, see also paragraph 25 of the judgment); in all those cases the application was accepted as admissible.

The declaration sought

31. The Commission seeks a declaration that by adopting Articles 1(2) and 2(1), (2) and (3) of the contested ordinance, Italy has failed to fulfil its obligations under Directive 93/36 and Articles 43 and 49 EC.

32. That delimitation of the scope of the application gives rise to two preliminary remarks.

33. First, the Commission has referred to supply procedures commenced and withdrawn before the adoption of the contested ordinance. [25] Those circumstances may explain the Commission's specific interest in the ordinance, and they may be relevant to some of the Commission's arguments concerning the existence of urgency.

34. Second, the discussion in the pleadings has dwelt to some extent on the acquisition of two Agusta AB 412 helicopters on the basis of the contested ordinance. The circumstances of those purchases may throw some light on the circumstances of the adoption of the ordinance.

25 — See point 17 above.

35. It must however be remembered in both regards that the declaration sought relates solely to the adoption of specific provisions of that ordinance, and not to any actual procurement procedures whenever initiated and on whatever basis.

36. The wording of the declaration sought also gives rise to some rather more substantial observations.

37. That declaration asserts that the contested provisions authorise negotiated procedures 'by way of derogation from the provisions of the Community directives on public supply and service contracts, and in particular, from the common rules on advertising and participation laid down by Titles III and IV of Directive 93/36/EEC and III and V of Directive 92/50/EEC ... without any of the lawful conditions for derogation from those common rules being satisfied and, in any event, without ensuring any form of direct advertising such as to permit a competitive comparison between potential tenderers'.

38. From that, it concludes that Italy has failed to fulfil its obligations under Directive 93/36 and Articles 43 and 49 EC — but not Directive 92/50.

39. That approach, whilst perfectly coherent with regard to supply contracts governed by Directive 93/36, seems more puzzling where service contracts are concerned.

40. It is true that the Court has held that, even where there is no requirement to comply with the provisions of the services directive, public procurement procedures must comply with the fundamental principles which flow from Articles 43 and 49 EC, in particular the principle of non-discrimination, which implies an obligation of transparency and thus in turn a degree of advertising sufficient to enable the market to be opened up to competition and the impartiality of procurement procedures to be reviewed. [26]

41. Consequently, it may be reasoned, recourse to a privately negotiated procedure where such recourse is not authorised by Directive 92/50 must also offend against those principles, since by definition there will be no advertising.

42. However, that seems an unduly circuitous route to take, particularly when a perfectly straightforward approach is available — and is taken in the strictly parallel context of supply contracts governed by Directive 93/36.

26 — See point 8 above.

43. The Commission does not offer any direct explanation for the approach it has taken, but one might infer from a passage in the application [27] that it intended to cater for a defence — which the Italian Government has not in fact advanced — to the effect that the service contracts concerned fell below the value threshold for the application of Directive 92/50.

44. However, since the case is concerned with the authorising provisions and not with any procedures carried out under them, even that consideration would be relevant only if those provisions applied expressly and exclusively to contracts whose value was below the threshold, whereas in fact they make no reference to any value whatever.

45. Another point is that the form of order sought refers to the authorisation of recourse to negotiated procedures without any of the conditions for derogation being satisfied 'and, in any event [*comunque*], without ensuring any form of direct advertising such as to permit a competitive comparison between potential tenderers'.

46. Yet it cannot be the case that the absence of publicity can infringe Community law *in any event*.

47. If the conditions for derogation are satisfied, and a negotiated procedure without prior publication of an invitation to tender is thus justified, there can be no requirement for advertising. The principles which flow from the Treaty cannot impose a requirement of publicity which has to be satisfied even when the directives expressly provide for a derogation, or that derogation would be nugatory.

48. That must in my view apply by analogy even if the value of a particular contract is below the threshold for application of the relevant directive. [28] Where circumstances would normally justify recourse to a negotiated procedure, it would be absurd for that justification to be lost where the value of the contract falls below the threshold laid down in the directive.

49. Consequently, the separate reference to a lack of publicity, in the context of Articles 43 and 49 EC, could be relevant only in cases where a particular contract fell outside the scope of the relevant directive *and* there

27 — Paragraph 48.

28 — In contrast to a situation such as that in, for example, *Telaustria*, cited above in footnote 11, where a contract falls below the threshold, but would not have qualified for a derogation if it had been covered by the directive.

were no circumstances which would have justified a derogation of the kind authorised by the directive.

50. In the present case, however, the authorisation contained in the contested provisions is in no way confined to such situations.

51. Overall, the formulation of the declaration sought does not appear particularly consistent or clear, a circumstance which does not assist the Court in its assessment.

52. However, on analysis the issue is simply whether any of the lawful conditions for derogation from the common rules in Directive 93/36 or, as the case may be, Directive 92/50 are present.

Substance

53. The authorisation contained in the contested provisions can be legitimate only if justified by one of the derogations in Article 6(3) of Directive 93/36, or Article 11(3) of Directive 92/50.

54. Italy does not in fact specifically invoke Directive 92/50. That may be due to an excessive concern with the two contracts actually concluded under the authorisation, which were supply contracts governed by Directive 93/36. However, since the relevant derogations are substantially the same in the two directives, whatever view is reached with regard to one directive will be valid with regard to the other.

55. Italy relies principally on Article 6(3)(d) of Directive 93/36, [29] which allows recourse to a negotiated procedure in situations of extreme urgency brought about by events unforeseeable by the contracting authorities. The urgent need to combat forest fires during the state of emergency declared in July 2002 constitutes, it claims, such a situation.

56. It also invokes, secondarily, Article 6(3)(c) and (e) of the same directive, [30] which allow such a procedure, respectively, where for technical reasons the products must come from a particular supplier and where it is necessary to continue to deal with the same supplier in order to ensure homogeneity of supply. Those conditions, Italy

29 — Equivalent to Article 11(3)(d) of Directive 92/50.

30 — Equivalent to Article 11(3)(b) and (broadly) (f) of Directive 92/50.

argues, are fulfilled by the need for the Corpo Forestale to maintain a homogenous fleet of AB 412 helicopters, which only Agusta could supply.

Technical requirements and homogeneity of supply

57. These criteria may be dealt with very simply.

58. Whatever reasons may or may not have given rise to the alleged need to acquire Agusta AB 412 helicopters, they are relevant only to the actual procedures carried out under the authorisations conferred by the contested ordinance.

59. The alleged infringement however concerns the contested provisions of that ordinance, and not the negotiated contracts themselves. Nothing in those provisions, or in the context of the contested ordinance, indicates any limitation to a particular supplier on whatever grounds.

60. The contested provisions therefore cannot be justified on the basis of Article 6(3)(c) or (e) of Directive 93/36, or of Article 11(3) (b) or (f) of Directive 92/50.

Urgency

61. As a general proposition, it seems incontrovertible that widespread outbreaks of forest fires may be reasons of extreme urgency giving rise to a need for the acquisition of firefighting services and equipment if they are not already sufficiently available.

62. The Commission does not argue against that proposition as such, but submits that not all the conditions for the application of the derogation are satisfied. On the one hand, outbreaks of forest fires in summer are a regularly recurring event throughout southern Europe; they are thus foreseeable, and any urgency in the need to acquire means to combat them is attributable to the Italian authorities. On the other hand, the contested ordinance remained valid after the end of the national state of emergency on 31 October 2002, and could thus be used to authorise recourse to negotiated procedures after any situation of urgency had disappeared.

63. I agree that regular seasonal occurrences cannot be considered unforeseeable events.

64. However, it cannot be denied that even such occurrences may in some years be of such exceptional intensity or extent as to be legitimately regarded as unforeseeable.

65. Both the decree declaring the national state of emergency and the contested ordinance itself speak, in their preambles, of exceptional meteorological conditions giving rise to drought and an increased risk of forest fires. The latter mentions such conditions in the early part of the year, giving rise to exceptional intervention by forest firefighting units and a need to increase capacity, followed by a long period of unseasonably high temperatures in June with a consequent increase in the risk of the outbreak and spread of forest fires. In its pleadings, the Italian Republic asserts that in the summer of 2002 such fires exceeded the worst forecasts.

66. The Commission however has not addressed the question of the exceptional nature of the meteorological conditions or of the outbreaks of forest fires in the summer of 2002. Its arguments are directed solely to the foreseeability of summer forest fires in general and to the mechanisms whereby the Italian authorities could legitimately have acquired the necessary means to combat such fires in good time and without recourse to any urgent procedure. And even in the latter regard, it refers extensively to the actual acquisition of two AB 412 helicopters rather than to the authorisations which are at issue.

67. It may be accepted that forest fires in summer are foreseeable in Italy, so that the authorities cannot rely on their own failure to provide in advance for such fires in order to justify recourse to a negotiated procedure under Article 6(3)(d) of Directive 93/36.

68. Exceptional forest fires due to exceptional weather conditions are however by definition not foreseeable as such and may provide reasons of extreme urgency for the purposes of that provision.

69. The Commission has not sought to disprove or deny the exceptional nature of

the circumstances on which the contested ordinance was based.

70. I therefore consider that Italy has made an adequate prima facie case for the existence of urgency as a ground for authorising recourse to negotiated procedures without prior publication of an invitation to tender, and that the Commission has not rebutted that case.

71. But the Commission further objects that the authorisation in that ordinance cannot be covered by the derogation for urgent situations because it was not limited to the specific period of emergency.

72. It puts forward two arguments: first, the contested ordinance did not contain any provision limiting its effects in time or expire by operation of any other legal rule; second, the Ministry of Agriculture and Forestry, in a letter of 21 May 2003,[31] undertook not to use the contested ordinance for any future acquisition of supplies — demonstrating that the ordinance had not lapsed with the national state of emergency on 31 October 2002.

73. Before dealing with those arguments, however, it may be useful to point out that the fact that the decree declaring a state of emergency in the province of Verbano-Cusio-Ossola was extended until 31 July 2004[32] is not relevant to this issue. The application seeks a declaration that by *adopting* the contested provisions Italy failed to fulfil its obligations. There is no indication or allegation that at the time of that adoption any extension of the legal basis for it was contemplated, and the declaration sought does not refer to any such extension or to the maintenance in force of the contested ordinance beyond any specified date.

74. Nor is it relevant that performance of the contract for the purchase of two AB 412 helicopters was not completed until after the end of the national state of emergency. What matters is whether the authorisation to initiate a negotiated procedure could still be relied upon after that period.

75. Turning now to the Commission's first argument, the Italian Government responds that the contested ordinance logically lapsed with the expiry of the state of emergency on which it was based.

31 — Annex 8 to the application.

32 — See point 11 above.

76. That seems a credible contention.

77. Where an executive ordinance is adopted on the basis of a declaration of a state of emergency, it appears reasonable to suppose that its effects and validity will lapse when the state of emergency legally comes to an end. In the present case, the preamble to the contested ordinance does not merely mention the declaration of a national state of emergency but specifies that it is to come to an end on 31 October 2002. I note also that Article 5(2) of Law No 225 of 24 February 1992, which is one of the legal bases for the contested ordinance, specifies that measures derogating from rules in force may be adopted 'for the purpose of ensuring emergency intervention consequent upon' a declaration of a state of emergency, a detail which strongly suggests that no such measures can be valid if adopted outside that context.

78. It certainly seems likely that any negotiated procedure concluded on the basis of the authorisation contained in the contested ordinance after the end of the state of emergency could be challenged on that ground. However, and in any event, there is no indication or allegation that the relevant authorities have attempted to initiate any such procedure since that date. It is moreover consistent with Italy's contention, and possibly suggestive of an assumption that the authorisation must lapse with the national state of emergency, that the contract for the purchase of two AB 412 helicopters, the only contract apparently negotiated under the authorisation, was approved on 31 October 2002, the last day of that state of emergency.

79. However, the undertaking given on 21 May 2003, not to use the contested ordinance for any future acquisition of supplies, could well seem in contradiction with the view that the ordinance was no longer valid by that date.

80. The Italian Government accepts the difficulty, but contends that the ministry's undertaking merely expresses the fact that it was no longer possible legally to rely on the contested ordinance, and does not indicate that it had any choice in the matter.

81. A reading of the relevant passage of the letter — which deals also with other matters and seems intended to demonstrate that the Commission's allegations are unfounded over a range of issues — shows that the undertaking follows an assertion that the

acquisition of the two AB412 helicopters was in any event in compliance with Community law and that the contested ordinance was relied upon simply as a 'reinforcing measure'.

82. In those circumstances, I do not consider that the letter is sufficient to establish that the contested ordinance was still in force on 21 May 2003.

83. I thus reach the view that the Commission has not established that the contested provisions could have been relied upon in order to acquire supplies or services after the end of the state of emergency for which they were adopted or, in general, that the reasons of extreme urgency on which the Italian Government credibly relies were absent or were attributable to the Italian authorities.

Costs

84. The Italian Republic has not asked for costs in its pleadings; consequently, pursuant to Article 69(2) of the Rules of Procedure, the parties should be ordered to bear their own costs.

Conclusion

85. In the light of all the foregoing considerations, I am of the opinion that the Court should:

— dismiss the application;

— order the parties to bear their own costs.