nothing therefore to prevent the Commission from setting out in detail in the reasoned opinion the complaints which it has already made more generally in its initial letter.

2. For the purposes of Article 29 (1) of Directive 71/305 concerning the coordination of procedures for the award of public works contracts the award of a contract on the basis of the criterion of the most economically advantageous tender presupposes that the authority making the decision is able to exercise its discretion in taking a decision on the basis of qualitative and quantitative criteria that vary according to the contract in question and is not restricted solely to the quantitative criterion of the average price stated in the tenders.

3. The Member States are obliged, by virtue of Article 5 of the EEC Treaty, to facilitate the achievement of the Commission's tasks which, under Article 155 of the EEC Treaty, consist in particular of ensuring that the provisions of the Treaty and the measures adopted by the institutions pursuant thereto are applied.

Where, for that purpose, a directive imposes upon the Member States an obligation to provide information in order to enable the Commission to check whether the directive has been implemented effectively and completely, the failure by a Member State to provide the information constitutes a failure to fulfil its obligations, even if the Commission was, in fact, able to obtain information regarding the implementing provisions adopted by that State.

OPINION OF MR ADVOCATE GENERAL LENZ
delivered on 13 February 1985 *

Mr President,
Members of the Court,

A. This case concerns the implementation in Italy of Council Directive 71/305/EEC of 26 July 1971 concerning the coordination of procedures for the award of public works contracts (Official Journal, English Special Edition 1971 (II), p. 682).

That directive was also at issue in Case 10/76. [1] On that occasion its contents were considered in detail so that it is sufficient for me here merely to refer to that case.

A first Law on the subject was adopted in Italy on 2 February 1973. That Law was at issue in the earlier proceedings, which culminated in a declaration that, by failing to adopt the measures necessary to comply with Directive 71/305 within the period of 12 months from its notification as laid down in Article 32, namely by 29 July 1972, the Italian Republic had failed to fulfil an obligation under the EEC Treaty.

A further law was adopted on 8 August 1977 which, according to the Commission,

* Translated from the German.

1 — Judgment of 22 September 1976 in Case 10/76 *Commission of the European Communities* v *Italian Republic* [1976] ECR 1359.

correctly implemented the directive in Italian law.

However, the matter did not rest there. On 10 December 1981, the legal position was altered by Law No 741 in such a way that the Commission, when it received notice thereof, came to the conclusion that various provisions of the Law were inconsistent with the aforementioned directive.

By a telex message dated 7 April 1982, the Commission notified its views to the Italian Government and asked it to submit its observations. Since no observations were submitted, the Commission, by a letter dated 17 December 1982, instituted proceedings under Article 169 of the EEC Treaty. The letter set out which provisions of the Italian Law of 10 December 1981 (namely Article 9, the first, third, fourth and fifth paragraphs of Article 10, Articles 11 and 13 and the second paragraph of Article 15 (2)) were allegedly contrary to which provisions of the directive and contended that, by failing to communicate the text of the aforementioned Law to the Commission, the Italian Government had failed to fulfil its obligations under Article 33 of Directive 71/305.

In a written reply dated 2 February 1983, the Italian Government accepted most of the Commission's allegations and pointed out that a draft law to amend the Law in question had already been prepared.

The Commission on examining a copy of that draft law sent to it, came to the conclusion that, if the draft law were adopted, it would meet some of its complaints but others would not be satisfactorily dealt with. In any event on 2 August 1983, it delivered a reasoned opinion under Article 169 of the EEC Treaty because at that time the legislative process had still not been completed. Furthermore, because the Italian legal provisions were not amended within the period laid down in that reasoned opinion, the Commission brought the matter before the Court of Justice on 10 December 1983 and sought a declaration that, by adopting certain provisions for the implementation of Directive 71/305 and by failing to notify the Commission of the main provisions of Italian law concerning the award of public works contracts, the Italian Republic had failed to fulfil its obligations under the EEC Treaty.

During the written procedure before the Court of Justice the defendant accepted that several of the complaints were justified (namely those relating to the third, fourth and fifth paragraphs of Article 10 and Article 13 of Law No 741). Conversely the Commission, after noting the Italian Government's explanations, conceded that some of its complaints could not be upheld (namely those relating to Article 11 and, in part, to Article 9 of the said Law).

During the oral procedure it was further learnt that Law No 687 amending Law No 741 and the provisions relating to provisional security and advertising had been adopted on 8 October 1984. Most of the remaining points in dispute have, according to the Commission, thereby been resolved. All that is now outstanding is the application for a declaration that the Italian Republic has failed to fulfil its obligations under the EEC Treaty as regards the criterion for the award of contracts (which was dealt with in the first paragraph of Article 10 of Law No 741 and which

pursuant to Law No 687 was provided for in virtually identical terms in the amended version of subparagraph (b) of the first paragraph of Article 24 of the Law of 8 August 1977) and to its failure to comply with Article 33 of the directive after the adoption of Law No 741.

The Italian Government denies both those complaints.

B. It is that dispute which now falls to be considered.

1. Against the first of those complaints, the defendant relied during the *oral procedure* primarily on an *objection of inadmissibility.*

According to the Italian Government, in the letter instituting the procedure it is alleged only that the contested first paragraph of Article 10 of Law No 741 (which inserted in Article 24 of the Law of 8 August 1977 concerning the criteria for the award of contracts the further provision that a contract could also be awarded to a tenderer whose tender corresponded to or came closest to the average of those tenders in the lower half of the scale between the lowest and highest tenders), was contrary to Article 29 (3) of the directive which provides that:

'The price criterion as calculated in accordance with current national regulations (Italian "anonymous envelope" procedure) may be retained for a period of three years following expiry of the time-limit laid down in Article 32 for contracts whose estimated value does not exceed 10 000 000 units of account, and for seven years from the date for contracts whose estimated value is between 1 000 000 and 2 000 000 units of account.'

That apparently occurred, according to the Commission's aforementioned letter, because Article 4 of Law No 14 of 2 February 1973 (to which the contested Article 10 refers) itself refers to Article 1 (d) of the Law of 2 February 1973 which provides for *secret* tenders to be examined by reference to the average value within the meaning of Article 4. However, in its reasoned opinion (and during the proceedings before the Court) the Commission has exclusively taken the view that the criterion for the award of contracts did not correspond to any of the criteria laid down in *Article 29 (1)* of the directive and was therefore inconsistent with that provision which provides that:

'The criteria on which the authorities awarding contracts shall base the award of contracts shall be:

either the lowest price only;

or, when the award is made to the most economically advantageous tender, various criteria according to the contract: e.g. price, period for completion, running costs, profitability, technical merit.'

According to the case-law, that is not possible. It has been held that the letter *instituting* proceedings must define the subject matter at issue in order that the Member State concerned may defend itself in good time. No further *causa petendi* may therefore be introduced at a later stage of the procedure, that is to say it is not possible to cite a further legal provision in support of a complaint. If the Commission is changing its application in that manner, thereby making a claim which was not contained in the letter instituting the procedure, that must be regarded as inadmissible and, as has also been established in the Court's judgments, such an action cannot become admissible by virtue of the fact that the Member State concerned has entered into a dispute with regard to the complaint as amended in the reasoned opinion.

Even if such an attitude appears excessively strict and formalistic, it seems to be correct according to the earlier case-law from which it may be deduced that in proceedings under Article 169 of the EEC Treaty the letter instituting the proceedings is of great significance in defining the factual and legal ambit of the subject-matter at issue. Its purpose is to give the Member State concerned an opportunity to defend itself; only to the extent that such an opportunity has been given, with regard to the factual and legal arguments, down a proper preliminary administrative procedure exist as a pre-requisite for the commencement of proceedings before the Court and therefore only those matters which have already been raised in the administrative procedure may be considered in the proceedings before the Court.

Furthermore, I take the view that the judgment in Case 254/83 [2] referred to by the Commission did not bring about a decisive change in the case-law even though it was declared in that judgment (as was alleged in the reasoned opinion) that the defendant had failed to fulfil its Treaty obligations by failing to adopt the measures in question and also by failing to notify the Commission thereof, despite the fact that the letter instituting the procedure merely alleged that the Commission was not *notified* of the measures which the Member State was under a duty to adopt. For in that case it may well have been concluded that, regardless of its actual wording, the letter instituting the procedure also related *impliedly* to the failure to adopt the measures which had not been notified. In addition it would have been absurd, once it became apparent that the Member State had failed to adopt the measures in question and not merely failed to notify them, nevertheless to limit the judgment to the latter failure, which without the first is left hanging in the air, as it were.

In the case now before the Court it is an undeniable fact that in the letter instituting the proceedings, the Italian provision complained of and specified as the subject-matter was judged only in the light of *paragraph 3* of Article 29 of the directive and that the Italian Government's response related to that provision alone. It is also clear on the other hand that the complaint first raised in the reasoned opinion that the *first paragraph* of Article 29 of the directive had not been complied with is a completely different claim and that the Italian Government was not able to make any submissions thereon during the administration procedure precisely because the Commission had referred expressly only to Article 29 (3). Since the preliminary administrative procedure has not been conducted properly the application for a declaration that the first paragraph of Article 10 of Law No 741 is contrary to Article 29 (1) of the directive cannot be regarded as admissible.

Furthermore, since according to the aforementioned case-law the question is one relating to admissibility, it is a matter for the Court to decide of its own motion; it is therefore irrelevant that the Italian Government drew attention to the matter for the first time only during the oral procedure and only then raised an objection of inadmissibility.

2. In view of that conclusion in relation to the first of the remaining two points at issue, I turn now to consider, as a secondary matter and fairly briefly, the question whether the Commission's objection in relation to the first paragraph of Article 10 of Law No 741 is justified or whether the Italian Government is correct in its view that the said provision (which was sub-

2 — Judgment of 3 October 1984 in Case 254/83 *Commission of the European Communities* v *Italian Republic* [1984] ECR 3395.

stantially retained in the Law of 8 October 1984 — a fact which is of course not now in dispute) is wholly in conformity with Article 29 (1) of Directive 71/305.

As has already been pointed out, the provision in question added to Article 24 of the Law of 8 August 1977 (which provided as criteria for the award of contracts (a) the lowest price and (b) the most economically advantageous tender) the further criterion of the average price calculated on the basis of the average of those tenders in the lower half of the scale between the lowest and highest tenders (which is the method of calculation referred to in Article 4 of the Law of 2 February 1973).

The Commission takes the view that that provision does not correspond to the criterion referred to in the first subparagraph of Article 29 (1) precisely because it does not refer to the *lowest* price; it also contends that it does not comply with the criterion of the most economically advantageous tender laid down in the second subparagraph of Article 29 (1) because that provision basically covers only qualitative and not purely quantitative criteria; if price is to be a relevant consideration then it can only be so as one of *several* factors to be considered in taking a discretionary decision.

In reply to the Commission's argument the Italian Government contended that in reality the provision in question, contrary to the Commission's belief, did not add a third criterion for the award of contracts and fell completely within the scope of the second subparagraph of Article 29 (1). That view is based on the fact that in that subparagraph, factors which are certainly not exclusively qualitative criteria, such as the 'period of completion', are of significance. Price is also expressly mentioned as a factor to be taken into account and there is certainly no compelling reason to conclude that price is only of importance in conjunction with other factors. In fact the contested provision lays down a yardstick for calculating the most economically advantageous price because the function of the price in that provision is different from its function in the first subparagraph of Article 29 (1): the correct *market price* is determined by that method, which, by excluding extremely low tenders which can hardly be regarded as serious, ensures that the contract is awarded to a tenderer who may be relied on to carry out the work correctly.

In the light of the wording and scheme of the directive I consider that the view taken by the Commission contains the better arguments. It is obvious that only two criteria for the award of contracts are provided for in the directive. If the sole factor is price, the first subparagraph of Article 29 (1) clearly provides that only the *lowest* price is to be taken into account and no other. However, inasmuch as the price is also relevant under the second subparagraph of Article 29 (1), that is to say in connection with the most economically advantageous tender, the intention must be that in that context price is not to be taken into account in isolation and by way of derogation from the first subparagraph — which would hardly be comprehensible — but only in conjunction with the other factors (such as period for completion, running costs and so on) which must be assessed when a discretionary decision is taken. That view is supported not least by Article 29 (2) which lays down what information is to be provided when the second subparagraph of Article 29 (1) is applied: it provides that *all* the criteria applied to the award, where possible in descending order of importance, are to be stated. That does in fact show that a *number* of criteria fall to be considered under the second subparagraph of Article 29 (1). Thus a tender can hardly be 'the most

economically advantageous tender' if it is determined on the basis of the average of those tenders in the lower half of the scale between the lowest and highest tenders.

Even if the Italian Government's argument that the advertising authority may be particularly concerned to exclude extremely low tenders (because they are often not serious and give rise to doubt whether the work involved will be completed reliably) is accepted, it is certainly not necessary to derogate from the scheme of the directive to achieve that purpose as was done in Italian Law No 741. On the contrary, account may be taken of that aim by laying down minimum prices, which is, according to the Commission's submission, a quite customary practice in Italy. I do not accept the counter-argument that that might give rise to difficulties since the price level may change considerably between the invitation to tender and the completion of the project due to inflation. In fact that problem may be mitigated by speeding up somewhat the procedure which does not necessarily have to take up to a year, as is apparently often the case in Italy. Furthermore, the administration should be equally able, when laying down a minimum price, to make an allowance for inflation over a relatively short period, as is expected of the undertakings submitting tenders, on the basis of whose tendered prices, according to the contested provision, an average price is to be determined as the price which most closely corresponds to the market conditions.

If it were in fact considered appropriate to give a judgment on that part of the appliation, it should be declared that the first paragraph of Article 10 (1) of Law No 741 is incompatible with the first subparagraph of Article 29 (1) of the directive and that it does not comply with the requirements of the second subparagraph of Article 29 (1). It should also be recognized that the Commission has an interest in such a declaration even after the repeal of Law No 741 because the Italian Government has substantially retained the contested provision in Article 2 of the Law of 8 October 1984.

3. The second remaining point at issue relates to Article 33 of the directive which provides that:

'Member States shall ensure that the text of the main provisions of national law which they adopt in the field covered by this directive is communicated to the Commission.'

Since this point does not involve the question of admissibility, it may be dealt with quite briefly.

There is no doubt that the Italian Law of 1981 falls within the scope of Article 33 of the directive because it was obviously adopted in a field covered by the directive and even to some extent amends legislation that was in conformity with Community law in a manner at variance with Community law. Furthermore, it is not disputed that the Italian Government failed to communicate the text of that Law to the Commission. It is therefore clear that Article 33 of the directive has been infringed and that it was correct for a procedure under Article 169 of the EEC Treaty to be instituted.

It is not possible to argue that the breach relates only to a very minor obligation. The purpose of provisions such as Article 33 is absolutely clear: they help the Commission to monitor the implementation of directives which otherwise, in view of the large numbers of such Community acts, would not be sufficiently effective to cover ten

legal systems with provisions whose significance is often difficult to assess. In this context I refer the Court to its judgment in Case 96/81.[3] In that case, whose subject-matter was similar to that in this case, it was emphasized that the Member States are obliged, by virtue of Article 5 of the EEC Treaty, to faciliate the achievement of the Commission's tasks. The Court went on to say that the directive which was the subject of that case imposed an obligation to provide information; that information had to be clear and precise and indicate unequivocally the relevant provisions, for otherwise the Commission would not be in a position to check whether the Member State had effectively and completely implemented the directive.

Finally, it is also clear that the fact that the Commission became aware of the contested provision of Italian law in some other way — although only in March 1982 — did not remedy the aforementioned breach, that is to say does not justify the breach. Furthermore, it goes without saying that, in view of the significance of the contested provisions, the Commission is quite right to seek a declaration that the Italian Republic has failed to comply therewith in order to draw attention, once again, to the importance of such provisions.

4. Finally, a few words must also be said with regard to the costs of the action.

It must be recalled first that the eight complaints originally made against it (one of which was divided into two parts), the Italian Government immediately recognized that three were justified and amended the relevant Italian law accordingly in October 1984 — which it also did in relation to one and a half of the other complaints. It is of importance also that the Commission had to admit that one and a half complaints were unjustified and lastly that one complaint must be declared inadmissible on the ground that the preliminary administrative procedure had not been conducted properly.

In those circumstances, it can hardly be said that the Commission's application was essentially successful and I do not consider it to be justified to order the Italian Republic to pay the whole of the costs of the action. It would be more appropriate to order the Italian Republic to pay half of the Commission's costs and the whole of its own.

5. In view of the foregoing, I propose that the Court should:

Dismiss as inadmissible the application for a declaration that the first paragraph of Article 10 of the Italian Law of 10 December 1981 is contrary to Article 29 (1) of Directive 71/305;

Declare that, by failing to notify the Commission of the text of the Law of 10 December 1981 after it had been adopted, the Italian Republic has infringed Article 33 of the said directive;

Order the Commission to bear half the costs incurred by it and the Italian Republic to pay the other half of the Commission's costs together with its own.

3 — Judgment of 25 May 1982 in Case 96/81 *Commission of the European Communities* v *Kingdom of the Netherlands* [1982] ECR 1791.