Case C-272/91 R

Commission of the European Communities
v
Italian Republic

(Concession for the lottery computerization system)

Order of the President of the Court, 31 January 1992 ..... I - 457

Summary of the Order

Application for interim measures — Interim measures — Conditions for granting — Prima facie *case — Serious and irreparable damage — Balancing of all the interests involved — Account to be taken of judgment declaring a Member State to have failed to fulfil obligations analogous to those in issue*

(EEC Treaty, Art. 186)

ORDER OF THE PRESIDENT OF THE COURT
31 January 1992 *

In Case C-272/91 R,

Commission of the European Communities, represented by A. Aresu and R. Pellicer, Members of its Legal Service, acting as Agents, with an address for service in Luxembourg at the office of Roberto Hayder, a representative of its Legal Service, Wagner Centre, Kirchberg,

applicant,

* Language of the case: Italian.

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-Adelaïde,

defendant,

APPLICATION for the adoption of interim measures requiring the Italian Republic to take the measures necessary to suspend the award of the concession for the lottery computerization system,

THE PRESIDENT OF THE COURT OF JUSTICE
OF THE EUROPEAN COMMUNITIES

makes the following

Order

1 By application lodged at the Court Registry on 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 which the Italian Ministry of Finance was envisaging awarding during that year 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 tender 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 By a separate document lodged at the Court Registry on the same day, the Commission also applied for interim relief under Article 186 of the EEC Treaty and Article 83 of the Rules of Procedure, seeking an order requiring the Italian Republic to take the necessary measures to suspend the legal effect of the decree of the Minister for Finance of 14 June 1991 awarding the contract in question or the legal effect of any contract subsequently concluded.

3 The defendant submitted written observations on the application for interim measures on 31 October 1991 and the parties presented oral argument on 2 December 1991.

4 At the hearing, the defendant filed two documents and the parties were invited to submit additional observations arising therefrom. The Commission submitted observations on 9 December and the defendant on 16 December 1991.

5 Before considering the merits of the application for interim measures, it is appropriate to summarize the background to the dispute.

6 On 13 November 1990, the Italian Ministry of Finance published a contract notice in the Italian press concerning an invitation to tender for the concession of the computerization system for the 'lotto', the State lottery.

7 It is apparent from the documents before the Court that the lottery is a game of chance operated by the Autonomous State Monopolies Administration ('the Administration'), an administrative body attached to the Ministry of Finance. The system involves players betting on one or more numbers with a view to weekly draws. The stakes are taken at authorized collection points (in particular, tobacconists) and there is a draw every Saturday in each of the ten lottery areas (*ruote*) into which Italy is subdivided. A bet may be entered either in the draw for the area in which the relevant collection point is situated or in the draw for all the areas. The amount of the winnings is determined, by reference in particular to the stake, in accordance with a formula laid down by Italian legislation, and winnings are payable at the collection point or, if they exceed a certain sum, at the local offices of the Ministry of Finance.

8 The lottery computerization system which was the subject of the contract comprised, according to the invitation to tender, premises, supplies, equipment, maintenance, operation, transmission of data and everything else necessary for running the lottery.

9 The invitation to tender provided that the concession was for nine years only and that when it expired the entire computerized system, including premises, apparatus, terminals at collection points, equipment, structures, programs, records and everything else necessary for operating and managing the system was to be handed over without charge for the exclusive use of the Administration.

10 It specified that the concession comprised three phases: in the first phase the equipment was to be supplied, installed and tested in parallel with the manual system, at the end of which the computerized system was to become operational in one lottery area; in the second phase the system was to be extended to all the lottery areas; and finally in the third, fully operational, phase the number of collection points was to be progressively increased. Tenders had to indicate the time within which each phase would be completed.

11 The computerization system concessionaire would receive no remuneration during the first phase, but during the second and third phases would receive a percentage of the gross receipts from automatically recorded bets. That percentage was to be indicated in the tender.

12 The invitation to tender also specified economic and technical criteria for the selection of bodies or undertakings wishing to submit tenders.

13 The invitation reserved the right to tender to bodies, companies or consortia and groups the majority of whose capital, considered individually or in aggregate, was held by the public sector. The Ministry of Finance was to take into account the particular nature and importance of the computerized operation of the lottery which, as a State monopoly operated for maximum returns, required special guarantees and absolute reliability and security for the setting-up and operation of the system.

14 Three bodies or undertakings were invited to submit tenders. By a decree of the Ministry of Finance of 14 June 1991, the concession was awarded to the consortium Lottomatica.

15 The Commission sent the Italian authorities a formal notice on 8 April 1991 followed by a reasoned opinion on 2 September 1991, in which it stated in particular that the restriction of the tendering procedure in issue exclusively to companies or bodies the majority of whose capital was held by the public sector, in so far as it favoured Italian undertakings, constituted an infringement of Articles 52 and 59 of the EEC Treaty and a measure having equivalent effect prohibited by Article 30 of the Treaty. The Commission pointed out to the Italian authorities that in its judgment in Case C-3/88 *Commission* v *Italy* [1989] ECR 4035, the Court had held that Italian legislation providing that only companies held as to a

majority by the public sector could conclude agreements for the development of data-processing systems for the public authorities infringed in particular Articles 52 and 59 of the EEC Treaty, and ruled that Italy had failed to fulfil its obligations. The Commission stated that the Italian authorities had not yet taken the necessary measures to comply with that judgment and that it had for that reason brought proceedings under Article 171 of the EEC Treaty.

16 In their reply to the reasoned opinion, the Italian authorities claimed in particular that the contract in question was not one of those envisaged by the abovementioned judgment, which concerned contracts for the procurement of data-processing systems under which the suppliers were also responsible for operating the systems but as a service provided to the authorities; the contract in issue, on the other hand, concerned a concession by which the administration entrusted a third party with carrying out an activity relating to official authority, namely the processing of lottery bets. Article 55 of the EEC Treaty provided that Articles 52 and 55 did not apply to activities which in Member States were connected with the exercise of official authority.

17 It should be noted that under Article 186 of the EEC Treaty, the Court may in any cases before it prescribe any necessary interim measures.

18 Article 83(2) of the Rules of Procedure provides that an order for interim measures such as those sought in these proceedings will only be granted if the circumstances give rise to urgency and the factual and legal grounds establish a prima facie case for the order. The Court has consistently held that the urgency of an application for interim measures must be assessed in relation to the necessity for an order granting interim relief in order to prevent serious and irreparable harm to the party requesting such measures.

19 It is appropriate to consider whether those conditions are satisfied in this case.

20 As far as concerns, first, the requirement for a prima facie case, the Commission states that the infringement of Articles 52 and 59 of the EEC Treaty is manifest and that the situation here is wholly analogous to that underlying the abovementioned judgment in Case C-3/88. In particular, the concession of the computerization system in issue cannot be considered to involve the exercise of official authority within the meaning of the first paragraph of Article 55 of the Treaty. The Italian Government used the same argument concerning the contracts to develop data-processing systems for the public authorities which were in issue in Case C-3/88. The Court pointed out that the exception in Article 55 of the EEC Treaty from the freedom of establishment and the freedom to provide services must be restricted to activities which in themselves involve a direct and specific connection with the exercise of official authority, and declared that that was not the case for activities concerning the design, programming and operation of data-processing systems, which are activities of a technical nature.

21 The defendant claims that the concession of the lottery computerization system involves a real transfer of official powers to the concessionaire and cannot be treated in the same way as a contract to provide goods or services. That would be irreconcilable with the remuneration of the concessionaire by a percentage of the receipts. Gaming in the form of the lottery is under Italian legislation strictly reserved to the State and any activity relating to the lottery accordingly falls within the exercise of official powers, which for the purposes of the first paragraph of Article 55 of the EEC Treaty include not only powers to take decisions but also powers to organize, inspect or certify. The technical specification for the invitation to tender, filed by the defendant at the hearing, sets out the powers which the concession transfers to the concessionaire. They include in particular the taking of bets, since in order to be valid the lottery tickets must be issued by the concessionaire's terminals installed at the collection points, and the determining of the winning tickets, to be done by the concessionaire's record centres in each lottery area.

22 It should be noted first that the introduction of the computerized system in issue does not appear at first sight to change the various operations inherent in the lottery, as currently implemented according to the description in the specification filed by the defendant. On the face of it, no responsibility for any of these processes is transferred to the concessionaire. The collection points remain

responsible for taking the bets, while the function of the concessionaire's terminal is simply to record, to check automatically, and to transmit the data entered by the person in charge of the collection point who, according to the specification, must be able to correct the entry if there is an error and even cancel a ticket issued by the terminal. Similarly for the determination of the winning tickets, the Area Commission, an administrative body, retains responsibility for checking and validating the tickets.

23 Secondly, the services to be provided by the concessionaire of the lottery computerization system do not appear at first sight to differ from those entailed by the contracts for the development of data-processing systems for the public authorities at issue in Case C-3/88. Both cases involve developing computerized systems, providing the necessary hardware and software and operating the system. Although the lottery computerization system does not become State property until the term of the concession has expired, and the concessionaire's remuneration consists of a share of the returns from operating the system, those factors are, on the face of it, irrelevant to the rules of Community law in issue.

24 It must therefore be held, taking account of the abovementioned judgment in Case C-3/88, that the Commission's application does not appear at this stage to be without substance and that the requirement for a prima facie case is satisfied.

25 As far as concerns the requirement for urgency, the Commission claims that it cannot wait until the decision on the substance without suffering serious and irreparable damage in its capacity as the institution responsible for ensuring the application of the Treaty. By the time the Court decided on the substance, the lottery computerization would have been in place for some time, and the Commission would have to accept the *fait accompli*, notwithstanding the flagrant violation of Community law. In order for the forthcoming judgment of the Court to be effective, the Commission claims that it is necessary for interim relief to be ordered.

26 The defendant, for its part, observes that the concession with the consortium Lottomatica was signed on 22 November 1991; the first phase of the concession should be completed by 1 April 1992 and the second phase by 31 December 1992. Implementing the computerization system will considerably improve the lottery, which is the only way of eradicating clandestine gambling which is currently widespread. The loss of revenue for the State if the computerization system is not implemented can be estimated at LIT 500 000 million a year. Elimination of clandestine gambling and the very significant fiscal revenue resulting from the lottery computerization should accordingly be weighed against the Commission's interest in ensuring compliance with specific Treaty rules.

27 It should be held that, as the Commission has stated, if it succeeds in the main proceedings, the judgment would have no practical effect in the absence of interim measures.

28 As to the balance of interests, the defendant's interest in rapidly completing the lottery computerization must be set against the Commission's interest, as guardian of the Treaties, in preventing any breach of fundamental rules in the Treaties. In the light in particular of the judgment of the Court in Case C-3/88, the interest of the Commission must prevail over that of the Member State in issue.

29 Since the condition as to urgency is thus also satisfied, the interim measures sought should be ordered.

On those grounds,

THE PRESIDENT OF THE COURT

hereby orders:

(1) The Italian Republic shall 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;

(2) The costs are reserved.

Luxembourg, 31 January 1992.

J.-G. Giraud — Registrar

O. Due — President