OPINION OF ADVOCATE GENERAL LENZ

delivered on 26 February 1992 *

Mr President,
Members of the Court,

A — Facts

1. In these proceedings the Commission alleges that Italy, by adopting Law No 80/87 introducing special measures for accelerating the execution of public building works, [1] has infringed Article 59 of the EEC Treaty and Directive 71/305/EEC concerning the coordination of procedures for the award of public works contracts. [2]

2. That directive was implemented in Italy by Law No 584 of 8 August 1977.

3. The contested law was enacted on 17 February 1987 and, after an extension of its period of validity, remained valid until 15 March 1991. It provided for a restricted procedure to be operated by the national authorities, the regions, the autonomous public organizations, regional authorities and public non-profit making organizations responsible for the carrying out of specific works. They were to be enabled to accelerate their building programmes — from the planning stage to any post-completion maintenance measures — by means of a single award in respect of all the works for a specific project.

4. Since the Commission was of the opinion that certain provisions of the law infringed the directive and/or Article 59 of the EEC Treaty, it brought this action following the pre-litigation procedure. In its application the Commission raised altogether six different complaints and applied for:

(1) a declaration that, by enacting Law No 80 on special measures for accelerating the execution of public building works which contains provisions incompatible with Community rules concerning public building works, the Italian Republic has failed to fulfil its obligations under Article 59 of the EEC Treaty and Directive 71/305/EEC of 26 July 1971 concerning the coordination of procedures for the award of public works contracts (OJ, English Special Edition 1971 (II), p. 682);

(2) an order for costs against the Italian Republic.

In its defence the defendant contended that the application should be dismissed as unfounded.

* Original language: German.

1 — *Gazzetta Ufficiale della Repubblica Italiana* (GURI — Official Gazette of the Italian Republic) No 61 of 14.3.1987.

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

5. Subsequently, the Commission withdrew three of the abovementioned complaints, as explained in detail in the Report for the Hearing (paragraph 21 in conjunction with paragraphs 10, 12 and 13). The Commission has accepted the Italian Government's argument that Law No 80 forms part of the general provisions for the award of public building works laid down in Law No 584 and does not depart from the provisions of that law, either in purpose or content. Law No 80 governs the conduct of authorities awarding contracts in the sense that they are required to observe the substantive and procedural rules in the areas left open, in accordance with the directive, by Law No 584. The latter law therefore remains applicable to global award procedures under Law No 80.

6. At the hearing the Commission withdrew a further complaint, again following the explanations of the Italian Government. That was the complaint directed against Article 3(2) of Law No 80. In the application it was alleged that since under that provision invitations to tender might be addressed only to undertakings which could produce an attestation of registration in the Albo Nazionale dei Costruttori (National Register of Building Contractors), there was an infringement of both the first paragraph of Article 22 of Directive 71/305/EEC and Article 59 of the EEC Treaty.

7. However, at the hearing, the Commission relied on a statement by the Italian Government according to which Law No 80 was to be construed in the light of the general provisions of Law No 584 (by which the directive was transposed). Moreover, the Italian Government referred to a decree by the President of the Ministerial Council (No 55 of 10 January 1991), which in a certain manner is said to contain a binding interpretation of the provisions of Law No 80. That information, together with the assurances of the Italian Government, enabled the Commission to withdraw this allegation.

8. In the following opinion I shall deal with the remaining two complaints, in regard to which the defendant has not moreover raised the possibility that the contested provisions might be interpreted in conformity with Law No 584. For further particulars I refer to the Report for the Hearing.

B — Analysis

9. *I.1* At paragraph 5.3 of its application the Commission challenges the following provision in Article 2(1) of Law No 80 with regard to the written invitation to tender from the awarding authority:

'The written invitation must stipulate that the tenderer is to entrust a minimum proportion of between 15 and 30% [3] of the works to undertakings which have their registered offices in the region in which the works are to be carried out.'

In the Commission's view this provision infringes Article 59 of the EEC Treaty since

3 — In the pre-litigation procedure, in the application and in the Report for the Hearing the highest permissible proportion was mentioned as being 50%. The provision, however, plainly mentions 30%.

it restricts freedom to provide services by favouring undertakings established in the relevant region and thus discriminates against undertakings established in other Member States.

10. *2.* The Italian Government responded to that allegation by means of two arguments.

11. (a) In the pre-litigation procedure and in the written procedure before the Court, it claimed that those provisions sought to make up for the disadvantages facing small and medium-sized undertakings as a result of the principle laid down in the law that a single contract could be awarded in respect of several different works. Those undertakings were thereby being excluded from contracts which, in the event of separate awards, would have interested only undertakings in the relevant region. In the rejoinder the defendant further submitted that they were works of minor importance which were being withdrawn from the natural catchment area of the relevant market which is of necessity a local market.

12. (b) At the hearing, on the other hand, it focused its argument on the interests of undertakings (contractors) from other Member States. It contends that in any case such undertakings have a manifest interest in having part of the works awarded carried out by local undertakings since an undertaking from another Member State will not as a rule move with its whole organization and its whole labour force to the Member State in which the works are to be carried out. The contested provisions are consistent with the normal conduct of any undertaking established abroad and therefore contain no restriction on the freedom to provide services. In that connection it goes on to refer to a procedure with regard to another Italian law, since repealed, which the Commission regarded as inconsistent with Article 59. The *restriction* in that law — on the opportunities for successful tenderers to have works carried out by third-party undertakings — was held by the Commission to discriminate against undertakings from other Member States since the latter are in general dependent upon local undertakings for the execution of less specialized work. The Italian Government argues that, from that standpoint, which it accepted, it is illogical at this stage to challenge a provision which takes account of the abovementioned situation of foreign undertakings.

13. *3.* My first observation on this general issue is that the contested provisions have a negative effect on two kinds of undertakings established in other Member States: those undertakings which might be considered instead of the local undertakings of the defendant Member State as sub-contractors of the successful tenderer, where the latter does not wish or is unable to carry out certain works himself; and successful tenderers who are ready and able to carry out all works themselves but are prevented from doing so by Article 2(1) of Law No 80.

14. In what manner the disadvantage incurred by the latter group falls to be assessed in the light of Article 59 of the EEC Treaty need not here be decided. Suffice it to note here that the first group is without doubt being discriminated against. It is out of the question that such undertakings will

be asked to carry out works which in the context of the relevant quota must be entrusted by successful tenderers to undertakings established in the region concerned. Thus, in application of the contested provision preference is given to services provided by national undertakings to the concomitant detriment of the provision of services by undertakings from other Member States.

15. Since the situation in this case therefore falls under the prohibition on restrictions on the freedom to provide services in Article 59 of the EEC Treaty, that conclusion is not affected by the fact that in each specific case only some national undertakings are given preference with regard to the services they provide, whilst other national undertakings are subject to the same restrictions in that regard as undertakings from other Member States. [4] Since the judgment in *Du Pont de Nemours Italiana*, [5] which concerned a parallel problem in regard to the free movement of goods, it is evident that that factor does not alter the discrimination found to exist. In that judgment the Court held:

'Although not all the products of the Member State in question benefit by comparison with products from abroad, the fact remains that all the products benefiting by the preferential system are domestic products.'

16. The fact that the provision at issue is discriminatory is not negated by the Italian Government's objection that successful tenderers from other Member States would in any event normally entrust certain works to undertakings established in the relevant region (and hence potential sub-contractors established in another Member State would in the result not be discriminated against). Even if an undertaking from another Member State has an interest in a specific case in not carrying out certain works itself, but in having them carried out by a third party undertaking, it is difficult to see why, in particular in the case of works in border regions, it should always necessarily make better economic sense to instruct an undertaking established in the relevant region (of the host state).

17. Nor am I persuaded by the Italian Government's argument with regard to the interests of the potential sub-contractor from another Member State that certain works would be of interest only to the favoured undertakings. After all that interest depends on the nature and extent of the works as well as the size and specialization or diversification of the undertaking. The mere fact that the undertaking has its *registered office* in the region concerned is surely not decisive on its own.

18. Since the provision is therefore discriminatory, it is compatible with the Treaty only if it falls within the terms of an express provision of the Treaty derogating from Article 59. [6] The only possibility in this respect is Article 56 of the EEC Treaty, to which Article 66 refers. None of the alternatives listed

4 — Case C-21/88 *Du Pont de Nemours Italiana* [1990] ECR I-889, paragraphs 12 and 13, and Case C-351/88 *Laboratori Bruneau* [1991] ECR I-3641 (Article 30 of the EEC Treaty); and Case C-353/89 *Commission* v *Netherlands* [1991] ECR I-4069, at paragraph 25 (Article 59).

5 — See previous footnote.

6 — Case 352/85 *Bond van Adverteerders* v *Netherlands* [1988] ECR 2085, at paragraph 32.

therein (public policy, public security or public health) are relevant to the present case. In particular there are no 'public policy' grounds, which would presuppose that a genuine and sufficiently serious danger existed affecting a fundamental interest of society. [7] No objective corresponding to those strict preconditions underlies either the provisions as a whole (accelerated execution of public building works) or Article 2(1) of the Law (countering disadvantages stemming from the grouped-award principle); irrespective of that, there is no evidence that one or both of the abovementioned objectives could be achieved only by means of the discrimination contested in this case. Article 2(1) of Law No 80 therefore infringed Article 59 of the EEC Treaty; the Commission's complaint in this regard is substantiated.

19. *II.* Furthermore, the Commission contests Article 3(3) of the law in issue which provided as follows:

'Where more than 15 undertakings are concerned, the administration or the authority awarding contracts may not invite fewer than 15 undertakings to tender. In the selection of the undertakings to be invited to tender, *priority* is to be given to temporary associations and consortia including *undertakings* which principally carry on business *in the region in which the works are to be carried out.*' [8]

20. *1.* It should be stated straight away that the Commission's complaint is directed neither against the requirement that a specific minimum number of undertakings has to be invited to tender nor against the preference given to temporary associations and consortia. The Commission is merely complaining of the fact that the associations to which preference is to be given must include undertakings whose business is concentrated in the region as mentioned above.

21. *2.* The Commission's view that this is an infringement of Article 59 of the EEC Treaty must be endorsed without more. It is a disguised form of discrimination since regard is had neither to nationality nor to the location of the undertaking but, nevertheless, owing to the differentiating criterion selected, undertakings from other Member States are in fact placed in a worse position than national ones. [9] The criterion selected (business carried on principally in the region in which the works are to be carried out) is far more frequently met, as the Commission submitted without contradiction, by national undertakings than by foreign ones.

22. The Italian Government's argument that undertakings from other Member States can, like national undertakings, associate themselves with the undertakings enjoying the favoured treatment, is not convincing. Irrespective of the question whether the chances of any such association with the favoured undertakings are equal for national undertakings and undertakings from other Member States — which is disputed by the Commission — it cannot be ruled out that for an undertaking from another Member State such an association may be commercially undesirable or inappropriate. Entrepreneurial

7 — Case 30/77 *R* v *Bouchereau* [1977] ECR 1999, at paragraph 35.

8 — Emphasis added.

9 — Cf for instance Case C-3/88 *Commission* v *Italy* [1989] ECR 4035, at paragraph 8.

freedom, which Article 59 is specifically intended to protect, implies that such a step should not be necessary. In this context it must be held that, of two interested parties — an undertaking *from another Member State* and a 'local' undertaking — which wish to offer the same building service and have taken their decision to tender alone or jointly with certain other undertakings in the same way in the light of their own commercial notions or constraints, Article 3(3) gives preference to the 'local' undertaking. I therefore consider that the discriminatory effect of that rule is substantiated, irrespective of the abovementioned difference of opinion.

23. Since there are also no apparent grounds for justification under Article 56 of the EEC Treaty, the Commission's complaint based on Article 59 of the EEC Treaty is well founded.

24. *3.* The Commission's further complaint that the requirement at issue infringes Article 22 of Directive 71/305/EEC is likewise well founded.

25. First it should be stated that since the Italian Government's reply to the letter of formal notice, it has been common ground between the parties that the contracts under Law No 80 cover services which fall within the scope of the directive pursuant to Article 1(b) thereof; the applicability of that Community act, and the parties are at one on this point, is not affected by the fact that, as provided for in Law No 80, other services may also be covered by the contract.

26. Thus, as far as concerns the compatibility of Article 3(3) of the Law with Article 22 of the directive, the Commission proceeds on the assumption that under the terms of the directive the selection of tenderers can *only* be made 'on the basis of information provided in accordance with Article 17(d)'. The Commission apparently does not believe that a margin of discretion is left to the Member States in which additional criteria, based for instance on grounds of economic policy [10] may be applied. [11] If that view is correct, the infringement of Article 22 is established in any event since the criterion laid down in Article 3(3) of the Law has nothing to do with information as defined in Article 17(d) of the directive. But even if Article 22 is construed as leaving the Member States a margin of discretion as described above, that discretion may only be exercised in compliance with the second paragraph of that provision, which provides:

'Each Member State shall ensure that authorities awarding contracts issue invitations to those nationals of other Member States who

10 — In the present context an example might be a criterion favouring small and medium-sized undertakings.

11 — In regard to the criteria mentioned in Article 20 of the directive (technical knowledge or ability on the one hand, additional criteria as mentioned in Article 29 on the other hand) the Court has held that the Member States do have such a margin of discretion for additional criteria, albeit subject to certain restrictions; cf — regarding a condition based on socio-political grounds — Case 31/87 *Beentjes* v *Netherlands* [1988] ECR 4635, at paragraphs 28, 29, 30 and 36.

satisfy the necessary requirements, under the same conditions as to its own nationals.'

27. If therefore the first paragraph of Article 22 were to be construed as not precluding additional selection criteria applicable by the Member States, the general legal principle to be inferred from the second paragraph of Article 22 would be that those criteria must not discriminate against tenderers from other Member States. In that case, too, the contested provisions infringe Article 22.

28. Since there is also no provision in the directive allowing for derogation from Article 22 in the present context, the enactment of the contested rules was unlawful, and the Commission's complaint is well founded.

III — Costs

29. In respect of the two complaints remaining at the end of the proceedings, the defendant Member State has failed in its submissions and in that respect Article 69(2) of the Rules of Procedure should be applied. In view of the gravity of those complaints (both concerned — at least in part — an infringement of one of the fundamental freedoms of the Treaty) in relation to the other complaints in the application, the defendant Member State, having been unsuccessful, should in the first place bear one-half of the total costs.

30. In respect of the other half, Article 69(5) should be applied. Since neither of the parties made any specific application in respect of this part of the costs (though there was an opportunity to do so at the hearing), each party should bear its own costs in this respect.

Conclusion

31. For all those reasons I propose that the Court should give the following decision:

(1) By enacting Law No 80 on special measures for accelerating the execution of public building works, the Italian Republic has failed to fulfil its obligations under Article 59 of the EEC Treaty and Directive 71/305/EEC.

(2) The Italian Republic shall bear one half of the costs. In respect of the other half, the parties shall bear their own costs.