JUDGMENT OF THE COURT

26 April 1994 *

In Case C-272/91,

Commission of the European Communities, represented by Antonio Aresu and Rafael Pellicer, members of its Legal Service, acting as Agents, with an address for service in Luxembourg at the office of Georgios Kremlis, a member of its Legal Service, Wagner Centre, Kirchberg,

applicant,

v

Italian Republic, represented by Professor Luigi Ferrari Bravo, Head of the Department for Legal Affairs at the Ministry of Foreign Affairs, acting as Agent, assisted by Ivo M. Braguglia, Avvocato dello Stato, with an address for service in Luxembourg at the Italian Embassy, 5 Rue Marie-Adélaïde,

defendant,

APPLICATION for a declaration that, by failing to make known, for the purposes of publication in the *Official Journal of the European Communities*, first, at the beginning of 1990, an indicative notice setting out the total procurement by product area of which the estimated value was equal to or greater than ECU 750 000 and which the Italian Finance Ministry envisaged awarding during 1990 and secondly, in November 1990, a notice concerning the invitation to tender for the concession of the lottery computerization system and by restricting participation in that contract exclusively to bodies, companies, consortia and groupings a majority of whose capital, considered individually or in aggregate, was

* Language of the case: Italian.

publicly owned, the Italian Republic has failed to fulfil its obligations under Articles 30, 52 and 59 of the EEC Treaty and Articles 9 and 17 to 25 of Council Directive 77/62/EEC of 21 December 1976 coordinating procedures for the award of public supply contracts (Official Journal 1977 L 13, p. 1), as amended by Council Directive 88/295/EEC of 22 March 1988 (Official Journal 1988 L 127, p. 1),

THE COURT,

composed of: O. Due, President, G. F. Mancini, J. C. Moitinho de Almeida (Rapporteur) and M. Díez de Velasco (Presidents of Chambers), C. N. Kakouris, R. Joliet, F. A. Schockweiler, F. Grévisse, M. Zuleeg, P. J. G. Kapteyn and J. L. Murray, Judges,

Advocate General: C. Gulmann,
Registrar: J.-G. Giraud,

having regard to the Report for the Hearing,

after hearing oral argument from the parties at the hearing on 26 May 1993,

after hearing the Opinion of the Advocate General at the sitting on 14 July 1993,

gives the following

Judgment

1 By application lodged at the Court Registry at 18 October 1991, the Commission of the European Communities brought an action under Article 169 of the EEC

Treaty for a declaration that, by failing to make known, for the purposes of publication in the *Official Journal of the European Communities*, first, at the beginning of 1990, an indicative notice setting out the total procurement by product area of which the estimated value was equal to or greater than ECU 750 000 and which the Italian Finance Ministry envisaged awarding during 1990 and secondly, in November 1990, a notice concerning the invitation to tender for the concession of the lottery computerization system and by restricting participation in that contract exclusively to bodies, companies, consortia and groupings a majority of whose capital, considered individually or in aggregate, was publicly owned, the Italian Republic has failed to fulfil its obligations under Articles 30, 52 and 59 of the EEC Treaty and Articles 9 and 17 to 25 of Council Directive 77/62/EEC of 21 December 1976 coordinating procedures for the award of public supply contracts (Official Journal 1977 L 13, p. 1), as amended by Council Directive 88/295/EEC of 22 March 1988 (Official Journal 1988 L 127, p. 1).

2 The background to the dispute is summarized in paragraphs 6 to 16 of the Order of the President of the Court of 31 January 1992 (C-272/91 R, [1992] ECR I-457) on the application for interim relief made by the Commission in connection with this application which ordered the Italian Republic to take the measures necessary to suspend the legal effect of the decree of the Minister for Finance of 14 June 1991 awarding the concession for the lottery computerization system and performance of the contract concluded for that purpose with the consortium Lottomatica.

The complaint of infringement of Articles 52 and 59 of the Treaty

3 The Commission claims that by restricting participation in the contract for the concession for the computerization system for the Italian lottery to 'bodies, companies, consortia and groupings the majority of whose capital, considered individually or in aggregate, is held by the public sector' the Italian Republic has failed to comply with its obligations under Articles 52 and 59 of the Treaty.

4 The Commission contends that this is a specific instance of the implementation of the restriction declared unlawful by the Court in Case C-3/88 *Commission* v *Italy* [1989] ECR 4035 under which only companies in which all or a majority of the shares are either directly or indirectly in public or State ownership may conclude agreements with the Italian State for the development of data-processing systems for the public authorities.

5 The Italian Government denies the alleged infringement. It maintains that the contracts envisaged by the abovementioned judgment were for the procurement of data-processing systems which were also to be managed by the supplier as a service to the administration; the contract in issue here, on the other hand, relates, according in particular to the technical programme annexed to the special specifications for the invitation to tender at issue, to a concession by which the administration in question entrusts a third party with carrying out an activity relating to official authority, namely part of the powers of organization, checking and certification in connection with the lottery which, under Italian legislation, are strictly confined to the State. Article 55 of the Treaty provides that Articles 52 and 59 do not apply to activities which in Member States are connected with the exercise of official authority.

6 It should be noted that, as the Advocate General showed in points 18 to 23 of his Opinion, the introduction of the computerized system at issue which, according to the invitation to tender relates to the premises, supplies, installations, maintenance, operation and transmission of data and everything else that is necessary for the conduct of the lottery, does not involve any transfer of responsibility to the concessionaire for the various activities inherent in the lottery.

7 First, the lottery collectors continue to be responsible for accepting bets and the function of the concessionaire's terminal is merely to register, automatically check and transmit the data resulting from the steps taken by the person managing the registration point. The technical programme states that the latter must be able, in

the event of a mistake being made, to rectify what has been registered and even to cancel a ticket issued by the terminal.

8 Second, the draws are carried out by the Draw Committees (Commissioni di Estrazione) which are State bodies, like the Area Committees (Commissioni di Zona) which retain responsibility for checking and validating winning tickets.

9 Third, as the Italian Government itself admitted, it is always the public administration which ultimately approves and pays out prizes.

10 Fourth, the fact that the first point of the technical programme states that the tender also relates to 'everything else that is necessary for the conduct of the lottery' does not justify the conclusion that the concessionaire takes part in the exercise of public authority but merely signifies that he must operate within the bounds of the concession.

11 Fifth, the Italian Government's argument that the voluntary payments made by players in the lottery constitute a fiscal charge which entails that the concessionaire is taking part in the exercise of public authority is ill-founded.

12 Accordingly, the services to be provided by the concessionaire of the lottery computerization system, in particular the design of a computerized system and the necessary software and the operation of that system, are no different from the technical services under the agreements for the development of data-processing systems for the public administration at issue in Case C-3/88 *Commission* v *Italy*, cited above.

13 Since the activities in question do not therefore fall under the derogation in Article 55 of the Treaty, it must be held that the restriction at issue is contrary to Articles 52 and 59 of the Treaty and the complaint of infringement of those Articles must be upheld.

The complaint that Article 30 of the Treaty has been infringed

14 In support of its complaint of infringement of Article 30, in the pre-litigation procedure the Commission merely stated that the restriction at issue reserving the right to tender to bodies, companies, consortia and groupings the majority of whose capital, considered individually or in aggregate, is held by the public sector in fact excludes companies from other Member States which are prevented from offering their computer systems and their software for operating the service covered by the contract. Consequently, the Commission says, the effect of that reservation, like the measure at issue in Case C-21/88 *Du Pont de Nemours Italiana* v *Unità Sanitaria Locale No 2 di Carrara* [1990] ECR I-889 whereby a set percentage of public-supply contracts were reserved to companies established in certain regions of the national territory, is that products originating in other Member States suffer discrimination in comparison with products manufactured in the Member State in question, with the result that the normal course of intra-Community trade is hindered.

15 It is to be noted that the Commission did not at that stage set out the reasons for its view that excluding foreign companies from participation in the contract at issue prevented the successful tenderer from using products originating in other Member States in setting up the computerized system in question.

16 According to the Court's case-law (see, in particular, Case 325/82 *Commission* v *Germany* [1984] ECR 777) the letter of formal notice and the reasoned opinion

must contain a sufficient statement of reasons to enable the Member State to prepare its defence. For the reasons set out above, that was not done in this case.

17 Consequently, the Court must of its own motion declare the complaint of infringement of Article 30 inadmissible.

The complaints of infringement of Directive 77/62, as amended by Directive 88/295

18 The Commissions claims, first, that the Italian Republic has infringed Article 9 of Directive 77/62 as amended by Directive 88/295 ('the Directive') by failing to make known, for the purposes of publication in the *Official Journal of the European Communities*, first, at the beginning of 1990, an indicative notice setting out the total procurement by product area of which the estimated value was equal to or greater than ECU 750 000 which the Italian Finance Ministry envisaged awarding in 1990 and, secondly, in November 1990 a notice concerning the invitation to tender for the concession for the lottery computerization system. The Commission further considers that by restricting participation in that latter contract to bodies, companies, consortia and groupings the majority of whose capital, considered individually or in aggregate, is held by the public sector the Italian Republic has also infringed Articles 17 to 25 of the Directive.

19 Article 9(1), (2) and (4) of the Directive provides:

'1. The contracting authorities listed in Annex I to Directive 80/767/EEC shall make known, as from 1 January 1989, as soon as possible after the beginning of their budgetary year, by means of an indicative notice, the total procurement by product area of which the estimated value, taking into account the provisions of Article 5 of this Directive, is equal [to] or greater than ECU 750 000 and which they envisage awarding during the coming 12 months.

The Council, acting on a proposal from the Commission and after consulting the European Parliament and the Economic and Social Committee, shall decide before 1 March 1990 on the extension of this obligation to the other contracting authorities covered by Article 1.

2. Contracting authorities who wish to award a public supply contract by open, restricted, or, under the conditions laid down in Article 6(3), by negotiated procedure within the meaning of Article 1 shall make known their intention by means of a notice.

...

4. The notices referred to in paragraphs 1, 2 and 3 shall be sent as rapidly as possible by the most appropriate channels to the Office for Official Publications of the European Communities. In the case of the accelerated procedure referred to in Article 12 the notice shall be sent by telex, telegram or facsimile.

(a) The notice referred to in paragraph 1 shall be sent as soon as possible after the beginning of each budgetary year;

(b) the notice referred to in paragraph 3 shall be sent at the latest 48 days after the award of the contract in question.'

20 Articles 17 to 25 of the Directive set out the criteria for qualitative selection and for the award of contracts.

21 The Italian Government contends that those provisions are not applicable in this case.

22 It maintains first that the invitation to tender at issue falls outside the scope of the Directive since the contract in question does not relate to the supply of goods for the contracting authorities but concerns the concession by the administration to a third party of an activity which forms part of the exercise of public authority in fiscal matters and is characterized by the absence of any transfer of goods and of any price corresponding to such a transfer.

23 This argument must be rejected.

24 As is clear from paragraphs 7 to 11 of this judgment, the introduction of the computerized system in question does not involve any transfer of responsibilities to the concessionaire in respect of the various operations inherent in the lottery. Moreover, it is common ground that the contract at issue relates to the supply of an integrated computerized system including in particular the supply of certain goods to the administration.

25 Contrary to the position of the Italian Government, it is irrelevant in that connection that the system in question does not become the property of the administration until the end of the contractual relationship with the successful tenderer and that the 'price' for that supply takes the form of an annual payment in proportion to the revenue. As the Advocate General rightly stated in point 40 of his Opinion, the fact that Article 2 of Directive 88/295 extended the scope of the Directive to 'contracts ... involving the purchase, lease, rental or hire purchase, with or without option to buy, of products' is a reflection of the Community legislature's wish to bring within the scope of the Directive the supply of products which do not

necessarily become the property of the public administration and for which the consideration is fixed in abstract terms.

26 The Italian Government argues secondly that the contracting authority, the Autonomous State Monopolies Administration ('AAMS') is not included in the list of contracting authorities in Annex I to Council Directive 80/767/EEC of 22 July 1980 adapting and supplementing in respect of certain contracting authorities Directive 77/62/EEC (Official Journal 1980 L 215, p. 1). Consequently, Article 9 of Directive 77/62 as amended, which lays down advertising rules applying to contracting authorities referred to in that annex, is not applicable in this instance. The Italian Government believes that its view is borne out by footnote 2 to the part of the list relating to Italy which, as regards the Finance Ministry, makes the following reservation: 'Not including purchases made by the tobacco and salt monopolies'. The Italian Government maintains that that reservation relates not only to contracts concluded by the tobacco and salt monopolies which were under the authority of the AAMS at the time when the Directive was adopted, but also all the other activities which are now under the authority of that administration.

27 That argument is ill-founded.

28 As the Commission rightly pointed out, it is clear from Article 4(4) of Italian Law No 528 of 2 August 1982 (GURI No 222 of 13 August 1982), as amended by Article 2 of Law No 85 of 19 April 1990 (GURI No 97 of 27 April 1990), that the Italian Finance Ministry is the sole real contracting authority for the contract at issue. In any event the AAMS, which conducts the lottery, is a mere administrative department — without separate legal personality — of the Finance Ministry so that even acts which may formally be ascribed to the AAMS are in substance subject to the decision-making power of that Ministry.

29 As regards footnote 2 to Annex I to Directive 80/767, its actual wording shows that it relates only to contracts awarded by the tobacco and salt monopolies.

30 The Italian Government contends finally that in any event since what is in question here is the grant to the concessionaire of the special and exclusive right to engage in a public service activity, namely, at least in part, the conduct of the lottery, the only rule to be complied with is that laid down in Article 2(3) of the Directive. It provides: 'When the State, a regional or local authority or one of the legal persons governed by public law or corresponding bodies specified in Annex I grants to a body other than the contracting authority — regardless of its legal status — special or exclusive rights to engage in a public service activity, the instrument granting this right shall stipulate that the body in question must observe the principle of non-discrimination by nationality when awarding public supply contracts to third parties'.

31 That argument must also be rejected.

32 As shown in paragraphs 7 to 11 of this judgment, the conduct of the lottery is not transferred to the concessionaire whose task is confined to technical activities relating to the setting up and operation of the computerized system. Those activities comprise the supply of services to the public administration and also the supply of certain goods to it.

33 It must therefore be concluded that the provisions of the Directive relied on by the Commission are applicable in this case and the complaints relating to the infringement thereof must be examined.

34 As regards the complaint of the infringement of Article 9 of the Directive, the Italian Government does not deny that the notices in question were not sent.

35 As regards the complaint of infringement of Articles 17 to 25 of the Directive, it should be noted that those provisions contain a binding and exhaustive list of the criteria for qualitative selection and for the award of the contract and do not envisage the possibility of restricting participation in that contract to bodies, companies, consortia or groupings the majority of whose capital, considered individually or in aggregate, is publicly owned.

36 It follows that the complaints of infringement of Directive 77/62, as amended by Directive 88/295, must also be upheld.

Costs

37 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs. Since the defendant has been essentially unsuccessful, it must be ordered to pay the costs.

On those grounds,

THE COURT

hereby:

1) **Declares that, by failing to make known, for the purposes of publication in the *Official Journal of the European Communities*, first, at the beginning of 1990, an indicative notice setting out the total procurement by product area of which the estimated value was equal to or greater than ECU 750 000 and which the Italian Finance Ministry envisaged awarding in 1990 and secondly, in November 1990, a notice concerning the invitation to tender for the concession of the lottery computerization system, and by restricting participation in that contract exclusively to bodies, companies, consortia and groupings the majority of whose capital, considered individually or in aggregate, was held by the public sector, the Italian Republic has failed to fulfil its obligations under Articles 52 and 59 of the EEC Treaty and Articles 9 and 17 to 25 of Council Directive 77/62/EEC of 21 December 1976 coordinating procedures for the award of public supply contracts, as amended by Council Directive 88/295/EEC of 22 March 1988;**

2) **Dismisses the rest of the application;**

3) **Orders the Italian Republic to pay the costs.**

Due Mancini Moitinho de Almeida

Díez de Velasco Kakouris Joliet

Schockweiler Grévisse Zuleeg

Kapteyn Murray

Delivered in open court in Luxembourg on 26 April 1994.

R. Grass
Registrar

O. Due
President