OPINION OF ADVOCATE GENERAL ALBER

delivered on 19 March 1998 *

A — Introduction

1. These proceedings for failure of a Member State to fulfil its obligations under the Treaty relate to the interpretation of Directives 89/440/EEC and 93/37/EEC [1] concerning the coordination of procedures for the award of public works contracts for the construction of a building for the Vlaamse Raad. Most of the contracts for the regional parliament building were awarded by a negotiated procedure and Lot 4 was awarded by a restricted procedure. The Commission considers that such conduct constitutes failure to comply with the requirements on tendering and publication established by the directives.

2. The Belgian Government, on the other hand, is of the opinion that the regional parliament, as a legislative body, cannot be bound by decisions of the minister responsible under the legal system of a Member State for the award of public contracts. It maintains that the Vlaamse Raad was therefore entitled to refrain from complying with the provisions of Community law relating to the publication of notices for public works contracts.

3. The Commission claims that the Court should:

— declare that the Kingdom of Belgium has failed to fulfil its obligations under Directives 89/440/EEC and 93/37/EEC, and in particular Articles 7 and 11 of Directive 93/37/EEC, in so far as it did not place a notice in the *Official Journal of the European Communities*, either for the overall project or for the individual lots, for the construction of a building for the Vlaamse Raad and it did not apply the award procedures in accordance with those directives;

— order the defendant to pay the costs.

* Original language: German.

1 — See Council Directive 71/305/EEC of 26 July 1971 concerning the coordination of procedures for the award of public works contracts (OJ 1971 L 185, p. 5) as amended by Council Directive 89/440/EEC of 18 July 1989 amending Directive 71/305/EEC (OJ 1989 L 210, p. 1), consolidated by Council Directive 93/37/EEC of 14 June 1993 concerning the coordination of procedures for the award of public works contracts (OJ 1993 L 199, p. 54) (hereinafter: 'the directive').

4. The Belgian Government does not seek a specific form of order in its defence.

5. I shall refer to the submissions of the parties in the course of the opinion.

B — Opinion

6. The *Commission* takes the view that the Vlaamse Raad is undoubtedly a 'contracting authority' within the meaning of the Directive. It maintains that the Directive was therefore applicable to the construction project in question. In awarding the contract by a negotiated procedure, the Vlaamse Raad failed to fulfil its obligations under the Directive.

7. The *Belgian Government* formulates its defence on various levels. However, there is a substantive element common to the various grounds of defence in that they all have recourse to the argument relating to the independence of the contracting authority by virtue of its nature as a legislative body.

The national legislation applicable to the award procedure carried out at the turn of the year 1996/97 was the Law of 14 July 1976 [2] on public contracts, including the provisions adopted for its implementation. That Law assumes that only the executive is bound by the award provisions. Although a new law was adopted on 24 December 1993, [3] its entry into force was delayed by the fact that the decrees [4] necessary for its implementation had not been adopted. In that context, the considerable problems connected with the special constitutional position of legislative bodies, which are relevant in this case, were discussed both at national level and in contacts with the Commission, but no solution which was satisfactory for all the parties concerned could be reached. The Belgian Government is of the opinion that the Commission did not provide it with the necessary assistance in the search for a solution and that, consequently, the bringing of the action giving rise to the present proceedings was unreasonable. It contends that the timing of the action taken against the Belgian Government was also particularly unfavourable since the events in question fall within the temporal context of the achievement of constitutional autonomy by the regions, a period of radical change which was accompanied by legal uncertainties.

According to the Belgian Government, allowance should in any case be made for the fact that the Vlaamse Raad — or the Flemish

2 — Law of 14 July 1976 relating to public works, supply and services contracts.

3 — Law of 24 December 1993 relating to public contracts and to certain contracts for works, supplies and services, *Moniteur belge*, 22 January 1994, p. 1308.

4 — Implementing decrees.

Parliament, as it has since become known — is a legislative body which is independent in accordance with the understanding of democracy prevailing in the Member States and underlying the Treaty of Maastricht. It is clear from the Directive itself that there are fields to which it does not apply, as Article 4 of the Directive shows.

8. In reply to those arguments, the Commission asserts that internal problems in the legal system of a Member State cannot release it from the duty to comply with Community law. Moreover, a parliament is also obliged to observe Community law.

9. Article 7 of Directive 93/37 lays down the criteria for determining whether an 'open procedure', [5] a 'restricted procedure' [6] or a 'negotiated procedure' [7] must be held. Thus, Article 7(2) defines the conditions for holding a negotiated procedure with prior publication of a contract notice and Article 7(3) defines those for holding a negotiated procedure without prior publication. Article 7(4) states: 'In all other cases, the contracting authorities shall award their public works contracts by the open procedure or by the restricted procedure'.

10. Since the construction project in question does not fulfil any of the criteria justifying a negotiated procedure without prior publication, the provisions of Article 11 of the Directive relating to publication of a notice must be complied with in so far as the Vlaamse Raad is to be regarded as a *contracting authority* within the meaning of the Directive. Article 1(b) of the Directive defines contracting authorities as 'the State, regional or local authorities, bodies governed by public law, associations formed by one or several of such authorities or bodies governed by public law'.

11. The State, according to the classical understanding of that concept in public law, comprises three powers: the legislature, the executive and the judiciary. At an abstract level, the organs of the three powers are bound by Community law. The Court held that to be a general principle in its judgment in *Von Colson and Kamann* which states: 'However, the Member States' obligation arising from a directive to achieve the result envisaged by the directive and their duty under Article 5 of the Treaty to take all appropriate measures, whether general or particular, to ensure the fulfilment of that obligation, is binding on *all the authorities* of Member States *including*, for matters within their jurisdiction, *the courts*.' [8] In that respect, the binding effect on the courts of a directive has been positively established.

5 — See Article 1(e) of the Directive.

6 — See Article 1(f) of the Directive.

7 — See Article 1(g) of the Directive.

8 — Case 14/83 *Von Colson and Kamann* [1984] ECR 1891, paragraph 26.

12. The question concerning the binding effect on the administration of the provisions of Community law relating to public contracts was the subject-matter of the *Costanzo* case. [9] In that case, the Court held that the obligations arising under the provisions of a directive 'are binding upon all the authorities of the Member States'. [10] The Court goes on to state that in all the defined circumstances in which individuals may rely on the provisions of a directive 'all organs of the administration, including decentralised authorities such as municipalities, are obliged to apply those provisions'. [11] In that respect, the binding effect on State authorities must also be regarded as positively established.

13. The only question therefore is whether the legislature is also bound by Community directives. In principle, that question must be answered in the affirmative since the obligation to legislate contained in a directive is always addressed directly to the legislative bodies. Beyond that abstract approach, in the field of public contracts, the Court held in its judgment in the *Beentjes* [12] case that the term 'the State' must be 'interpreted in functional terms'. [13] In the previous case-law on public contracts, the question whether a body awarding a works contract is a contracting authority within the meaning of the Directive arose as a rule in terms different from those in question in this case. The issue has been principally whether subsidiary bodies and institutions had failed to comply with the award provisions. [14]

14. A parliament, on the other hand, as an organ of State power, is certainly part of the State in functional terms. The same is obviously true of the parliaments of the constituent States in a federal structure.

15. What is exceptional in this case is that the Vlaamse Raad was confronted with Directive 93/37, not in its original capacity as a legislature, but in the course of its administrative activities in the form of fiscal acts. However, that circumstance is no reason for exempting it from the procedural requirements of Community law relating to transparency and publicity in the field of public contracts. On the contrary, there is all the more reason to assume that the Vlaamse Raad is bound by the Directive when it is not entitled, since it is not acting in a legislative capacity, to rely on its original independence vis-à-vis the administration.

9 — Case 103/88 *Fratelli Costanzo* [1989] ECR 1839.

10 — Case 103/88, cited in footnote 9, paragraph 30.

11 — Case 103/88, cited in footnote 9, paragraph 31.

12 — Case 31/87 *Beentjes* [1988] ECR 4635.

13 — Case 31/87, cited in footnote 12, paragraph 11.

14 — Case 31/87 *Beentjes*, cited in footnote 12, paragraphs 8 and 12 — concerning a local land consolidation committee; Case 103/88 *Fratelli Costanzo*, cited in footnote 9, paragraph 30 et seq. — concerning the Municipality of Milan; Case C-24/91 *Commission* v *Spain* [1992] ECR I-1989 — concerning Universidad Complutense, Madrid; see also Opinion of Advocate General Lenz in that case, ECR I-1995, at point 9 et seq.

16. Moreover, at the hearing the Belgian Government's representative conceded that in reality the Vlaamse Raad did not act in its capacity as a legislature when it awarded the contract. According to the Belgian Government, the freedom invoked is founded on the exceptional nature of the constitutional situation. Thus, it justifies the use of the procedure at issue by reference to its own domestic legal situation. It maintains that the Law of 14 July 1976 expressly rendered only the executive subject to the award provisions.

17. As the Commission correctly argues, it is settled case-law of the Court of Justice that a Member State may not rely on its own legal system or an interpretation thereof in order to justify conduct which is contrary to Community law. [15] Doubts as to whether the Belgian legal situation was in conformity with Community law had certainly been raised at the time in question. The Belgian Government itself states that it intended to remedy defects in the Law of 14 July 1976 by means of the Law of 24 December 1993. According to it, there were still disagreements with regard to the role of legislative bodies. In that context, it contends that the Commission failed to provide it with the necessary assistance.

15 — Case C-265/95 *Commission* v *France* [1997] ECR I-6959, paragraph 55 et seq.; Case 310/86 *Commission* v *Italy* [1988] ECR 3987, paragraph 6; and Case 326/87 *Commission* v *Italy* [1988] ECR 4009, paragraph 6.

18. It may be unfortunate that the Commission did not provide the assistance hoped for from it during the legislative procedure. However, from the time of the institution of the Treaty infringement proceedings at the latest, there could be no doubt about the Commission's attitude. The letter of formal notice instituting the Treaty infringement procedure dates from 28 July 1994 and the Belgian Government replied to it on 31 August of that year. Over a year later, on 16 November 1995, the Commission addressed its reasoned opinion to the defendant government, which replied by letter of 15 December 1995. The Commission finally brought its action on 2 October 1996.

19. While it is true that the communication problems between the Vlaamse Raad, the Permanent Representation of Belgium and the Commission, which are mentioned by the Belgian Government, may explain the attitude of the Vlaamse Raad, they cannot justify its conduct in a legal sense. The obligations relating to publication contained in the Directive are directly applicable and in that respect were also binding on the Vlaamse Raad.

20. At the hearing, the Belgian Government's representative expressly referred once again to the provisions of the Directive authorising derogation, and in particular to Article 4, in order to show that there are indeed fields which a State could legitimately regard as falling outside the scope of the provisions on the award of public contracts.

21. Against that it must be stated that, in this particular case, Article 4 offers no grounds for disregarding the obligations which arise from the Directive. Article 4(1) merely provides for derogation in respect of certain fields, referring to certain provisions of Council Directive 90/531/EEC on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors. [16] Article 4(2) excludes from the scope of the Directive those works contracts 'which are declared secret or the execution of which must be accompanied by special security measures in accordance with the laws, regulations or administrative provisions in force in the Member State concerned or when the protection of the basic interests of the Member State's security so requires'. The Belgian Government has not put forward any facts which justify application of the provision authorising derogation, whether by mentioning specific laws, regulations or administrative provisions declaring the works contract secret or by pleading special security measures or the protection of essential interests of the State.

22. It is settled case-law that provisions authorising derogations from directives in the field of public works contracts must be interpreted *strictly*. [17] A general reliance, unsupported by more specific factors, on the principle of the separation of powers cannot therefore be construed as pleading the protection of essential interests of the State.

23. In view of the independence of the Vlaamse Raad as a legislative body, the question still arises, in any event, of the liability of the Member State in the context of proceedings under Article 169 of the Treaty. In this respect also, reference may be made to settled case-law of the Court which states that the liability of a Member State under Article 169 arises whatever the agency of the State whose action or inaction is the cause of the failure to fulfil its obligations, even in the case of a constitutionally independent institution. [18]

24. I therefore conclude that the form of order sought by the Commission should be granted.

Costs

In accordance with the first paragraph of Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the defendant has been unsuccessful, it must be ordered to pay the costs.

16 — Council Directive of 17 September 1990 (OJ 1990 L 297, p. 1)

17 — Case 199/85 *Commission* v *Italy* [1987] ECR 1039, paragraph 14; Case C-57/94 *Commission* v *Italy* [1995] ECR I-1249, paragraph 23; and Case C-318/94 *Commission* v *Germany* [1996] ECR I-1949, paragraph 13; on the temporal effect of a provision authorising derogation, Case C-143/94 *Furlanis* [1995] ECR I-3633.

18 — Case 77/69 *Commission* v *Belgium* [1970] ECR 237, paragraph 15; Case 8/70 *Commission* v *Italy* [1970] ECR 961, paragraph 9; and Case 52/75 *Commission* v *Italy* [1976] ECR 277, paragraph 14.

C — Conclusion

25. In the light of the foregoing I propose that the Court:

(1) declare that, by failing to comply with the requirements in the field of tendering procedures and publication in respect of the award of both the overall project and the various lots concerning the construction of a building for the Vlaamse Raad, the Kingdom of Belgium has failed to fulfil its obligations under Directives 89/440/EEC and 93/37/EEC, in particular Articles 7 and 11 of Directive 93/37;

(2) order the Kingdom of Belgium to pay the costs.