OPINION OF MR ADVOCATE GENERAL LENZ
delivered on 27 June 1991 *

Mr President,
Members of the Court,

1. The case in which I am called to give my opinion today is one of four references for a preliminary ruling concerning the same subject matter.[1] It is concerned with a requirement laid down in Italian legislation that at least 30% of all public supply contracts are to be given to undertakings established in the Mezzogiorno.

2. In Case C-21/88 the Court had occasion to rule on a legal situation identical to the present, Case C-351/88. In particular, the way in which intra-Community trade is affected in the present case is similar to Case C-21/88. In Case C-21/88 the plaintiff claimed that it obtained 80% of its X-ray material from Germany. In the present case, the plaintiff in the main proceedings obtain a significant proportion of the equipment it distributes from France.

3. In Case C-21/88 I delivered my opinion on 28 November 1989 and it was broadly followed by the Court in its judgment of 20 March 1990.

4. The similarity to Case C-21/88 of the reference for a preliminary ruling in this case was drawn to the attention of the national court. However, the reference for a preliminary ruling has not yet been withdrawn — probably for reasons connected with the national rules of procedure. For that reason, the procedure in the present case must be taken to its formal conclusion.

5. In order to answer the questions referred for a preliminary ruling, I refer to my Opinion of 28 November 1989 and the judgment of 2 March 1990 in Case C-21/88.

6. Even though the legal problems correspond to those in Case C-21/88 — as, moreover, the parties to the proceedings agree — and the question referred for a preliminary ruling must therefore be regarded as answered by the judgment, in view of the observations made by the plaintiff's representative at the hearing on 5 June 1991 some remarks on the duties arising from a judgment of the Court of Justice are called for.

7. The plaintiff's representative emphasized that, more than a year after the Court's judgment in Case C-21/88, no measures had been adopted to bring the Italian legislation into conformity with Community law. He stated that no steps had been taken, whether by legislative measures or administrative directions or the latest annual law on

* Original language: German.

1 — See Case C-21/88 *Du Pont de Nemours* v *Unità sanitaria locale No 2 di Carrara* [1990] ECR I-889, Case C-310/88 *Istituto Behring* v *USSL* pending, and Case C-311/88 *Hoechst Italia* v *USSL* pending.

the Community, to give effect to the consequences of the judgment. Efforts to make the Commission bring proceedings for breach of Treaty obligations had been fruitless.

8. It must first be stated that a judgment in proceedings for a preliminary ruling is a judgment on interpretation and binds only the parties to the proceedings and the courts charged with ruling on the case. Nonetheless, Member States are required to rectify a provision in their internal legal order which is contrary to Community law, when such a situation can be deduced from a judgment in proceedings for a preliminary ruling. If a Member State fails to take the necessary measures and thereby maintains in force the legal situation that is contrary to the Treaty, it commits a breach of the Treaty, which the Commission, in the first place, is required to pursue.

9. The practice of the Commission has therefore been to react to judgments delivered by the Court of Justice in proceedings for a preliminary ruling by bringing proceedings against the Member States concerned. As examples of where such an approach has been taken, one can cite proceedings for a breach of a Treaty obligation [2] brought against the Federal Republic of Germany regarding 'butter ships' [3] and proceedings for breach of a Treaty obligation [4] brought against Belgium in connection with the levying of a registration fee for students known under the name of 'minerval'. [5]

2 — Case 325/82 *Commission* v *Germany* [1984] ECR 777.

3 — Case 158/80 *Rewe* v *Hauptzollamt* [1981] ECR 1805, and Case 278/82 *Rewe* v *Hauptzollämter Flensburg, Itzehoe and Lübeck-West* [1984] ECR 721.

4 — Case 293/85 *Commission* v *Belgium* [1988] ECR 305.

5 — Case 293/83 *Gravier* v *City of Liège* [1985] ECR 593, and Case 152/82 *Forcheri* v *Belgium* [1983] ECR 2323.

10. In order to provide legal protection to individual persons, it is, admittedly, not absolutely essential to amend national law as individuals can rely on Community law before the courts even in the absence of legislative measures to that effect. In this way individuals can, as in the main proceedings, achieve the implementation of Community law through courts prepared to apply it — which is, moreover, a duty of each of the courts of the Member States.

11. However, the situation becomes particularly critical if — as in the period following the judgment in Case C-21/88, according to the assertions made by the plaintiff's representative at the hearing — courts in the Member States maintain that the legal situation contrary to Community law is lawful, in spite of the clear wording to the contrary of a judgment of the Court of Justice, and fail to apply Community law. Such a denial of legal protection in itself constitutes a fresh breach of the Treaty.

12. Action by the Member State concerned is necessary both to clarify the legal situation and to avoid further breaches of the Treaty. In the event that the Member State fails to take any action, the Commission, whose task it is to monitor the application of the Treaty (Article 155 of the EEC Treaty), may and ought to remind it of its obligations under Community law by means of the procedures for breach of Treaty obligations and urge it to bring its internal legal order into conformity.

13. In so doing, the Commission must act on its own initiative, because it cannot be

obliged by individual persons to intervene. Natural or legal persons may bring proceedings under Article 175 of the EEC Treaty for failure to take action only if a Community institution has failed to address *to them* a binding legal act (third paragraph of Article 175 of the EEC Treaty). As regards the bringing of proceedings for breach of Treaty obligations individuals are restricted to making informal complaints and observations.

14. Lastly, it should be stated again, in order to make the legal position absolutely clear, that Article 30 of the EEC Treaty prohibits the contested rules from reserving part of the public supply market, and the rules cannot be justified by the provisions of the Directive coordinating procedures for the award of public supply contracts.[6] I have already discussed that point in paragraph 49 et seq. of my Opinion in Case C-21/88. Paragraph 17 of the judgment in that case expressly states that Article 26 of the directive cannot impede the application of Article 30 of the EEC Treaty.

15. In its original version Article 26 of the Directive stated:

'This Directive shall not prevent the implementation of provisions contained in Italian Law No 835 of 6 October 1950 (Official Gazette No 245 of 24 October 1950 of the Italian Republic) and in modifications thereto in force on the date on which this Directive is adopted; *this is without prejudice to the compatibility of these provisions with the Treaty.*'[7]

16. That rule is comparable to a provision of a directive which was referred to in the two cases on milk substitutes,[8] in order to justify legal provisions which were incompatible with Article 30 of the EEC Treaty. The Court of Justice also stated in those two cases that:

'Without its even being necessary to rule on whether Article 5 of Regulation No 1898/87 is retroactive it is sufficient to observe that that article provides that national regulations may be maintained only on condition that the general provisions of the EEC Treaty are complied with. However, as the Court has held above, the provision at issue in this case is contrary to Article 30 of the EEC Treaty and therefore does not satisfy the conditions laid down by Article 5 of Regulation No 1898/87.'[9]

17. The subsequent amendment of Article 26 of Directive 77/62[10] is equally incapable of justifying rules of the kind referred to. The wording of the amended Article is as follows:

'(1) This Directive shall not prevent, until 31 December 1992, the application of existing national provisions on the award of public supply contracts which have as their objective the reduction of

6 — Council Directive 77/62/EEC of 21 December 1976 coordinating procedures for the award of public supply contracts (OJ 1977 L 13, p. 1), last amended by Council Directive 90/531/EEC of 17 September 1990 (OJ 1990 L 297, p. 1).

7 — My emphasis.

8 — Case 216/84 *Commission* v *France* [1988] ECR 793 and Case 76/86 *Commission* v *Germany* [1989] ECR 1021.

9 — See paragraph 22 of the judgment in Case 216/84 and paragraph 23 of the judgment in Case 76/86, referred to above.

10 — By Council Directive 88/295/EEC of 22 March 1988 (OJ 1988 L 127, p. 1).

regional disparities and the promotion of job creation in the most disadvantaged regions and in declining industrial regions, *on condition that the provisions concerned are compatible with the Treaty* and with the Community's international obligations.' [11]

18. In particular, the amended version cannot — as was argued at the hearing — excuse the Commission's inactivity as regards bringing proceedings for breach of a Treaty obligation. The time-limit of 31 December 1992 laid down in Article 26 for the exceptions cannot remove the incompatibility of the system of preferences with the Treaty.

Costs

19. The proceedings for a preliminary ruling are in the nature of a step in the proceedings pending before the national court. For that reason, it is for the national court to rule on the costs as between the parties to the main proceedings. The costs incurred by the Italian Government and the Commission are not recoverable.

20. Having regard to the fact that it is not for the Court of Justice in preliminary-ruling proceedings to rule on whether or not a provision of a national law is in conformity with Community law, I suggest that, in reply to the request for an assessment under Community law of the rules reserving the award of contracts to certain undertakings, the Court should adopt the formulation contained in its judgment in Case C-21/88 and rule as follows:

'(1) Article 30 of the EEC Treaty must be interpreted as precluding national rules which reserve to undertakings established in particular regions of the national territory a proportion of public supply contracts.

(2) The fact that national rules might be regarded as aid within the meaning of Article 92 of the Treaty cannot exempt them from the prohibition set out in Article 30 of the Treaty.'

11 — My emphasis.