OPINION OF ADVOCATE GENERAL LENZ
delivered on 16 February 1995 *

A — Introduction

1. On 11 July 1991 the Greek Ministry for Industry, Energy and Technology concluded an agreement with six Greek manufacturers of dressing materials. This 'framework agreement' provided that the hospitals listed in Annex A of the agreement should purchase certain types of dressing material exclusively from those manufacturers. At the same time the six manufacturers undertook to produce these goods and supply them to those hospitals (Article 1 of the framework agreement). If in the future more hospitals were to be opened or other institutions made subject to the framework agreement, it was provided that such hospitals and institutions should also cover their requirements for the goods concerned exclusively from the said manufacturers (Article 8 of the framework agreement).

2. The framework agreement was to take effect for three years after it came into force. Entry into force was conditional on ratification by the Greek Minister for Industry, Energy and Technology, which was given by ministerial decree of 19 July 1991. The agreement also provided that its period of validity could be extended by one or two years (Article 14).

3. In a letter of 9 September 1991 the Commission asked the Greek Government to state its opinion on whether this procedure was compatible with Council Directive 77/62/EEC of 21 December 1976 coordinating procedures for the award of public supply contracts. [1]

4. As no reply was received to this letter, the Commission initiated the procedure laid down by Article 169 of the EC Treaty by giving the Greek Government, in a letter of 14 November 1991, an opportunity to submit its observations. In this letter the Commission stated its opinion that Directive 77/62 was applicable to the framework agreement concluded by the Greek Government and that the agreement ought therefore to have been the subject of a notice in the *Official Journal of the European Communities* pursuant to Article 9 of the directive. It is not disputed that no such notice was ever published.

* Original language: German.

1 — OJ 1977 L 13, p. 1.

5. The Greek Government contested these allegations. Accordingly, on 21 September 1992, the Commission delivered a reasoned opinion substantiating its allegations and examining the Greek Government's objections.

6. The Greek Government, in a letter of 10 December 1992, subsequently accepted that the Commission's view regarding the applicability of Directive 77/62 was correct. However, it claimed that the disputed agreement had not adversely affected competition in the Community and that there would be considerable difficulty in cancelling the framework agreement unilaterally, particularly as this would expose the Greek State to claims for damages by the manufacturers concerned. Furthermore, the Greek authorities had already complied with the Commission's recommendations. Thus, a provision in the framework agreement stipulating that only Greek primary products should be used in the manufacture of the dressing materials in question had been deleted. Consideration was also being given to refraining from exercising the option of extending the framework agreement beyond the proposed term of three years.

7. After the Commission had indicated that, in its opinion, the Treaty infringement of which it complained had not been remedied by these measures, the Greek Government sent a further letter on 13 February 1993 which described once again the measures which the Greek Government had taken or proposed to take and which had already been set out in the letter of 10 December 1992. The letter added that the Greek Government had informed the parties to the framework agreement that it was considering terminating that agreement unilaterally before the expiry date. The Greek Government also stated its intention to organize, before the end of 1993, an invitation to tender for the supply of dressing materials which would comply with all the requirements of Community law.

8. As the stated intentions of the Greek Government were not followed by concrete action, the Commission finally brought the matter before the Court of Justice pursuant to Article 169 of the EC Treaty. The Commission asks the Court:

(1) to declare that, by concluding a framework agreement for the exclusive supply by six Greek textile manufacturers of dressing materials for use by hospitals and the Greek army and by not publishing a notice to that effect in the *Official Journal of the European Communities*, the Hellenic Republic has failed to fulfil its obligations under Directive 77/62/EEC;

(2) to order the Hellenic Republic to pay the costs of the action.

9. The Hellenic Republic considers the action brought by the Commission to be inadmissible, but also raises objections on its merits. The defendant accordingly requests the Court to dismiss the action and order the Commission to pay the costs.

B — Analysis

Admissibility

10. The defendant considers the action inadmissible in two respects. First, it points out that it acknowledged, in its reply to the Commission's reasoned opinion, its failure to fulfil its obligations under the EC Treaty. At the same time, it explained in its reply that the framework agreement would not be extended beyond the planned term of three years and that the provisions of Community law would in future be complied with. In the defendant's opinion, the action brought by the Commission is abusive and in breach of the obligation to treat Member States equally. The Hellenic Republic refers in this connection to the procedure followed by the Commission in an action brought against Italy for failure to fulfil Treaty obligations. [2] In that case, it claims, the Commission treated as sufficient a written declaration that the provisions of Community law would be observed in the future.

Second, the defendant considers the action inadmissible because the Commission intervened only at the stage when the contested agreement was to be implemented. Under Article 3(1) of Council Directive 89/665/EEC on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts, [3] the Commission must take steps before the contract in question is concluded if it considers that the Community provisions concerning the award of public contracts have been infringed.

11. The second submission of the Greek Government must be dismissed immediately. If, in pursuing an infringement of the Community provisions in the field of public procurement, the Commission does not act as diligently as might have been expected in view of the circumstances of the case, this may be relevant to a decision on an application by the Commission for interim measures in the context of an action for failure to comply with Treaty obligations. [4] However, it in no way affects the admissibility of the action as such. In any event, the Commission has rightly pointed out that it informed the

2 — Judgment in Case 199/85 *Commission* v *Italy* [1987] ECR 1039.

3 — OJ 1989 L 395, p. 33.

4 — See the order of the Court of Justice in Case C-87/94 R *Commission* v *Belgium* [1994] ECR I-1395, in particular paragraph 42.

Greek Government of its objections as early as 9 September 1991, that is to say, less than two months after the framework agreement had entered into effect.

12. The purpose of Article 3(1) of Directive 89/665 was to enable the Commission to intervene with the Member States if, 'prior to a contract being concluded', it considered that a clear and manifest infringement of Community provisions in the field of public procurement had been committed. The power in question is thus aimed at prevention. As the Commission rightly points out, this cannot affect the Commission's powers under Article 169 of the EC Treaty. This is confirmed by the Court's judgment of 24 January 1995 in an action for failure to fulfil Treaty obligations brought by the Commission against the Netherlands. [5] In that judgment the Court pointed out that 'that special procedure under Directive 89/665 is a preliminary measure which can neither derogate from nor replace the powers of the Commission under Article 169 of the Treaty'. [6]

13. That question is in any case irrelevant here. If the Commission is to take steps 'prior to a contract being concluded', this presupposes that it is aware of the contract before its conclusion. However, the defendant has not alleged (let alone proved) that the Commission was already aware of the framework agreement before 19 July 1991.

14. The defendant's first argument in support of the inadmissibility of the action likewise lacks conviction. The Hellenic Republic pleads that it has acknowledged and discontinued the failure in respect of Treaty obligations alleged by the Commission. This submission is particularly surprising in view of the fact that the defendant here also challenges the merits of the action brought by the Commission, that is to say, it specifically denies any failure to fulfil its obligations. However, the Greek Government's argument is untenable even if this inconsistency is overlooked. The argument is based primarily on the fact that the defendant gave the Commission a written undertaking to observe the relevant provisions of Community law in the future (that is to say, after the expiry of the framework agreement). In other words, the Greek Government takes the view that it rectified its alleged infringement of the Treaty by promising to comply with its Treaty obligations in the future.

15. There can be no serious doubt that this argument must be rejected. Member States would otherwise have a simple and convenient defence against actions under Article 169 of the Treaty for failure to fulfil their obligations. The present case offers a particularly good example of this. As already mentioned, the contested framework agreement was concluded in July 1991 for a period of three years. In its letter of 10 December 1992, thus at a time when not even half of the period had elapsed, the Greek Government informed the Commission that it was considering not extending the period of validity of the framework agreement. In its letter of 13 February 1993 it indicated that it might terminate the agreement before its

5 — Case C-359/93 *Commission* v *Netherlands* [1995] ECR I-0000.

6 — Paragraph 13.

expiry date. However, this was not done, as the statement of defence confirms. The Greek Government has not referred to any circumstances which would suggest that it was impossible for it to terminate the agreement prematurely. The general and unquantified reference to claims for damages which might possibly be brought by the manufacturers concerned against the Greek State in the event of termination is not sufficient for this purpose. The mere promise to adhere to Community law in the future could not remedy the infringement of the Treaty.

16. Contrary to the Greek Government's opinion, the action brought by the Commission against Italy for failure to fulfil Treaty obligations, which was the subject of the Court's judgment in Case 199/85, [7] does not support an argument to the contrary. That case concerned the construction of a solid-waste recycling plant by the Municipality of Milan, in relation to which the provisions of Directive 71/305/EEC concerning the coordination of procedures for the award of public works contracts were disregarded. The Commission's reasoned opinion in that case complained of this infringement and requested Italy to take 'the necessary measures'. The reasoned opinion added that the necessary measures were to be understood as including in particular a written undertaking by the Municipality of Milan to observe all the provisions of Directive 71/305 in the future.

17. However, the Hellenic Republic's reliance on the procedure followed by the Commission in the above case is mistaken in at least two respects. First, it must be observed that the Commission brought an action for infringement of the Treaty before the Court in that case *even though* the Mayor of Milan had made a written declaration in the above-mentioned terms, and the Court upheld the Commission's application. It should be noted that, in connection with the question of admissibility, the Court pointed out in its judgment that the Italian authorities had adopted no 'practical measure' to give effect to that declaration. [8] Second, it is significant that the original situation in that case was quite different from the present situation. The Commission delivered its reasoned opinion in the earlier case on the assumption that the construction work in question was as good as finished and therefore the contracts which had been awarded could no longer be suspended or cancelled. [9] In that context it is clear why the Commission was inclined to accept an undertaking with regard to the future. In the present case, by contrast, the Greek Government was perfectly able to remedy the infringement of the Treaty — at least, with regard to the remaining term of the framework agreement — on receipt of the Commission's reasoned opinion because the effects of the framework agreement were far from exhausted at that date.

18. In its statement of defence the Greek Government also seeks to rely on the fact

7 — See footnote 2 above.

8 — Paragraph 8.

9 — See my Opinion in Case 199/85 [1987] ECR 1047, at p. 1049, point 8.

that one of the provisions of the framework agreement was cancelled in response to the Commission's remonstrations. As already mentioned, this was a clause to the effect that only Greek primary products should be used in the production of the dressing materials in question. While the cancellation of this condition was undoubtedly a step in the right direction, this amendment was of course not sufficient to remedy the Treaty infringement alleged by the Commission as it did not affect the substance of the framework agreement, that is to say, the obligation on the hospitals and other institutions to obtain their supplies solely from the six Greek manufacturers named in the agreement.

19. For the sake simply of completeness, it may be mentioned that the fact that the Commission's reasoned opinion (and the application in this action itself) complains of the exclusive purchasing obligation for 'hospitals and the army', whereas the letter of 14 November 1991 requesting the Greek Government's observations referred only to 'hospitals', has no bearing on the question of admissibility. As the representative of the Greek Government explained during the hearing, the exclusive purchasing obligation applied from the beginning also to army hospitals. The wording chosen by the Commission in its letter therefore corresponds to the terms of the application. This, in my opinion, is sufficient. [10] The Greek Government has in any event raised no objection on this point.

10 — See also the judgment in Case 274/83 *Commission* v *Italy* [1985] ECR 1077, paragraph 21, which states that 'such strict requirements' cannot be imposed with regard to the initial letter as can be imposed with regard to the reasoned opinion.

Substance

20. In the course of time Directive 77/62 has undergone many amendments [11] and was finally recast by Council Directive 93/36/EEC of 14 June 1993 coordinating procedures for the award of public supply contracts. [12] According to the Court's case-law, the question whether there has been a failure to fulfil obligations must be examined on the basis of the position in which the Member State found itself at the end of the period laid down in the reasoned opinion. [13] In the present case, therefore, regard must be had to the factual and legal situation towards the end of 1992. The version of the provisions applicable at that time, which must therefore be examined here, appears in Council Directive 88/295/EEC of 22 March 1988. [14] In its application the Commission refers to the provisions of the original version of the directive. As the subsequent amendments do not entail any material alterations so far as the present case is concerned, the position is not affected. I shall refer below to the provisions applying at the end of 1992.

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

12 — OJ 1993 L 199, p. 1.

13 — See the judgment in Case C-200/88 *Commission* v *Greece* [1990] ECR I-4299, paragraph 13.

14 — Council Directive 88/295/EEC of 22 March 1988 amending Directive 77/62/EEC relating to the coordination of procedures on the award of public supply contracts and repealing certain provisions of Directive 80/767/EEC (OJ 1988 L 127, p. 1). The later amendments of Directive 77/62 by Council Directive 90/531/EEC of 17 September 1990 on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors (OJ 1990 L 297, p. 1) are not relevant to the present case.

21. According to Article 9(2) of Directive 77/62, contracting authorities who wish to award a public supply contract must make known their intention by means of a notice. However, pursuant to Article 5(1)(a), first indent — overlooking the supply contracts referred to in Article 5(1)(a), second indent, which are not at issue in the present case — this obligation applies only to public supply contracts concluded by contracting authorities within the meaning of Article 1(b) of the directive and the estimated value of which is not less than ECU 200 000. Under Article 1(a) of the directive, 'public supply contracts' are 'contracts for pecuniary interest concluded in writing' between a supplier and one of the contracting authorities defined in Article 1(b) for 'the purchase, lease, rental or hire purchase, with or without option to buy, of products'.

22. The Commission contends that the Greek Ministry for Industry, Energy and Technology and the hospitals and other institutions covered by the disputed agreement must be regarded as 'contracting authorities' within the meaning of the directive. This seems to me correct and the Greek Government does not disagree. However, the latter has raised the objection that the framework agreement does not come within the scope of the directive because it is only a 'structure' within which a large number of supply contracts are concluded, none of which exceeds ECU 200 000 in value.

23. The Greek Government thus takes the view that the supply contracts concluded by the hospitals and other institutions concerned should be considered on an individual basis. As none of them has a value of more than ECU 200 000, it argues, the directive does not apply at all. This submission may imply a further argument, concerning the question whether the disputed framework agreement is a 'supply contract' at all within the meaning of the directive. It is not entirely clear from the submissions of the Greek Government's representative at the hearing whether the Greek Government opposes the Commission's application on this point also. I shall therefore deal briefly with it just in case this is so.

24. The first argument strikes me as unsound. By concluding the framework agreement the Greek Government (or the responsible Ministry) itself amalgamated the separate supply contracts into a single unit. That being so, the only consistent course to follow is to consider the whole, rather than individual supply contracts, as a basis for calculating the value. This is supported by the Commission's observation that otherwise it would be possible to circumvent the provisions of Directive 77/62. It is common ground that the value calculated on the basis of all the supply contracts covered by the framework agreement exceeds the threshold of ECU 200 000.

25. It may of course be more important to determine whether the framework agreement

is a 'supply contract' at all within the meaning of the directive. In order to fill out the framework created by the framework agreement it is of course necessary for the hospitals and other institutions concerned to place specific supply contracts. Furthermore, 'pecuniary interest' is payable only on the basis of individual contracts. However, these considerations are rather theoretical. All the principal contractual elements, in particular the exclusive purchasing obligation and the price calculation, are already laid down in the framework agreement, with the result that the individual supply contracts do little more than specify the quantity to be supplied. In those circumstances there should hardly be any doubt that, having regard to the interpretation required here, which must be guided by the aims of the directive, a framework agreement of this kind must be treated as a supply contract within the meaning of the directive. [15] If this were not accepted, the present action would have to be dismissed (because there would be no breach of Directive 77/62). However, the framework agreement would then quite certainly have to be classified as a measure having equivalent effect to a quantitative restriction on imports within the meaning of Article 30 of the EC Treaty in so far as it prevents tenderers from other Member States from supplying specific customers in Greece.

26. The Greek Government also claims that in the present case it refrained from publishing the notice required by Article 9 of the directive because no tenderers from other Member States have so far shown any interest in such supply contracts. A notice would for that reason have been a meaningless formality. This contention must be categorically rejected. Clearly, it is perfectly possible that the situation described by the Greek Government is attributable precisely to the fact that no information was available to potential tenderers from other Member States.

27. Finally, the Greek Government contends that such notice was unnecessary by reason of one of the derogations provided for by Article 6 [16] of the Directive. This provision relates to cases where 'for technical or artistic reasons, or for reasons connected with protection of exclusive rights, the goods supplied may be manufactured or delivered only by a particular supplier'. At the hearing before the Court the representative of the Greek Government was unable to explain how this provision could apply to the present case, which concerns the supply of dressing materials. As the Court has recently reconfirmed (and precisely with reference to this provision of Directive 77/62), the burden of proof in this connection is borne by the party which seeks to rely on the derogation. [17] The claim made by the Greek Government during the hearing that the dressing

15 — See the similar view expressed by the Commission in its Guide to the Community Rules on Open Government Procurement (OJ 1987 C 358, pp. 1, 16).

16 — The Greek Government refers to Article 6(1)(b) of the directive. In the version of the directive which is applicable here, this provision appears in Article 6(4)(c).

17 — Judgment in Case C-328/92 *Commission* v *Spain* [1994] ECR I-1569, paragraph 16.

materials in question could have been supplied in any case only by the six Greek manufacturers is of no significance — quite apart from the fact that the representative of the Greek Government was unable, in response to a question from the Court, to produce proof of this — because the directive does not provide for an exception in this respect.

C — Conclusion

I propose accordingly that the Court uphold the Commission's application and order the Hellenic Republic to pay the costs of the action.