OPINION OF MR ADVOCATE GENERAL GULMANN

delivered on 18 November 1993 *

Mr President,
Members of the Court,

1. In bringing these proceedings the Commission is seeking a declaration that the Italian Republic has failed to comply with its obligations under Council Directive 71/305/EEC concerning the coordination of procedures for the award of public works contracts. [1] It claims that Italy breached its obligations by allowing the provincial administration of Ascoli Piceno to conclude a contract concerning the construction of a section of rapid transit highway without putting the work out to public tender and without publishing a notice of invitation to tender in the *Official Journal of the European Communities* and 'by not taking steps to preclude at the outset the legal effects thereof which infringe Community law'.

2. The section of road in question was part of the 'Ascoli — Mare' highway which was to link the town of Ascoli Piceno, which is the capital of the province of the same name and lies some 25 km from the Adriatic coast, with the A14 motorway and the national highway No 16, which runs along the coast, and with the coastal town of San Benedetto del Tronto.

The first sections of the highway, stages I, II and III, and the first part of stage IV were the subject of a restricted tendering procedure and were completed at the beginning of the 1970s. The work for stage IV was awarded to the undertaking Rozzi Costantino. Stage IV, which covered *inter alia* the link with the A14 motorway and national highway No 16, was subsequently extended by so-called supplementary projects entailing *inter alia* an extension of the original highway.

3. These proceedings concern the '11th and 12th supplementary projects' which were ultimately treated as a joint project. The project related to an extension of the highway. The object was to overcome the physical barriers represented by national highway No 16 and the railway line between Bologna and Lecce and thus to create a good connection between the port of San Benedetto on the one hand and the main traffic arteries and Ascoli Piceno's industrial area on the other. The works included the construction of a viaduct over the railway line between Bologna and Lecce. The section of road was only a few kilometres and was to join up the section covered by the 10th supplementary project and a road towards San Benedetto which was being built at the same time by the Commune of Ascoli Piceno.

* Original language: Danish.

1 — Directive of 26 July 1971, OJ, English Special Edition 1971 (II), p. 682.

4. It has been established in these proceedings that the execution of the first ten supplementary projects in stage IV was allocated to the same undertaking which had carried out the original stage IV, that is to say the undertaking Rozzi Costantino.

The 11th and 12th supplementary projects had been approved by the Agenzia per la Promozione dello Sviluppo del Mezzogiorno, which transferred responsibility for the implementation of the project to the provincial administration of Ascoli Piceno. On 21 May 1990, without publishing a contract notice in the *Official Journal of the European Communities*, the latter concluded a private contract with Rozzi Costantino to carry out the project for a contract amount of some LIT 36 000 million.

The Italian Government has stated, moreover, that the construction of the further extension to San Benedetto of the highway in question here, which, as mentioned above, was the responsibility of the Commune of Ascoli Piceno and not the provincial administration, was also awarded to Rozzi Costantino.

5. The circumstances surrounding the construction of the highway 'Ascoli—Mare' came to the attention of the Commission which decided to open Article 169 proceedings against Italy which it confined to the 11th and 12th supplementary projects. The Commission sent its letter of formal notice to the Italian Government on 17 January 1991.

6. It is not disputed in these proceedings that the project at issue is covered by Directive 71/305.

It is also common ground that the procedure applied in awarding the contracts is objectively in breach of the directive unless the derogation under Article 9(b) of the directive applies, that is to say unless the project relates to works which 'for technical... reasons... may only be carried out by a particular contractor'.

7. It would have been fairly simple to take a position on the case if the only issue had been whether or not the conditions under Article 9(b) were met.

However, the Italian Government contends that the Commission has formulated its claims in such a way as to seek judgment against the Italian Republic not for the provincial administration's conduct contrary to the directive but for failing to take steps against that conduct, that is to say for breach of its supervisory obligation.

The Italian Government denies that it failed to fulfil its supervisory obligation with regard to the provincial administration and that is the fundamental basis of its case. Only in the alternative does it contend that the conditions under Article 9(b) were met.

8. It must be observed straightaway that the formulation of the Commission's claims has given rise to certain procedural problems in this case.

In its defence the Italian Government concentrated on demonstrating that it had not failed to comply with its supervisory obligations. It did indeed mention that non-compliance with obligations under the directive might be justified under Article 9(b) but its treatment of that provision showed that it primarily believed that it could rely on that provision to show that it was far from obvious in the present situation that there had been a breach of the directive. The Italian Government did not submit detailed argument on whether the conditions under Article 9(b) were met.

In its reply the Commission concentrated on the one hand on asserting that according to the consistent case-law of the Court, Member States may be held liable on an objective basis for conduct contrary to directives of State, regional and local bodies, and on the other on showing that the Italian Republic had not merely allowed the conduct of the provisional administration which was contrary to the directive but had also failed to take steps subsequently in order to remove the unlawful legal effects of that conduct.

It was not until its rejoinder that the Italian Government developed substantive arguments concerning the issue whether the conditions under Article 9(b) were met, submitting in that connection working drawings and the like.

9. The Commission sought leave from the Court to submit a new document in order to comment on the working drawings and the like that had been submitted. Leave was granted and the Commission submitted a document, accompanied by a declaration from an expert it had consulted, which disputed that the conditions under Article 9(b) were met.

In that document the Commission further contended that the working drawings and the like which had been submitted should be regarded as new pleas in law which pursuant to Article 42 of the Rules of Procedure could not be introduced.

10. I do not consider that the Court should refrain on the basis of Article 42 of the Rules of Procedure from taking account of the views and information submitted by the Italian Government in its rejoinder concerning the application of Article 9(b).

Article 9(b) was invoked by the Italian Government both in its responses to the Commission's letters in the administrative procedure and in its defence.

It is certainly in principle questionable for substantive argument concerning the issue of the application of Article 9(b) to be submitted for the first time in the rejoinder but that is at least in part attributable to the content of the form of order sought by the Commission. Moreover, the Commission has had a full opportunity to submit its views in the light of the new views and information in the rejoinder and its procedural rights have therefore not actually been prejudiced.

11. I consider it appropriate to go on to consider first whether the provincial administration could refrain on the basis of Article 9(b) of the directive from putting the contract out to tender and publishing a notice in the *Official Journal of the European Communities*.

The fundamental precondition for any judgment being given against the Italian Republic is that the provincial administration acted in breach of the directive.

12. The question is whether the construction of the section of highway in question, and in particular the viaduct over the railway line, involved works which 'for technical... reasons... may only be carried out by a particular contractor', that is to say in the present case the contractor responsible for construction of the section of motorway that was to be extended by the project at issue here (the section covered by the 10th supplementary project).

13. In that connection the Italian Government has stated that is apparent from the working drawings submitted that there were such 'technical reasons' in the present case in so far as it was impossible:

— to complete the work covered by the 10th supplementary project before certain of the structures covered by the project at issue were put in place,

— to begin work at two different places because of the very cramped nature of the site of the works, and

— to carry out the work in progress separately from the work at issue here because of the close structural connection of the foundations.

14. The Commission denies that those circumstances in themselves reveal technical reasons making it possible to award the work only to the contractor for the section of road covered by the 10th supplementary project.

15. It is apparent from the report of the expert consulted by the Commission — a French engineer — that it was certainly necessary on the basis of the factors referred to by the Italian Government to coordinate the timing and placing of the works at issue in this case with the work in progress but that such coordination would also have to be carried out even if all those works were allocated to the same undertaking and that accordingly there are no 'technical reasons' to justify the choice made by the Italian awarding authority in this instance.

16. It does not seem to me that the Italian Government has shifted the burden of proof which, according to the consistent case-law of the Court, [2] is incumbent on it in order for the derogation to apply.

The arguments put forward by the Italian Government were confined to a fairly abstract level. Notwithstanding the production of the working drawings, it has failed to

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

produce cogent evidence of the alleged serious difficulties involved in leaving the construction of the section of highway at issue to an undertaking other than that responsible for the construction of the section of road covered by the 10th supplementary project. It also seems implausible that such serious difficulties exist in the light of the views expressed in the report submitted on behalf of the Commission.

Nor may the fact be altogether overlooked, in my view, that the Italian Government itself in its defence expressed certain doubts as to whether the conditions for the application of Article 9(b) were met.

17. I therefore consider that it may be presumed that, as the Commission has alleged, the provincial administration of Ascoli Piceno acted in breach of Directive 71/305.

18. The question is, however, whether judgment may be given against the Italian Republic in respect of that conduct in view of the fact that in the terms of the form of order sought the Italian Republic is charged with having acted in breach of the directive 'by allowing' the conduct of the provincial administration which is contrary to the directive 'by not taking steps to preclude at the outset the legal effects thereof which infringe Community law'.

19. It is not quite clear to me why the Commission formulated its claims in those terms. The formulation is surprising in view of the fact that it is established under the Court's case-law that a Member State may be found guilty on the basis of objective factors of infringement of the directive irrespective of what State, regional or local body has failed to comply with the rules in the directive. [3]

20. The Court may of course consider that it would be appropriate to hold that a general duty applies for individual Member States as such to ensure in all cases that State, regional and local authorities comply with the directive in connection with their public works and that a Member State may be held to have breached the Treaty whenever it is objectively found that it has failed to comply with its supervisory obligation because action has been taken which is contrary to the directive.

However, that would entail a legal position corresponding to that whereby the Commission reduces the form of order sought by it to a claim that the Member State has breached its obligations under Community law in so far as one of its authorities has acted in breach of the directive.

On that basis, whether the Commission formulated its claim in one manner or another would be immaterial.

3 — See *inter alia* judgment in Case 77/69 *Commission* v *Belgium* [1970] ECR 237 and the judgment referred to in footnote 2 in which it was held that the Italian Republic was liable for a local authority's infringement of Directive 71/305.

21. Quite apart from the fact that claims must naturally be construed on the basis of their terms, the procedural problems which have arisen in this case point up the importance of the Court requiring the Commission's claims to be precise.

22. For those reasons and in view of the pleadings exchanged and the oral procedure, I consider that the claims must necessarily be construed as seeking judgment against the Italian Government not for the fact that the provincial administration had acted in breach of the directive but for the fact that that was allowed by the Italian Government and that the latter did not take any steps to stop it.

No consideration has been given in these proceedings to the question what authorities in this instance allowed the provincial administration's conduct and failed to take steps to stop it. It is unnecessary to examine that question further. The form of order sought by the Commission necessarily presupposes that there exist authorities which have such supervisory obligations and which, by the nature of the case, must be State authorities.

23. Judgment against the Member State is therefore conditional on it being established that there were State authorities which allowed the conduct of the provincial administration and failed to take steps to stop it.

The Commission must demonstrate that that was the case.

As mentioned above, the Italian Government denies that State authorities accepted that conduct and that there was in fact any possibility of taking steps against it. It points out that its attention was first drawn to that conduct by the Commission in January 1991, eight months after the contract had been awarded to the undertaking in question, and it had no possibility under Italian law to take appropriate steps in that regard.

24. On that basis I consider that I must propose that the Court dismiss the case against the Italian Republic.

The Commission has failed to demonstrate that the Italian Government or other State authorities expressly or tacitly allowed the conduct of the provincial administration and it has not produced cogent evidence that the Italian Government or other State authorities had any real possibility of subsequently taking steps to remedy the situation.

Conclusion

25. On those grounds I propose that the Court dismiss the case against the Italian Republic and order the Commission to pay the costs.