OPINION OF ADVOCATE GENERAL GULMANN

delivered on 30 June 1993 *

Mr President,
Members of the Court,

1. Since 1987 the Commission has been examining, with the Spanish authorities, Spanish legislation with regard to the award of contracts by the public authorities with a view to checking its conformity with Community law. That examination has resulted in this case, initiated by the Commission by a formal letter of 19 December 1990, in which the Commission claimed that some 30 Spanish provisions were contrary to Community law, in particular to Articles 30 and 59 of the EEC Treaty and to Council Directive 71/305/EEC of 26 July 1971 concerning the coordination of procedures for the award of public works contracts (hereinafter 'Directive 71/305') [1] and Council Directive 77/62/EEC of 21 December 1976 coordinating procedures for the award of public supply contracts (hereinafter 'Directive 77/62'). [2] The case concerns the directives in their original version, that is, without taking into account the extensive amendments adopted by the Council in 1989 as regards Directive 71/305 [3] and in 1988 as regards Directive 77/62, [4] which were to be transposed into Spanish law only by 1 March 1992 at the latest.

2. The Spanish rules at issue are to be found principally in the Law on State contracts (Ley de Contratos del Estado, hereinafter 'the LCE') and in the General Regulation on the award of State contracts (Reglamento General de Contratos del Estado, hereinafter 'the RGCE'). The LCE and the RGCE lay down general rules applying to the award of public works, supply and service contracts and relate to both centralized and non-centralized authorities awarding public contracts. The proceedings also concern other national provisions which may be of significance for public works and purchasing activities. [5]

3. In its claim the Commission has divided the Spanish provisions which it regards as inconsistent with Community law into the following five main groups:

— provisions excluding certain matters from the field of application of the legislation on the public award of contracts;

* Original language: Dutch

1 — OJ, English Special Edition 1971 (II), p. 682.

2 — OJ 1977 L 13, p. 1.

3 — Directive 89/440/EEC, OJ 1989 L 210, p. 1. Directive 71/305 was most recently amended by Directive 93/4/EEC, OJ 1993 L 38, p. 31.

4 — Directive 88/295/EEC, OJ 1988 L 127, p. 1

5 — They are in particular the Royal Legislative Decree No 781/1986 of 18 April 1986 on local regulations, the Law of 24 November 1939 on the organization and protection of national industry and Royal Decree No 946/1978 of 14 April 1978 on a procedure for evaluating and monitoring pharmaceutical services.

— provisions authorizing the possibility of entering into private agreements;

— provisions on rules for participation in tendering procedures and criteria for qualitative selection;

— provisions on technical matters;

— provisions on criteria for the award of contracts.

4. It is not claimed in these proceedings that the two important original directives on the coordination of national rules on public works and supply contracts have not been transposed into Spanish law. The LCE and the RGCE were amended in 1986 with a view to adapting their provisions to the Community directives. [6] On the other hand the position is that the Commission's careful examination of Spanish law showed that there were, in the Commission's view, shortcomings in the transposition as regards a series of points.

It is my impression that there are individual complaints on which the Commission would scarcely have brought an independent action for infringement of the Treaty, and that there are several complaints on which the Spanish Government has contended that the application should be dismissed which would hardly have been the case if there had not been genuine differences between the parties on other points.

It may be seen from the following discussion that these proceedings arise from the fact that the parties disagree on several points as to how the relevant Community provisions are to be interpreted, whilst on other points they disagree as to the content and effect of Spanish law.

My Opinion must necessarily deal with the individual points of complaint one by one. In view of the nature of the various points that will be a very technical examination and one which it will not always be easy to effect.

5. As the Commission has claimed in several respects that the relevant Spanish rules give rise to legal uncertainty and therefore do not comply with the requirements laid down by the Court for a correct transposition of directives into national law, it may be appropriate to recall by way of introduction the content of the general requirements which may be deduced from the case-law of the Court on this question.

The Court has stated that:

— '... the Member States are obliged to ensure the full and exact application of the provisions of any directive'; [7]

— '... the principles of legal certainty and the protection of individuals require that, in areas covered by Community law, the

6 — See the Royal Legislative Decree No 931/1986 of 2 May 1986 and Royal Decree No 2528/1986 of 28 November 1986 respectively.

7 — See *inter alia* the judgment of the Court in Case 91/79 *Commission* v *Italy* [1980] ECR 1099 at paragraph 6.

Member States' legal rules should be worded unequivocally so as to give the persons concerned a clear and precise understanding of their rights and obligations and to enable national courts to ensure that those rights and obligations are observed'; [8]

— '...the transposition of a directive into national law does not necessarily require the provisions of the directive to be enacted in precisely the same words in a specific express legal provision, and ... a general legal context may be sufficient if it actually ensures the full application of the directive in a sufficiently clear and precise manner'; [9] and

— national rules which provide for a derogation and which, on the basis of directives, derogate from prohibitions laid down in the said directives, must scrupulously observe the limits and conditions laid down therein. [10]

8 — See the judgment of the Court in Case C-119/89 *Commission* v *Spain* [1991] ECR I-641 at paragraph 10. See also *inter alia* the judgments in Case 257/86 *Commission* v *Italy* [1988] ECR 3249 at paragraph 12, in Case 29/84 *Commission* v *Germany* [1985] ECR 1661 at paragraph 23, in Case 143/83 *Commission* v *Denmark* [1985] ECR 427 at paragraph 10 and in Case 102/79 *Commission* v *Belgium* [1980] ECR 1473 at paragraph 11.

9 — See the judgment in Case C-339/87 *Commission* v *Netherlands* [1990] ECR I-851 at paragraph 6. See also *inter alia* the judgments in Case 247/85 *Commission* v *Belgium* [1987] ECR at paragraph 9 and in Case 239/85 *Commission* v *Belgium* [1986] ECR 3645 at paragraph 7.

10 — See *inter alia* the judgments in Case 247/85 *Commission* v *Belgium* [1987] ECR 3029 at paragraphs 28 and 34, in Case 252/85 *Commission* v *France* [1988] ECR 2243 at paragraph 11 and in Case C-339/87 *Commission* v *Netherlands* [1990] ECR I-851 at paragraphs 15 and 28.

Provisions excluding certain matters from the field of application of the legislation on the award of contracts by public authorities

(a) *Article 2, point 3, of the LCE and Article 2, point 3, of the RGCE*

6. These provisions, where the RGCE simply repeats the provision in the LCE, exclude certain agreements from the legislation on the State award of contracts and read as follows:

'Notwithstanding the provisions of the preceding article, this Law shall not apply to the following contracts and legal measures of the administrative authorities:

...

3. Transactions effected by the administrative authorities with individuals as regards goods or rights, trade in which is governed ("mediatizado") by legal provisions, or products ("intervenidos") (controlled) or ("estancados") (subject to a monopoly) or ("prohibidos") (prohibited).'

7. The Commission has claimed

— that that provision is so general and its content so unclear that it gives rise to legal uncertainty and that that in itself constitutes a defective transposition of Directive 77/62, and

— that the derogation moreover conflicts with the directive, since the basis of the directive is that all public supply contracts are covered unless they are expressly excluded and since the Spanish provision authorizes exceptions, which are not included in the directive's list of exclusions, from the field of application of the rules.

8. The Spanish Government has contended that:

— the provision at issue is a reference provision which acquires specific legal effect only in conjunction with other legal provisions which, within the meaning of the provision, apply to trade in goods or provide that goods are controlled, subject to a monopoly or prohibited,

— the specific cases which, by reference to that provision, are excluded from the field of application of the rules are in the last resort justified by other Community provisions, including in particular Articles 36, 90(2) and 223 of the Treaty, and

— the essence of the laws to which the provision refers and by which restrictions are introduced with regard to trade in certain products is that 'special or exclusive rights of a public nature' are conferred, the result of which is that there is only one supplier with whom the public authorities can award supply contracts for the products in question. As a basis for its contention that the provision is therefore compatible with Directive 77/62, the government refers to Article 6(1)(b) of the directive, according to which private contracts may be awarded 'when, for technical or artistic reasons connected with protection of exclusive rights, the goods supplied may be manufactured or delivered only by a particular supplier'.

9. Perhaps I may say straight away that it seems clear to me that the Court should declare that the provision at issue conflicts with Community law.

In my view there is no doubt that the provision is far from complying with the requirements of clarity and lack of ambiguity which, according to the case-law of the Court, apply to national provisions transposing Community directives.

In the first place the Spanish Government has not, in my opinion, succeeded during the proceedings in shedding the necessary light on the field of application of the provision at issue, and in the second place has not been able to show that the provision — even if strictly interpreted — is generally speaking based on Community law.

10. The state of Spanish law is so unclear and the provision at issue is so difficult to understand that in my view there is no occasion for the Court to consider whether it may be regarded as being relevant to contracts which may lawfully be excluded from

the field of application of the rules under Community law.

The Spanish Government has an obligation to ensure that its law is sufficiently clear. The provision in question is not drafted in such a way as to make it possible for the Court to come to a decision as to whether its field of application is compatible with Community law. It is not therefore appropriate in these proceedings to go more precisely into the extent to which it is lawful under Directive 77/62 to derogate from its rules.

11. With regard to the Spanish Government's arguments I think it must be sufficient to make the following comments:

12. The government is of course right in saying that the provision at issue can take legal effect only if there are laws laying down, in one of the ways set out in the provision, rules for trade in the products in question. As the Commission has stated, that does not mean, however, that the provision has no meaning of its own. If there are laws governing trade in goods in one of the ways stated, it is a direct legal consequence of the contested provision that public contracts relating to those goods are not covered by the LCE and RGCE rules. The provision is therefore more than just a formal reference provision, since it lays down itself criteria for the type of derogations which may be made from the field of application of the rules.

13. As I mentioned, the Spanish Government's attempt to shed light on the field of application of the provision was not successful. The Commission has stated that contracts for medicines, stamps, stamped paper, tobacco, electrical energy and gas do not come under the rules on the award of State contracts as a result of the provision at issue. In its rejoinder the Spanish Government has to a limited extent tried to explain which of the forms of controls mentioned in the provision apply to the products in question, but has moreover tried in particular to argue that the types of controls in question are basically such as to imply that there is only one possible supplier.

It is not easy to see how the provision can be interpreted in such a way as to have so restricted a field of application as the Spanish Government states, and it is not easy to include all the specific examples of excluded contracts which have been quoted under the provision as so interpreted.

14. On the other hand it is not hard to establish that the contested provision as at present drafted cannot in general be in conformity with Directive 77/62.

Article 2(1) of the directive provides that, 'in awarding public supply contracts, the contracting authorities shall apply their national procedures, adapted to this directive'. It may be seen from the ninth recital to the directive that 'provision must be made for exceptional

cases where measures concerning the co-ordination of procedures may not necessarily be applied, but such cases must be expressly limited'. The directive must be interpreted in such a way as to lay down exhaustively the general exceptions to the Member States' duty to put public supply contracts out to tender in accordance with the rules of the directive. Such general exceptions to the field of application of the directive are laid down in Articles 2(2) and 3 of the directive. [11] It is clear that the contested Spanish provision is not in general covered by any of those exceptions, nor has any such claim been made by the Spanish Government.

15. No weight can be attached to the Spanish Government's argument with regard to Articles 36, 90(2) and 223 of the Treaty. As the Commission has stated, special rules for trade in products which are compatible with Community law under the said provisions of the Treaty must obviously be observed in the award of public supply contracts. In itself however that cannot render the rules on the award of public contracts generally inapplicable. As regards in particular products in which trade is forbidden, it might at first sight seem, as contended by the Spanish Government, that the provision does not conflict with the directive. If trade in a certain product is prohibited it will not be possible for supply contracts concerning that product to be awarded and there is consequently no reason to apply the rules of the directive. Even though the question is scarcely of practical importance, it must not be overlooked that if a situation should arise in which the public authorities, in spite of an existing prohibition, were to award supply contracts for the product in question, that would in principle have to take place under the rules of the directive. A general exception to that effect is therefore incompatible with the directive.

16. Nor can any weight be attached to the Spanish Government's argument regarding Article 6(1)(b) of the directive. In the first place one must agree with the Commission that it follows from Articles 4(3) and 6(1) of the directive that contracts covered by the said provision are not excluded from the field of application of the directive but must on the other hand be awarded in the form of private contracts, which means that the provisions of Article 7 of the directive on common rules in the technical field are applicable. Secondly the Commission is right in saying that the contested provision is incompatible with Article 6(1)(b) of the directive since it does not expressly lay down conditions corresponding to those required by the directive.

17. On those grounds I shall propose that the Court declare Article 2, point 3, of the LCE and Article 2, point 3, of the RGCE incompatible with Directive 77/62.

11 — Article 2(2) of the directive provides that public supply contracts awarded by bodies which administer transport services or by bodies concerned with water, energy and telecommunications are not covered by the directive. Article 3 concerns contracts awarded pursuant *inter alia* to international agreements.

(b) *Article 2, point 8, of the LCE and Article 2, point 8, of the RGCE*

18. As regards these provisions the RGCE simply repeats what is in the LCE; they exclude from the legislation on the award of State contracts 'contracts for which a law lays down an express exception'.

19. The Commission has claimed that this is a provision laying down an exclusion of a general nature, which as such conflicts with both the relevant Community directives. The Commission has stated that the Spanish authorities have not specified which laws or types of public contracts are covered by the provision. Further, the Commission has stressed that all the exclusions which are set out exhaustively in the directive are also expressly excluded by other provisions of the LCE and the RGCE, so that the provision opens the way to exceptions other than those authorized in the directives. For that reason the Commission has claimed that the provision gives rise to legal uncertainty contrary to Community law. In this respect the Commission has emphasized that since the Court has declared that the delimitation of criteria for exclusion must be clear and compatible with the directive, any provision for exclusion which lays down no criterion is entirely unacceptable.

20. My view is that one must agree with the Spanish Government that a reference provision of this type is not incompatible with Community law. Member States are allowed a certain discretion as to how directives are to be implemented in national law and the legislative technique used by the Spanish authorities cannot, as such, be regarded as contrary to Community law. The purpose of the provision is to draw attention to the fact that there may be further exceptions to the field of application of the Law than those appearing in the Law itself and to require them to be laid down in legislation. The provision differs from that already considered inasmuch as it has a neutral and purely formal content and there is a clear and distinct relationship between the reference provision and the Laws to which it refers, because the latter must necessarily contain an express provision to the effect that the LCE and the RGCE are not applicable. Moreover no importance can be attached to the Commission's argument to the effect that all the exceptions authorized in the directive are covered by other provisions of the LCE and the RGCE and that the possibility introduced by that provision for other exceptions to be made creates legal uncertainty. The reference provision is not superfluous. That is due to the fact, as the Commission itself has indicated, that the LCE relates also to other public contracts which are not covered by the directives and to which the directives do not therefore preclude further exceptions.

21. For those reasons I shall propose that the Court declare that Article 2, point 8, of the LCE and Article 2, point 8, of the RGCE are compatible with the two Community directives.

(c) *Article 29 bis, paragraph 1, points 1 and 3, of the LCE and Article 93 ter, points 1 and 3* of the RGCE

22. These provisions, of which that in the RGCE is simply a repetition of that in the LCE, exempt from the obligation to publish invitations to tender in the *Official Journal of the European Communities*, laid down in Article 12 of Directive 71/305, contracts concerning:

'1. industrial installations of the mechanical, electrical or energy-producing variety, with the exception of any part of such installations which comes within the province of building or civil engineering;

...

3. excavation, shaft-sinking, dredging and waste disposal works carried out in connection with the extraction of minerals (mining and quarrying industries).'

23. The Commission has claimed *that* these contracts come within the field of application of Directive 71/305, *that* the directive states exhaustively what exceptions may be made therefrom and *that* the exclusion of the contracts in question is contrary to the directive.

24. The *Spanish Government* disputes that such contracts come within the field of application of the directive. The directive is applicable to public works contracts and that concept is defined in Article 1(a) of the directive as contracts 'which have as their object one of the activities referred to in Article 2 of the Council Directive of 26 July 1971 concerning the abolition of restrictions on freedom to provide services in the field of public works contracts and on the award of public works contracts to contractors through acting agents or branches' (hereinafter 'Directive 71/304'). Directive 71/304 was issued at the same time as Directive 71/305 and was one of the liberalization directives adopted at that time, that is, it imposed on the Member States an obligation to abolish restrictions on freedom to provide services in the sphere in question.

In Article 2 the directive provided as follows:

'1. The provisions of this directive shall apply to activities of self-employed persons which are covered by Major Group 40 in Annex I to the General Programme for the abolition of restrictions on freedom of establishment. Such activities correspond to those which fall within Major Group 40 of the "Nomenclature of Industries in the European Communities" (NICE); they are given in the Annex to this directive.

2. This directive shall not apply to:

(a) industrial installations of the mechanical, electrical or energy-producing variety, with the exception of any part of such installations which comes within the province of building or civil engineering;

(b) ...

(c) excavation, shaft-sinking, dredging and waste disposal works carried out in connection with the extraction of minerals (mining and quarrying industries).'

25. It may be seen that the Spanish provisions at issue are exact repetitions of the provisions of Article 2(2)(a) and (c) of the directive.

As Directive 71/305 defines the contracts to which it applies as contracts which have as their object activities referred to in Article 2 of Directive 71/304, and as Article 2 expressly excludes the two forms of activity which are excluded by the contested Spanish provisions, it seems at first sight that there are good grounds for the Spanish Government's view.

26. On the other hand, however, the Commission has claimed that the reference in Article 1(a) of Directive 71/305 must be regarded as referring exclusively to Article 2(1) of Directive 71/304 which, according to the Commission, defines the field of application of the directive, but not to paragraph 2, in which the exceptions are listed. The Commission has put forward a number of considerations in support of that view, including *the fact that* Directive 71/304 was issued with reference to the basic principle of freedom to provide services mentioned in Article 59 of the Treaty, *that* the fact that Article 59 of the Treaty became directly applicable after the transitional period deprives Article 2(2) of Directive 71/304 of any independent significance, *that* it is inconceivable that a directive which repeats the principle of the abolition of restrictions on freedom to provide services should then restrict the field of application of a directive on harmonization of legislation containing an exhaustive list of the public contracts to which it relates, and *that* any restrictions on freedom to provide services which the provision might have entailed must in all circumstances be compatible with Article 59 et seq. of the Treaty.

27. I find it hard to follow the Commission's arguments. Article 1(a) of Directive 71/305 refers expressly to 'one of the activities referred to in Article 2' of Directive 71/304, and in my view there can be no doubt that originally at any rate it was intended that the forms of activity mentioned in Article 2(2) should not be covered by the obligations which Directive 71/305 imposed on the Member States for coordinating the relevant national procedures for the award of public works contracts.

Further, the decisive part of the Commission's argument seems to be that the fact that, subsequent to the adoption of the two directives, the Court's decision that, following the expiry of the transitional period, the *duty of liberalization* was a consequence of Article 59 of the Treaty having direct effect and that Directive 71/304 accordingly lost its independent significance must imply that the field of application of the *duty of coordination* under Directive 71/305 was extended to cover also the contracts referred to in Article 2(2)(a) and (c) of Directive 71/304.

The Commission has not put forward any arguments to convince me that such a conclusion is correct. There were originally

grounds for excluding the relevant contracts from the duties of both liberalization and coordination. Those grounds were not explained in detail and it is therefore impossible to say with any certainty to what extent the performance of the duty of liberalization nullifies the reasons which led the Council to decide that the obligations with regard to coordination should not apply to the contracts in question. In my opinion it is clear that the conclusion put forward by the Commission is neither necessary nor the most obvious. The prohibition in the Treaty of discrimination on grounds of nationality and other unjustified and disproportionate restrictions on freedom to provide services applies in principle to all fields. On the other hand it is for the Council to decide to what extent it is necessary to supplement the duty of liberalization, which follows directly from the Treaty, with rules which require the Member States to coordinate their national rules which do not conflict with the prohibition in the Treaty. Accordingly it is also for the Council to determine the field of application of those rules of harmonization.

In 1971 the Council determined the field of application of Directive 71/305 by a reference to Article 2 of Directive 71/304. That delimitation was not altered as a result of the later statement that the prohibition in Article 59 of the Treaty was directly applicable.

28. On the other hand it may be noted that when the Council in 1989 adopted the aforesaid amendments to Directive 71/305, it amended Article 1(a) so that public works contracts are now defined in that very provision as contracts having as their object one of the activities referred to in Annex II to the directive. Annex II corresponds to Major Group 50 of the 'General Industrial Classification of Economic Industries within the European Communities' (NACE), which essentially corresponds to Major Group 40 of the NICE referred to in Article 2(1) of Directive 71/304.

29. In my view it would be wrong for the Court to concur with the Commission that the Spanish rules, the purpose of which is to transpose the directive in its original version, cannot lawfully exclude from their field of application contracts listed in Article 2(2)(a) and (c) of Directive 71/304.

30. The Commission has also referred to the fact that the contested Spanish rules make an exception only to the obligation to publish invitations to tender in the *Official Journal of the European Communities* and that the directive does not authorize such a possibility. I find it hard to understand why it should in itself be contrary to the directive to apply some of its provisions to contracts which are not covered by the directive. If the contracts in question are not covered by the directive, the Member States can in principle themselves lay down rules for tendering procedures and they can hardly be criticized for choosing to apply some of the provisions of the directive even though they are not obliged to do so under Community law.

31. On those grounds I shall propose that the Court declare that Article 29 bis, paragraph 1, points 1 and 3, of the LCE and

Article 29 ter, points 1 and 3, of the RGCE are compatible with Directive 71/305.

Provisions authorizing the possibility of awarding private contracts

32. The Commission has claimed that a number of the Spanish provisions authorizing the award of private contracts are contrary to both directives. It points out that the directives contain an exhaustive list of the cases in which it is possible to resort to private contracts and that it follows from the Court's judgment in Case 199/85 *Commission* v *Italy* [12] that the provisions in question must be strictly interpreted.

The Spanish Government has indicated that a number of the contested provisions concerning private contracts are to be amended in conjunction with a proposed amendment of the LCE. The Commission has observed that in its view the new provisions will meet the requirements for a correct transposition of the two directives but has maintained its claim in view of the fact that the new Spanish provisions have not yet been adopted and are not in force.

33. The Spanish Government, which has not denied that the contested Spanish rules diverge, at any rate on certain points, from the rules of the directive, has contended in general that in coming to a decision about a legal provision it is necessary first to exhaust all reasonable possibilities of interpreting it in accordance with the rule of Community law with which it is being compared and that it is possible to establish its incompatibility with the Community provision only if it is impossible or disproportionately difficult to interpret it in accordance therewith.

34. That view is clearly untenable. It is true that under Community law national authorities and courts are obliged to interpret national rules in such a way that they respect Community law to the greatest possible extent. [13]

But that does not amount to saying that in proceedings for a declaration that a Member State has failed to fulfil its obligations under the Treaty the Court is able to declare national provisions incompatible with Community law only if it proves impossible to interpret them in a way which would be compatible with the Community rules. As may be seen from the foregoing exposition of the Court's case-law, [14] the Member States are obliged for reasons of legal certainty to word their legal rules so unequivocally as to give citizens and undertakings a clear and precise understanding of their rights and obligations and to enable the national courts to ensure that they are observed. It follows therefore that, regard being had to the principle of legal certainty, the Court must declare national provisions incompatible with Community law in so far as they do not ensure sufficiently clearly and precisely that the rules of the directive are fully applied. These requirements for a correct

12 — [1987] ECR 1039.

13 — See the judgments in Case 14/83 *Von Colson and Kamann* v *Land Nordrhein Westfalen* [1984] ECR 1891 at paragraph 26 and in Case C-106/89 *Marleasing* [1990] ECR I-4135 at paragraph 8.

14 — See section 5.

transposition of directives are not met for the simple reason that it must be possible to extend the interpretation of the relevant national rules in such a way that they may be applied in conformity with Community law.

35. In addition the Spanish Government has contended that it is not possible to deduce from the judgment in Case 199/85, referred to by the Commission, which concerned a specific application of the rules on private contracts, any principles of interpretation of significance for this case, which concerns the legality of abstract rules.

36. That view is similarly untenable. In the judgment in question the Court declared, with regard to Article 9(b) and (d) of Directive 71/305, that 'those provisions, which authorize derogations from the rules intended to ensure the effectiveness of the rights conferred by the Treaty in the field of public works contracts, must be interpreted strictly and the burden of proving the actual existence of exceptional circumstances justifying a derogation lies on the person seeking to rely on those circumstances'. [15] It follows, in my view, first that the lists contained in the directives of cases in which private contracts may be awarded must be considered exhaustive, and secondly that, in the transposition into national law of such exemption clauses, the limits and conditions laid down in the relevant provisions of the directives must be scrupulously observed.

15 — See paragraph 14.

(a) *Article 37, paragraph 1, point 1, and Article 87, paragraph 4, point 1, of the LCE and Article 117, paragraph 1, point 1, and Article 247, paragraph 4, point 1, of the RGCE*

37. Article 37, paragraph 1, point 1, of the LCE, which is repeated in Article 117, paragraph 1, point 1, of the RGCE, provides that, as far as public works contracts are concerned, private contracts may be awarded 'for works for which it is not possible to give preference to competitive tendering or for which, on technical or exceptional grounds, it is not appropriate to give preference to competitive tendering'. A provision with similar content as regards supply contracts is to be found in Article 87, paragraph 4, point 1, of the LCE, with the addition, however, of the following: 'as for example when the contract relates to products protected by patents or copyrights, or which are utility models or works of art, or to objects which have only a single producer or owner'. That provision is repeated in Article 247, paragraph 4, point 1, of the RGCE.

38. The Commission has claimed that Directives 71/305 and 77/62 do not authorize resort to private contracts in the cases referred to in the contested provisions. In this respect it has pointed out in particular that these provisions leave the authorities awarding contracts a discretion to decide whether the circumstances are such that preference cannot, or for quite special reasons should not, be given to competitive tendering.

39. The Spanish Government has contended that the contested provisions do not allow the authorities a discretion and are covered by Article 9(b) of Directive 71/305 and Article 6(b) of Directive 77/62.

40. Article 9(b) of Directive 71/305 provides that authorities awarding contracts may award private contracts 'when for technical or artistic reasons connected with the protection of exclusive rights, the works may only be carried out by a particular contractor'. It seems clear to me that Article 37, paragraph 1, point 1, of the LCE is not consistent with that provision. It is possible that the words 'it is not possible [or appropriate] to give preference to competitive tendering', as claimed by the Spanish Government, may be considered, as regards their content, to correspond to the requirement of the directive that the work 'may only be carried out by a particular contractor'. However, in the first place it may be said that the reference in the provision to 'technical or exceptional grounds' relates only to the second part of the provision concerning cases in which competition is not appropriate, which implies that the first part of the provision may be regarded as entailing a general authorization to the authorities awarding contracts to award private contracts by reference to the fact that 'it is not possible to give preference to competitive tendering'. In the second place the reference in the provision to 'exceptional grounds' may be regarded as too wide and indefinite when compared to the requirement in the directive of 'technical or artistic reasons or ... reasons connected with the protection of exclusive rights'.

41. The wording of Article 6(b) of Directive 77/62 is essentially identical to Article 9(b) of Directive 71/305. It is correct, as stated by the Spanish Government, that there is a reference in the second part of Article 87, paragraph 4, part 1, of the LCE to criteria which seem to a large extent to correspond to those referred to in Article 6(b) of Directive 77/62. However, the first part of the provision concerning cases in which 'it is not possible or not appropriate to give preference to competition by way of tenders' is linked only to the second part by 'as for example', which in my opinion means that the second part is merely the expression of an example and that the provision may therefore authorize the award of private contracts on grounds other than those mentioned therein. That is not compatible with the directive, which is exhaustive on that point.

42. On those grounds I shall propose that the Court declare that Article 37, paragraph 1, point 1, of the LCE and Article 117, paragraph 1, point 1, of the RGCE are incompatible with Directive 71/305 and that Article 87, paragraph 4, point 1, of the LCE and Article 247, paragraph 4, point 1, of the RGCE are incompatible with Directive 77/62.

(b) *Article 37, paragraph 1, point 2, and Article 87, paragraph 4, point 2, of the LCE and Article 117, paragraph 1, point 2, and Article 247, paragraph 4, point 2, of the RGCE*

43. Article 37, paragraph 1, point 2, of the LCE, repeated in Article 117, paragraph 1, point 2, of the RGCE, provides that as

concerns works contracts private contracts may be awarded 'in cases of recognized urgency resulting from pressing needs requiring prompt execution which it is impossible to effect within the framework of the emergency procedure governed by Article 26 of this Law and after the agreement of the authority awarding contracts'. [16] A correspondingly-worded provision concerning supply contracts is contained in Article 87, paragraph 4, point 2, of the LCE, repeated in Article 247, paragraph 4, point 2, of the RGCE.

44. The question is whether those provisions are consistent with Article 9(d) of Directive 71/305 and Article 6(d) of Directive 77/62, which are similar to one another, and provide that the awarding authorities may award the relevant public contracts without applying the provisions of the directives — apart from rules in the technical field — 'in so far as is strictly necessary when, for reasons of extreme urgency brought about by events' unforeseeable (or unforeseen) 'by the contracting authorities, the time-limit laid down' in other procedures cannot be kept. [17]

45. The Spanish Government has contested the Commission's claim that the Spanish provisions at issue are worded more loosely than envisaged in the directives and ha claimed that the Spanish rules contain the three conditions laid down in the directives. As regards the condition in the directives that there must be *reasons of extreme urgency*, the government has contended that the concepts of 'necesidades apremiantes' and 'urgencia imperiosa' have in principle the same meaning, since they both refer to matters requiring immediate attention. As concerns the condition in the directives that there must be *events unforeseeable (or unforeseen) by the awarding authorities* the government has claimed that it follows from the case-law of the Spanish Constitutional Court that the condition that there shall be unforeseeable events is indissolubly bound up with the concept of urgency, so that it is not necessary to specify that condition expressly. Finally the Spanish rules expressly lay down the condition in the directives that the events in question *make it impossible to keep the time-limits laid down* in the procedures covered by the directives.

46. My first impression is that the Spanish rules lay down conditions which correspond, up to a point, to the requirement of the directives that there shall be *reasons of extreme urgency*. It is true, as the Commission states, that there is a reference in the Spanish provisions to the fact that there must be urgency resulting from 'pressing needs', which in itself scarcely corresponds to 'extreme urgency', but it must not be overlooked that such 'pressing needs' in the Spanish provisions are described in greater detail as circumstances 'requiring prompt execution'. A condition that the urgency shall be due to pressing needs which make it necessary to act promptly seems to me to have the same restrictive meaning as the requirement of the directives that there shall be reasons of extreme urgency (in conjunc-

16 — In Spanish the provision is worded as follows: 'Las de reconocida urgencia, surgida como consecuencia de *necesidades apremiantes* que demandaran una pronta ejecución que no pueda lograrse por medio de la tramitación urgente regulada en el artículo 26 de esta Ley, y previo acuerdo del órgano de contratación' (my emphasis).

17 — In Spanish the provisions read as follows: 'En la medida estrictamente necesaria, cuando una *imperiosa urgencia* resultante de acontecimientos imprevistos para los poderes adjudicadores no sea compatible con los plazos requeridos por otros procedimientos' (my emphasis).

tion with the existing requirement of compelling grounds).

However, in my view it is unnecessary to go further into this question, since I think it is clear that the Spanish provisions do not comply with the relevant provisions of the directives in so far as they require that there shall be *events unforeseeable (or unforeseen) by the contracting authorities*. It is common ground that the Spanish rules do not expressly contain a provision to that effect and it is undeniable that this is an important and independent condition for the application of the provision. [18] The fact that the Spanish Constitutional Court, as stated by the government, has declared in two judgments that 'la notion d'urgence est liée à la nécessité de résoudre une situation qui, *pour des raisons difficiles à prévoir*, exige une intervention immédiate' do not in my view provide sufficient certainty that the condition of the directives to the effect that the events must be *unforeseeable, or unforeseen, by the contracting authorities* will be met.

47. On those grounds I shall propose that the Court declare that Article 37, paragraph 1, point 2, of the LCE and Article 117, paragraph 1, point 2, of the RGCE are incompatible with Directive 71/305 and that Article 87, paragraph 4, point 2, of the LCE and Article 247, paragraph 4, point 2, of the RGCE are incompatible with Directive 77/62.

18 — See in this respect the judgment of the Court in Case C 24/91 *Commission* v *Spain* [1992] ECR I 1989, at paragraph 13, where the Court declared that the conditions for the application of Article 9(d) of Directive 71/305 are concurrent.

(c) *Article 37, paragraph 1, point 7, and Article 87, paragraph 4, point 5, of the LCE, and Article 117, paragraph 1, point 7, and Article 247, paragraph 4, point 5, of the RGCE*

48. Article 37, paragraph 1, point 7, of the LCE, repeated in Article 117, paragraph 1, point 7, of the RGCE provide that as regards works contracts, private contracts may be awarded 'where the tenderer does not fulfil the conditions necessary for formalizing the contract ("formalización"), provided that the procedure for private negotiation complies with the basic conditions and that the price does not exceed those which were the subject of the call for tenders'. A provision of comparable content as regards supply contracts is contained in Article 87, paragraph 4, point 5, of the LCE, with the addition '... unless the authority decides to issue a fresh call for tenders on conditions defined case by case'. That provision is repeated in Article 247, paragraph 4, point 5, of the RGCE.

49. The Spanish Government has explained that a distinction is made in Spanish law between the 'adjudicación' or award of a contract and the 'formalización', which makes its implementation possible, and that the contested provisions 'arise from the special situation in which an authority may be placed when, after an award, it is bound by a definitive contract having full legal effect, but which cannot be implemented because the successful tenderer is precluded from implementing the contract for reasons attributable to him'.

50. The Commission has claimed that no provisions to that effect are contained in Directive 71/305 or 77/62 and that the Spanish provisions are therefore contrary to the directives. It has stated that the situation dealt with in those provisions, in which the contract cannot be implemented for reasons attributable to the contractor, must, to begin with, be resolved by the awarding authorities' opening a fresh procedure. The authorities will have the opportunity to award private contracts in that situation in so far as there is urgency, but it must be decided in each individual case whether the conditions for recourse to that deviation from the rules are met.

51. The Spanish Government has contended that the situation envisaged in the Spanish provisions is a case in which there is extreme urgency brought about by events unforeseeable or unforeseen, as mentioned in Article 9(d) of Directive 71/305 and Article 6(d) of Directive 77/62, which may justify the award of private contracts. [19]

The Spanish Government has also stated that the Spanish provisions lay down very strict conditions which do not appear in the directives, namely that the basic conditions of the original invitation to tender are to be observed and that the contract may not be finally awarded at prices which exceed those of the tender originally selected. In addition, the procedure for the award of private contracts set out in Article 37, paragraph 2, of the LCE presupposes negotiations with at least three contractors. On those grounds the government has claimed that the contested provisions involve a solution which is 'more appropriate' than the types of solution proposed by the Commission.

Finally the government has claimed that the contested provisions concern a situation very close to that dealt with in Article 9(a) of Directive 71/305, described by the Spanish Government as 'an ineffectual procedure not resulting in the award of a contract', and that there is therefore all the more reason to accept private contracts in such a situation, which is even more serious since it is 'an interruption at a more advanced stage of the procedure'.

52. In my opinion the Commission is altogether right on this point. It cannot be stated in general that this situation involves cases covered by the provisions of the directives on urgency. The question whether there is urgency in situations such as that discussed here must, as the Commission claims, be appraised specifically case by case.

It cannot be decisive in this respect that stricter conditions are laid down in Spanish law as regards the actual procedure for the award of private contracts. Nor can it be decisive that Article 9(a) of Directive 71/305 authorizes the possibility of awarding private contracts where it has not been possible following an invitation to tender to secure acceptable tenders. That situation differs from the one under discussion where, as the Commission has claimed, it seems

19 — The Spanish Government has added that although it will not ordinarily be possible, by application of normal procedures, to make up for the periods prescribed for implementation which have already expired, the possibility of applying them is expressly provided for in Article 87, paragraph 4, point 5, of the LCE.

entirely possible, for example, to award the contract to the tenderer who is second on the list, or where there are in any case no specific grounds for fearing that a fresh invitation to tender would not produce acceptable tenders. [20]

53. On those grounds I shall propose that the Court declare that Article 37, paragraph 1, point 7, of the LCE and Article 117, paragraph 1, point 7, of the RGCE are incompatible with Directive 71/305 and that Article 87, paragraph 4, point 5, of the LCE and Article 247, paragraph 4, point 5, of the RGCE are incompatible with Directive 77/62.

(d) *Article 37, paragraph 1, point 8, of the LCE and Article 117, paragraph 1, point 8, of the RGCE*

54. Article 37, paragraph 1, point 8, of the LCE, repeated in Article 117, paragraph 1, point 8, of the RGCE, provides that as regards works contracts private contracts may be awarded 'for works intended as the completion of works, for which the contracts have been terminated on the conditions set out in the preceding paragraph, without prejudice to the application, where appropriate, of the provisions of point 2 of this article (urgency)'.

55. The Commission has claimed that that provision is incompatible with Directive 71/305 and in this respect has referred to the considerations it put forward with regard to the previous point.

56. The Spanish Government has merely stated that it is not possible to provide for this provision such a clear justification as for the foregoing point and that it is to be repealed in conjunction with the proposed amendment of the LCE.

57. I shall accordingly propose that the Court declare Article 37, paragraph 1, point 8, of the LCE and Article 117, paragraph 1, point 8, of the RGCE incompatible with Directive 71/305.

(e) *Article 120, paragraph 1, points 1, 2 and 6 of the Legislative Decree on local regulations*

58. The Commission has stated that Article 120, paragraph 1, points 1, 2 and 6 of Legislative Decree No 781/1986 on local regulations lists cases allowing the award of private contracts, which correspond to the provisions of the LCE and RGCE referred to above, and has claimed that these provisions are therefore likewise contrary to the directives.

59. That has not been contested by the Spanish Government and the Court can therefore uphold the Commission's claim on this point.

60. However, the parties are not agreed as to the consequences. The Spanish Government has claimed that it will not be necessary to

20 — Finally no decisive significance can be attached to the fact that Article 87, paragraph 4, point 5, of the LCE provides a possibility of applying the normal procedures, since that is a matter of discretion for the awarding authorities and not a duty arising when the conditions for urgency are not specifically met.

amend the Legislative Decree on local regulations since the award of private contracts by local bodies is governed direct by the relevant provisions of the LCE and the RGCE. It has contended in this connection that it is laid down in the first of the final provisions of the Royal Decrees adopted in order to adapt the LCE and the RGCE to the directives that the provisions of the LCE and the RGCE are the basic texts.

61. In principle the Court can only declare in this case that the provisions in question conflict with Spain's obligations under Community law, after which it will be for Spain to draw the necessary conclusions from such a finding.

It may, however, be appropriate to mention that the revocation of the rules will best conform with the requirements of Community law. If the rules were not to be revoked there would be a possibility that they might be erroneously applied in national law, and the ensuing legal uncertainty would itself conflict with Community law.

62. I shall therefore propose that the Court declare that Article 120, paragraph 1, points 1, 2 and 6 of the Legislative Decree on local regulations is incompatible with Directives 77/62 and 71/305.

Provisions on rules for participation and criteria for qualitative selection

63. The Commission has claimed that a number of the Spanish provisions on participation in public invitations to tender and criteria for qualitative selection are contrary to the Community rules. It seems to me appropriate to begin with a brief account of the relevant rules of the two directives and the case-law of the Court in this field.

It may be seen from Article 20 of Directive 71/305 and Article 17 of Directive 77/62 that the award of public contracts takes place in two stages. First there is a selection of the contractors or suppliers who possess the qualifications necessary for taking part in the invitation to tender. That verification of tenderers' suitability involves on the one hand a check on whether tenderers must be excluded from participation as a result of their own circumstances, including reasons involving insolvency or lack of good standing. On the other hand there is an examination of the tenderers' economic, financial and technical capacity. Once a selection has been made in this way of the tenderers who may participate in the invitation to tender, the contract is awarded according to the criteria laid down in Article 29 of Directive 71/305 and Article 25 of Directive 77/62, that is, as a general rule, either according to the lowest price or on the basis of the tender which is economically the most advantageous.

64. More detailed rules on the qualitative selection of tenderers may be found in Articles 23 to 28 of Directive 71/305 and Articles

20 to 24 of Directive 77/62, which are basically similar.

Article 23 of Directive 71/305 and Article 20 of Directive 77/62 contain a list of a number of circumstances affecting tenderers' *good standing and solvency*, which may constitute grounds for excluding them from participation in the invitation to tender. These provisions also contain a list of the documents and certificates, production of which the awarding authorities may demand as proof that contractors are not in one of the situations listed. Article 24 of Directive 71/305 and Article 21 of Directive 77/62 provide that any contractor or supplier wishing to take part in a public works or supply contract may be requested to prove his enrolment in the *professional or trade register* in his own country. Article 25 of Directive 71/305 and Article 22 of Directive 77/62 provide the manner in which tenderers may prove their *financial and economic standing*. Article 26 of Directive 71/305 and Article 23 of Directive 77/62 prescribe the way in which they may prove their *technical ability*. Article 27 of Directive 71/305 and Article 24 of Directive 77/62 provide that the authorities awarding contracts may invite tenderers to *supplement or clarify* the documents submitted but that that must be done within the limits of Articles 23 to 26 of Directive 71/305 or Articles 20 to 23 of Directive 77/62, as the case may be. Finally Article 28 of Directive 71/305 contains rules on enrolment on the *official lists of recognized contractors* which exist in certain Member States, including the extent to which enrolment on such a list of contractors may be used as alternative proof that they meet the qualitative criteria of Articles 23 to 26 of the directive.

65. The Court has delivered two judgments containing essential aspects concerning the interpretation of the application of these provisions. They are the judgments in Case 76/81 *Transporoute* v *Minister of Public Works* [21] and in Case 31/87 *Beentjes* v *Netherlands State*. [22] The Court's interpretation related to the relevant provisions of Directive 71/305, but might be applied equally by analogy to the corresponding provisions of Directive 77/62. It may be deduced from the judgments that:

— the authorities awarding contracts may check the technical knowledge and ability of such tenderers as have not been excluded for one of the reasons concerning their own circumstances only on the basis of criteria relating either to their economic and financial capacity or their technical ability; [23] and

— the list in the directives of the references which may be required as proof that

21 — [1982] ECR 417.

22 — [1988] ECR 4635.

23 — See paragraph 17 of *Beentjes* v *Netherlands State* in which the Court declared that: 'Article 20 provides that the suitability of contractors is to be checked by the authorities awarding contracts in accordance with the criteria of economic and financial standing and of technical knowledge or ability referred to in Articles 25 to 28. The purpose of these articles is not to delimit the power of the Member States to fix the level of financial and economic standing and technical knowledge required in order to take part in procedures for the award of public works contracts but to determine the references or evidence which may be furnished in order to establish the contractor's financial and economic standing and technical knowledge or ability ... Nevertheless, it is clear from these provisions that the authorities awarding contracts *can check the suitability of the contractors only on the basis of criteria relating to their economic and financial standing and their technical knowledge and ability*' (my emphasis).

tenderers meet the conditions of good standing and the like and of technical capacity is exhaustive, whereas there is nothing to prevent the awarding authorities from requesting evidence other than that mentioned in the directives so far as proof is required that the tenderers possess the necessary financial and economic standing. [24]

66. The authorities awarding contracts are not precluded from laying down conditions for the award of public contracts other than those relating to proof of contractors' economic, financial and technical capacity or criteria for the award of the contract in question. In its judgment in *Beentjes* v *Netherlands State* the Court stated that additional contractual conditions were not in themselves incompatible with Directive 71/305. [25] However, the Court also stated that such contractual conditions, to be compatible with the directive, must on the one hand be compatible with all the relevant provisions of Community law, including in particular the prohibitions flowing from the principles laid down in the Treaty with regard to the right of establishment and freedom to provide services, and must on the other hand be applied subject to observance of the procedural rules laid down in the directive, including the rules on advertising. [26]

67. The Commission's claims with regard to the failure to observe the rules of the directives on participation and criteria for qualitative selection must be considered in that context.

24 — In paragraph 9 of *Transporoute* v *Minister of Public Works* the Court declared: '... Article 27 states that the authority awarding contracts may invite the contractor to supplement the certificates and documents submitted only within the limits of Articles 23 to 26 of the directive, according to which Member States *may request references* other than those expressly mentioned in the directive *only for the purpose of assessing the financial and economic standing of the contractors* as provided for in Article 25 of the directive' (my emphasis).
That case raised the question whether it was compatible with the rules of the directive to require the contractor to be in possession of a government establishment permit from the Member State in which the invitation to tender was issued. The Court stated in paragraph 10: 'Since the establishment permit in question is intended ... to establish not the financial and economic standing of undertakings but the *qualifications and good standing* of those in charge of them ... the permit constitutes *a means of proof which does not come within the closed category of those authorized by the directive*' (my emphasis).
On those grounds the Court concluded as follows: 'Council Directive 71/305 must be interpreted as precluding a Member State from requiring a tenderer in another Member State to furnish proof by any means, for example by an establishment permit, other than those prescribed in Articles 23 to 26 of that directive that he satisfies the criteria laid down in those provisions and relating to his good standing and qualifications.'
The fact that the directives do not contain an exhaustive list of the documents which may be required as proof of tenderers' economic and financial standing is confirmed in the judgment in Joined Cases 27, 28 and 29/86 *CEI* v *Association Intercommunale pour les Autoroutes des Ardennes ('Bellini')* [1987] ECR 3347 at paragraphs 10, 11 and 17.

25 — The Court came to that conclusion *inter alia* on the ground that 'the directive does not lay down a uniform and exhaustive body of Community rules; within the framework of the common rules which it contains, the Member States remain free to maintain or adopt substantive and procedural rules in regard to public works contracts on condition that they comply with all the relevant provisions of Community law...' (paragraph 20).

26 — See paragraphs 28 to 31 in *Beentjes* v *Netherlands State*. See also as regards that case-law the Commission communication of 22 September 1989 entitled 'Public contracts, regional and social aspects', OJ 1989 C 311, p. 7, points 43 to 64.
See also the judgment of the Court in Case C-360/89 *Commission* v *Italy* [1992] ECR I-3401 concerning a provision of Italian legislation according to which in the selection of candidates invited by the awarding authority to tender under the rules relating to restricted procedures (cf. Article 22 of Directive 71/305), preference was to be given to temporary associations and consortia, members of which were undertakings carrying out their principal business in the region in which the work was performed. The Court simply stated that that was a criterion for selection which was not mentioned in Articles 23 to 26 of the directive and which was accordingly contrary to Article 22 of the directive. Although the Court went no further than to consider whether the criterion in question was compatible with the directive in the light of the principles set out in the *Beentjes* judgment, it scarcely represents a change in the case-law.

(a) *Articles 24, paragraph 1, point 1, and Article 25, paragraph 1, points 1 and 3 of the RGCE*

68. Article 24, paragraph 1, point 1, of the RGCE provides:

'For the award of contracts with the administrative authorities, foreign undertakings must, in addition to the conditions laid down in Article 23 of this regulation, comply with the following conditions:

1. Have full capacity to enter into contracts and to assume obligations in accordance with the law of their country.'

Article 25, paragraph 1, points 1 and 3, of the RGCE provides:

'The personality of undertakings shall be demonstrated to the administrative authorities as follows:

1. If the undertaking is a legal person, by means of the production of the memorandum of association or modification thereof, duly entered in the trade register. For individual contractors production of the national identity document or, as the case may be, of the document legally serving as a substitute therefor, is mandatory.

...

3. Foreign undertakings shall produce an official translation of their memorandum of association into Spanish or, as the case may be, into the language of the autonomous community in which the principal office of the contracting authority is situated, together with a certificate issued by the Spanish Embassy in the country in question, certifying that according to the legislation of that country the undertaking has the capacity to enter into contracts or to assume obligations.'

69. The Commission has claimed that the requirement for such evidence is not laid down in Directive 71/305 or 77/62 and that as a result of the exhaustive nature of the directives it cannot therefore be imposed so as to exclude tenderers who do not comply with it from taking part in invitations to tender. According to the Commission the authorities awarding contracts have sufficient opportunities to check that foreign undertakings have legal personality and the status of legal persons, inasmuch as they can demand documentary proof on the one hand that they are enrolled in the professional or trade register of their country of origin and on the other hand that they are not in one of the situations described in Article 23 of Directive 71/305 and Article 20 of Directive 77/62. The Commission has made it clear, particularly during the oral procedure, that the requirement that tenderers shall have legal personality is in itself compatible with Community law.

70. The Spanish Government has claimed *that* a condition with regard to legal capacity may logically be required in advance of the requirement of the directives with regard to economic, financial and technical capacity and good standing, *that* the requirement is necessary to ensure that contractors may be made liable and *that* such a requirement does not discriminate between foreign and

Spanish tenderers. The Spanish Government has emphasized in addition that Article 24, paragraph 1, point 1, of the RGCE does not require the production of any specific evidence but simply imposes an abstract condition with regard to legal personality. Moreover it is of the opinion that the directives do not lay down sufficient rules with regard to proof of the legal personality of undertakings and their status as legal persons, so that the rules contained in Article 25, paragraph 1, points 1 and 3, of the RGCE are justified. [27]

71. It follows from the case-law of the Court, as I mentioned by way of introduction, that in an appraisal of the legality of criteria for exclusion from participation in invitations to tender for public contracts it is first essential to determine what type of condition is involved.

It is certainly possible to discuss whether the requirement of legal capacity is included in the criteria dealt with in the rules of the directives on qualitative selection of tenderers. On the other hand it is hard to see that the requirement has any other object than to ensure the *bona fides* of the tenderer who is in a position to carry out the contract and where necessary has the capacity to incur liability for damages if he fails to do so. It is therefore, in my opinion, a requirement which must actually be regarded as coming within the field in which the directives were intended to give an exhaustive list of the evidence which might be demanded. [28]

These observations must be understood subject to one important reservation. Community law cannot of course prevent authorities awarding contracts from refusing to award contracts to undertakings devoid of legal personality. To that extent the requirement in Article 24, paragraph 1, point 1, of the RGCE is not unlawful. On the other hand the directives preclude a general requirement for documentation regarding legal personality. It must also for practical purposes be superfluous to lay down separate requirements as to documentation regarding tenderers' legal personality when it is considered that proof may be required that the person concerned is enrolled in the professional or trade register in his own country and is not insolvent. Such a requirement for documentation, which according to the information

27 — The parties have discussed the significance of the fact that Article 24 of Directive 71/305 lists the professional or trade registers of only six Member States, whilst Article 21 of Directive 77/62 lists those registers in only nine Member States. The Commission has indicated that Article 24 of Directive 71/305 was supplemented by the Acts of Accession of 1972, 1979 and 1985 and that Article 21 of Directive 77/62 may be applied by analogy as a matter of course to the three remaining Member States. I can fully accept the Commission's view on this point and do not propose to deal further with the point.

28 — My view is that it is possible to find support for this interpretation in the judgment in the *Transporoute* case. In that judgment the Court decided that the purpose of the demand for an establishment permit was to provide evidence of 'the qualifications and good standing of those in charge' of undertakings and that that requirement was therefore contrary to Directive 71/305, which contains an exhaustive list of the evidence which may be demanded to prove these qualities. However, the Court did not explain in any greater detail why an establishment permit such as that at issue was to be regarded as concerning a tenderer's good standing. My conclusion is that all evidence concerning not only the tenderers' good standing and solvency in the strict sense but their general capacity for concluding public contracts must be compatible with the exhaustive list of the means of proof in Article 23 in conjunction with Article 24 on proof of enrolment in the professional or trade register in the undertaking's country of origin.

supplied does not apply to Spanish tenderers, impose burdens on foreign tenderers which cannot reasonably be justified by the purpose of the requirement.

72. The Commission has claimed in addition that the provisions of Article 25, paragraph 1, points 1 and 3, of the RGCE, in so far as they apply to public works contracts, are incompatible with Article 59 of the Treaty on freedom to provide services.

73. There is rather less point in declaring the contested Spanish rules contrary to Article 59 of the Treaty in so far as it has already been established that they are incompatible with the rules of the directives. It should be sufficient to declare that there is no need for further requirements in addition to those documents which may be required of tenderers under the directives, since they entail unnecessary burdens on those concerned. That is sufficient in itself to illustrate that Article 59 of the Treaty has been disregarded.

74. The Court has consistently declared that Article 59 of the Treaty primarily requires the elimination of all discrimination against a person providing services on grounds of his nationality or the fact that he is established in a Member State other than that in which the service is performed. National provisions according to which persons providing services are not uniformly treated irrespective of their origin are compatible with Community law only if they may be brought under an express derogation such as Article 56 of the Treaty, which refers to considerations of public policy, public security or public health. [29] However, limitations on the freedom to provide services may also be the result of the application of national rules affecting any person established in the national territory to persons providing services established in the territory of another Member State who already have to satisfy the requirements of that State's legislation. According to the Court's consistent case-law such restrictions are compatible with Article 59 of the Treaty only if they are justified by overriding reasons relating to the public interest which are not already satisfied by the rules imposed on those persons in the Member State in which they are established and which are appropriate and necessary for the achievement of the intended aim, which implies that the same result cannot be obtained by less restrictive rules. [30]

75. The requirements set out in Article 25, paragraph 1, points 1 and 3, of the RGCE with regard to the production of special documents as a condition for the award of public contracts constitute impediments to the freedom to provide services. I think one must agree with the Commission that, whatever may be the objective of any general interest pursued, it must be sufficiently guaranteed by means of the opportunity to require the production of the documents listed in Directive 71/305. As the provisions in question cannot therefore be regarded as objectively necessary to protect the interest or interests which they seek to safeguard,

29 — See most recently the judgment in Case C-17/92 *Federación de Distribuidores Cinematográficos* [1993] ECR I-2239, paragraphs 13 and 16.

30 — See the judgment in Case C-288/89 *Collectieve Antennevoorziening Gouda* [1991] ECR I-4035 at paragraphs 12 to 15.

they are incompatible with Article 59 of the Treaty.

76. I shall accordingly propose that the Court declare that Article 25, paragraph 1, points 1 and 3, of the RGCE is incompatible with Directives 71/305 and 77/62 as well as with Article 59 of the Treaty.

(b) *Article 284, paragraph 5, of the RGCE*

77. Article 28 of Directive 71/305 relates to the official lists of recognized contractors to be found in certain Member States (the so-called classification system) and specifies the use which contractors may make of classification certificates with a view to proving that they meet certain of the criteria laid down in the directive for their selection.

78. Article 284, paragraph 5, of the RGCE provides:

'In order to avail themselves of the provisions of paragraph 3 of this article' (that is to say, to avail themselves of the right to prove their qualifications by means other than classification) 'non-Spanish contractors of the Member States of the European Economic Community must prove by means of a certificate issued by the Advisory Committee for Public Contracts that they are not classified or that they have not been the subject of a classification which has been suspended or cancelled'.

As far as I understand the information available it means that the principal rule according to Spanish law is that contractors must use classification certificates and that they may prove their qualifications by other means only if they produce a certificate issued by a Spanish body showing that they are not enrolled on the Spanish list [31] or that they have not previously been the subject of a classification which has been suspended or cancelled.

79. The Commission has claimed that it may be deduced from Directive 71/305 [32] that contractors are entitled to choose whether they will prove their qualifications by means of a classification certificate or in some other way. The requirement of the special certificate as a condition for being able to prove qualifications in a way other than the production of a classification certificate therefore, in the Commission's view, runs counter to the scheme of the directive. The Commission has further claimed that this is an unjustified and disproportionate obstacle to freedom to provide services which is contrary to Article 59 of the Treaty.

80. The Spanish Government has claimed that the purpose of the provision is to avoid circumvention of the classification scheme by undertakings from other Member States evading the effects of a previous classification which has been suspended or cancelled, by

31 — The Commission regards it as clear that the provision imposes the condition of a 'negative' certificate to the effect that the contractor has not been classified on the list of contractors recognized *in Spain*. The Spanish Government does not contest that interpretation of the provision.

32 — In its application the Commission had claimed that the contested provision also applied, by virtue of Article 109 of the LCE, to public supply contracts. However, the Spanish Government stated that the rules on classification had not actually been extended so as to apply also to public supply contracts. Subsequently, and in reply to a question from the Court, the Commission stated that it did not contend that Article 284, paragraph 5, of the RGCE was contrary to Directive 77/62.

availing themselves of the opportunity to prove their qualifications by producing other evidence. According to the government that involves a simple formality with which it is not hard to comply and which cannot be regarded as unreasonable or objectively unjustified in the light of its clear and simple purpose, which is to avoid award of a contract to a contractor who does not fulfil the economic, financial and technical conditions for trade classification.

81. I agree with the Commission that the Member States cannot introduce restrictions on contractors' right to choose the mode of proof they will use within the framework of the directive to prove their qualifications. The directive presupposes freedom of choice [33] and in the rules of the directive on methods of proof (Articles 23 to 26) there is no authority for a requirement such as that now at issue. One must also agree with the Commission that it is an obstacle to the freedom to provide services which cannot be regarded as justified by the considerations put forward by the Spanish Government. As it is incompatible with Directive 71/305 to require contractors to be enrolled on the official list of contractors in the Member State in which the invitation to tender is issued, [34] no significance can be attached to the cancellation or suspension at any time of such a classification. It can only be decisive for the tenderer to be able, at the time of the invitation to tender, to provide proof that he possesses the required qualifications. That consideration must be regarded as sufficiently safeguarded by the opportunity to demand of tenderers the documentary evidence listed in Directive 71/305.

82. On those grounds I shall propose that the Court declare Article 284, paragraph 5, of the RGCE incompatible with Directive 71/305 and Article 59 of the Treaty.

(c) *Article 287, paragraph 2, of the RGCE*

83. Article 287, paragraph 2, of the RGCE, which deals with conditions for classification of contractors in Spain, provides:

'For that purpose preference shall be given to an assessment of the personal, material and financial means permanently available to undertakings on the national territory'.

84. The Commission has claimed that that provision is contrary to Directive 71/305 [35] and to Article 59 of the Treaty.

85. The Spanish Government has contended that the provision has no specific legal effect, since it does not state to what in particular importance is to be attached and that there

33 — See the judgment in Joined Cases 27/86 to 29/86 *CEI* v *Association Intercommunale pour les Autoroutes des Ardennes ('Bellini')* [1987] ECR 3347 at paragraphs 24 and 25.

34 — See the judgment in *Transporoute* at paragraphs 12 and 13.

35 — In its application the Commission had stated that the contested provision applied also, by virtue of Articles 320 and 330 of the RGCE, to public supply contracts. As previously mentioned, the Spanish Government stated that the rules on classification had not been extended so as to apply also to public supply contracts. Subsequently, and in reply to a question from the Court, the Commission stated that it did not contend that Article 287, paragraph 2, was contrary to the provisions of Directive 77/62.

were therefore plans to repeal it. In addition the Spanish Government has stated that if that provision had any legal effect it would be in accordance with Article 26(c) and (d) of Directive 71/305.

86. Article 28(4) of Directive 71/305 provides, in reference to the official list of registered contractors, that 'For the registration of contractors of other Member States no further proofs and statements may be required other than those requested of nationals and, in any event, only those provided for under Articles 23 to 26'. As the Commission has rightly stated, those provisions do not make it possible to demand from contractors from other Member States information regarding the circumstances mentioned in Article 287, paragraph 2, of the RGCE. Article 26(c) and (d) provides that information may be requested mentioning *inter alia* the tools available to the contractor for carrying out the work and the firm's average annual manpower for the last three years. The decisive point for an appreciation of the contested rule is, however, that it is not possible to find in the directive any authority for requiring special information about the manpower, tools or economic means *on Spanish territory*. Article 287, paragraph 2, is therefore incompatible with Directive 71/305.

87. The Commission is also correct in stating that the contested provision constitutes an obstacle to freedom to provide services. The rule must be understood as meaning that the fact that an undertaking has on Spanish territory no, or few, tools and the like might be significant for classification in Spain, which again might be significant for the relevant contractors' opportunity to provide services in Spain. Although the provision applies formally both to foreign and to national contractors, it seems to me to be a provision which in reality favours Spanish contractors, since they have much greater chances of having manpower and tools on Spanish territory. [36] In other words this is a disguised discrimination based on nationality, which is not justified on any of the grounds which, under the Treaty, may justify such rules.

88. I shall accordingly propose that the Court declare Article 287, paragraph 2, of the RGCE incompatible with Directive 71/305 and Article 59 of the Treaty.

(d) *Article 312, paragraph 2, of the RGCE*

89. This provision, which lays down the probative value in relation to a number of Spanish requirements of certificates and similar documents issued by authorities in other Member States is, in the Commission's view, incompatible in certain points with Article 28(3) of Directive 71/305 which contains rules with regard to the probative value of classification certificates issued in other Member States. The Spanish Government

36 — See the judgment in Case C-360/89 *Commission* v *Italy* [1992] ECR I-3401 at paragraphs 10, 11 and 12.

has not contested that point and has stated that the provision will be amended in conjunction with the proposed amendment of the LCE. I shall accordingly propose that the Court deliver judgment in accordance with the Commission's claim.

(e) *Article 320, paragraph 3, point 5, of the RGCE*

90. This provision contains rules with regard to proof of a supplier's technical ability and provides *inter alia* that that may be effected by production of certificates regarding the products in question, issued by official Spanish quality control institutes or offices. The Commission regards the provision as contrary to Article 23(1)(e) of Directive 77/62, according to which a demand may be made for the production of certificates of quality but not that they be issued by a body in the country of the authority awarding the contract. At the same time the Commission has claimed that the demand constitutes an obstacle to free movement of goods contrary to Article 30 of the Treaty. That has not been contested by the Spanish Government, which has stated that the provision is to be deleted in conjunction with the proposed amendment of the LCE. The Spanish Government has only put forward an argument that the drafting is faulty and that that may be remedied if the provision is not interpreted literally. No importance can be attached to that argument. I shall therefore propose that the Court should deliver judgment in accordance with the Commission's claim.

(f) *Article 341 of the RGCE*

91. Article 341 of the RGCE provides:

'In pursuance of the fourth of the final provisions of the LCE, the Government may, if it thinks fit, exempt contractors who have obtained a specific classification from the Ministry of Finance from providing provisional security when tenders are submitted for works contracts'.

92. The Commission has stated that that possibility was provided by Royal Decree No 1883/79 of 1 June 1979, which authorizes authorities awarding contracts to include in the tender specifications a provision on exemption, and by an order of 23 October 1979 allowing the inclusion of an exemption in tender specifications from the Minister of Public Works and Town Planning and its independent bodies.

93. The Commission has claimed that Article 341 of the RGCE is incompatible with Directive 71/305 and Article 59 of the Treaty. It has stated that the opportunity to submit a tender without being classified the contractor's right which cannot be obstructed on the grounds put forward by the Spanish authorities. The exemption from providing provisional security, which is granted to contractors who are classified, constitutes an economic incentive to be classified and its effect is to limit in practice the right to submit a tender without being classified.

The Commission has also stated that it sees no problems in extending the provision on exemption from providing provisional security also to tenderers who have demonstrated their qualifications in ways other than classification. In the Commission's view the authorities awarding contracts have sufficient opportunity for penalizing an 'irresponsible tenderer', for example by applying the provisions of Article 23(1)(d) and (g), previously discussed.

94. The Spanish Government has contended that the Spanish rules allow foreign contractors to provide two forms of security for the correct performance of contracts on the same conditions as those applicable to Spanish contractors. Thus contractors may choose between providing provisional security or obtaining classification with the Spanish Ministry of Finance. It follows that non-Spanish contractors may be exempted from providing provisional security in the same way as Spanish undertakings. In the event of non-performance of a contract the awarding authorities have the opportunity of imposing penalties for non-performance either by regarding the security provided as forfeit or by suspending the classification. The Spanish Government has claimed that these two forms of security are both covered by the provisions of Article 16(i) of Directive 71/305, which requires the awarding authorities to include in the notice regarding open procedures 'information about deposits and any other guarantees, whatever their form, which may be required...'.

The Spanish Government has remarked that the authorities awarding contracts would be unable to impose effective penalties for non-performance of contracts if the exemption from providing provisional security were extended also to non-Spanish contractors who have proved their economic, financial and technical capacity by means other than classification.

95. As may be seen from the foregoing, the Spanish Government has attached importance to the need to obtain security for the correct performance of contracts. That purpose will of course be achieved by requiring provisional security, which must be regarded as authorized by Article 16(i) of Directive 71/305. On the other hand a requirement for classification by the Spanish Ministry of Finance will not give any special guarantee of the correct performance of contracts awarded. That guarantee is supposed, according to the Spanish Government, to consist in the 'threat' of suspension of classification in cases of non-performance of contracts and the difficulties that would entail for the subsequent award of contracts. Such a 'threat' of exclusion from future invitations to tender exists, however, irrespective of the question of classification in Spain. As the Commission has stated, Article 23(d) and (g) of the directive provide that the awarding authorities may exclude from participation in the tendering procedure any contractor 'who has been guilty of grave professional misconduct proven by any means which the authorities awarding contracts can justify', or 'is guilty of serious misrepresentation in supplying the information required under this chapter' (on criteria for qualitative selection). These provisions give the awarding authorities in any case the opportunity of imposing penalties for a deliberate omission to perform contracts awarded — and also cover

non-Spanish contractors who have proved their economic, financial and technical capacity in ways other than classification — and the existence of that opportunity provides, as I see it, the same form of guarantee for the performance of contracts awarded, namely a 'threat' of exclusion from future invitations to tender, as the Spanish Government thinks it is providing by means of the requirement of classification.

In those circumstances it may be seen that the real position with the Spanish requirement of classification by the Spanish Ministry of Finance as a condition for exemption from giving provisional security is that non-Spanish contractors who are not classified in Spain are subjected to a special economic burden. [37] As mentioned by the Commission, however, Directive 71/305 gives contractors a right to prove their ability by the production of the documents or certificates mentioned in Articles 23 to 26 of Directive 71/305 or by production of a certificate of classification in another Member State. They cannot demand that the contractor be classified in the Member State awarding the contract. [38] It cannot therefore be compatible with the directive to link economic burdens to the absence of classification in Spain.

96. An economic burden imposed on non-Spanish contractors who are not classified in Spain constitutes an obstacle to freedom to provide services under Article 59 of the Treaty. As I mentioned, no weight can be attached to the Spanish Government's argument about the need for the provision of security for the performance of contracts nor would other public interests appear to justify a rule of that nature.

97. I shall therefore propose that the Court declare Article 341 of the RGCE incompatible with Directive 71/305 and with Article 59 of the Treaty.

Provisions in the technical field

98. The Commission has claimed that Article 244 of the RGCE, laying down rules on technical requirements, is contrary to Article 7 of Directive 77/62.

99. Article 7(1) of the directive provides *inter alia* that technical specifications relating to public supply contracts may be defined by reference to appropriate standards and that in that case it is appropriate to make reference, in order of preference, to Community standards, European standards, international standards, national standards and finally any other standard. The Commission has claimed that the rules on order of preference were not transposed in the contested provision of the RGCE.

100. The Spanish Government has recognized that the order of preference in Article

37 — As regards Spanish contractors, it seems that the requirement for classification is compulsory. Thus the Spanish Government has stated that the requirement of classification is compulsory for public contracts to a value of more than PTA 20 million and that the possibility of proving technical and financial capacity by means other than classification does not apply to Spanish contractors. I understand these statements as meaning that for contracts of the value mentioned only non Spanish contractors may choose between classification and giving provisional security.

38 — See the judgment in *Transporoute* at paragraphs 12 and 13.

7(1) of Directive 77/62 has not been transposed into Spanish legislation, in which it is merely provided that technical specifications may be defined by reference to national or international standards. The government has however pointed out that Article 7 was substantially amended by Article 8 of Directive 88/295 and that in those circumstances it would be inappropriate and unreasonable to demand that Spanish legislation be adapted to the provisions of Directive 77/62 or that the provisions of Directive 88/295 be transposed before the expiry of the period prescribed. In that connection the government has emphasized that Spain was granted an extension of the normal period for the transposition of Directive 88/295. The Spanish Government contends that the Commission's claim in this case is incompatible with the duty to provide the Member States with the greatest possible help in complying with the obligations incumbent upon them under the Treaty and refers in that respect to Article 5 of the Treaty and the case-law of the Court, in particular the judgment in Case C-303/88 *Italy* v *Commission.* [39]

101. No weight can be attached to the Spanish Government's arguments. The duty to transpose directives within the prescribed period is not affected by the fact that these directives are later amended and it cannot be deduced either from Article 5 of the Treaty on the mutual obligation of loyal cooperation between the Member States and the Community institutions or moreover from the case-law of the Court that the Commission is empowered to issue exemptions from the periods prescribed for transposition. It may therefore be regarded as established that Spain has failed to fulfil its obligations under Article 7(1) of Directive 77/62 by not transposing within the prescribed period the order of preference which it lays down.

102. The Commission has next claimed that Article 244, paragraph 2, of the RGCE conflicts with Article 7(2) of Directive 77/62.

Article 244, paragraph 2, provides *inter alia* as follows:

'Unless the subject of the call for tenders so requires, technical specifications shall not mention goods of a specific make or source or of a particular process, capable of favouring or eliminating certain tenderers. Where the authority awarding contracts cannot give a description of the subject of the invitation to tender by means of other specifications which are sufficiently precise and intelligible to those concerned, it may refer to trade marks, patents or types, provided that such an indication is accompanied by the words "or equivalent"'.

Article 7(2) of Directive 77/62 is worded as follows:

'Unless such specifications are justified by the subject of the contract, Member States shall prohibit the introduction into the contractual clauses relating to a given contract of technical specifications which mention goods of a specific make or source or of a particular process ... In particular, the indication of trade marks, patents, types or specific origin

39 — [1991] ECR I-1433.

or production shall be prohibited; however, such an indication accompanied by the words "or equivalent" shall be authorized where the subject of the contract cannot otherwise be described by specifications which are sufficiently precise and fully intelligible to all concerned.'

103. In this connection the Commission has claimed that Article 244, paragraph 2, of the RGCE provides the possibility that there may be a reference to 'a specific origin or production' but does not include the words 'or equivalent'.

104. The Spanish Government has claimed that the provision contains partly a general prohibition, the terms of which are more or less identical to the first sentence of Article 7(2) of Directive 77/62, and partly an exception, which differs from the corresponding provision in Article 7(2) by being more restrictive, since it does not provide for the possibility of the technical specifications' indicating a specific origin or production, whether or not accompanied by the words 'or equivalent'.

105. It is clear that Article 7(2) of the directive prohibits references both to *a specific origin* or *production* and to *trade marks, patents* or *types*. It is likewise clear that all such references may be used, if necessary, in special circumstances and if they are accompanied by the words 'or equivalent'. On the other hand Article 244, paragraph 2, of the RGCE mentions the two first-named references in its first sentence and the three last-named references in its last sentence. The provision thus becomes unclear. If it is read exactly according to its wording, it gives the impression that it is permissible to refer to a specific make or source provided that the subject of the contract justifies it, without any need to mention the words 'or equivalent', and to refer to trade marks, patents or types on condition that the awarding authority cannot give a description of the subject of the contract by means of other specifications and that these references are accompanied by the words 'or equivalent'. As I mentioned, the Spanish Government contends that that interpretation is wrong since the provision by no means makes possible a reference to the make or source of a product. The government's interpretation, which supposedly brings the provision into line with the directive, is however not sufficiently certain, regard being had to the wording of the provision and the state of the law in this respect must therefore be regarded as so unclear that that in itself conflicts with the requirement under Community law of a correct transposition of directives.

106. I shall therefore propose that the Court declare that Article 244 of the RGCE is incompatible with Directive 77/62.

Provisions on criteria for the award of contracts

107. In its application the Commission claimed a declaration that the Law of 24 November 1939 on the organization and protection of national industry and Article

11 of Royal Decree No 946/1978 of 14 April 1978 on pharmaceutical services were incompatible with Community law. In the course of the oral procedure the Spanish Government stated that those provisions had been repealed. In those circumstances the Commission withdrew its claims.

Costs

108. In an earlier part of this Opinion I came to the conclusion that the claim against the Spanish Government with regard to Article 2, point 8, and Article 29 bis, paragraph 1, points 1 and 3, of the LCE and Article 2, point 8, Article 29 bis, paragraph 1, points 1 and 3, and Article 93 ter, points 1 and 3, of the RGCE should be rejected.

However, as the great majority of the Commission's claims must in my view be accepted, I shall propose that Spain be ordered to pay the costs.

Conclusion

On the basis of the foregoing considerations I shall propose that the Court:

declare that:

— by maintaining in force provisions by which certain matters are excluded from the field of application of the legislation on public contracts, namely Article 2, point 3, of the Law on State Contracts and Article 2, point 3, of the General Regulation on the award of State Contracts;

— by maintaining in force certain provisions which allow the award of private contracts, namely Article 37, paragraph 1, points 1, 2, 7 and 8, and Article 87, paragraph 4, points 1, 2 and 5, of the Law on State Contracts, Article 117, paragraph 1, points 1, 2, 7 and 8 and Article 247, paragraph 4, points 1, 2 and 5 of the General Regulation on the award of State Contracts, as well as Article 120 of the Legislative Decree on local regulations;

— by maintaining in force certain provisions concerning the rules on participation and qualitative selection criteria, namely Article 25, paragraph 1, points 1 and 3, Article 284, paragraph 5, Article 287, paragraph 2, Article 312, paragraph 2, Article 320, paragraph 3, point 5, and Article 341 of the General Regulation on the award of State Contracts; and

— by maintaining in force certain rules in the technical field, namely Article 244 of the General Regulation on the award of State Contracts,

the Kingdom of Spain has failed to fulfil its obligations under Articles 30 and 59 of the EEC Treaty as well as under Council Directives 71/305/EEC of 26 July 1971 concerning the coordination of procedures for the award of public works contracts and Council Directive 77/62/EEC of 21 December 1976 coordinating procedures for the award of public supply contracts;

dismiss the remainder of the application; and

order the Kingdom of Spain to pay the costs.