OPINION OF ADVOCATE GENERAL TESAURO
delivered on 17 November 1994 *

1. In this action the Commission seeks a declaration that the Kingdom of the Netherlands has failed to fulfil its obligations under Council Directive 77/62/EEC of 21 December 1976 coordinating procedures for the award of public supply contracts, [1] as subsequently amended by Directives 80/767/EEC of 22 July 1980 [2] and 88/295/EEC of 22 March 1988, [3] and also under Article 30 of the Treaty.

To be more specific, the Commission considers that the tender notice for a public supply contract published by the Nederlands Inkoopcentrum NV (hereinafter 'the NIC') in the Official Journal of the European Communities of 10 December 1991 concerning the supply and maintenance of a meteorological station [4] does not comply with Community requirements. The Commission relies on two grounds: failure to indicate the persons authorized to be present at the opening of tenders as well as the date, time and place of opening; and inclusion in the general terms and conditions of a technical specification defined by reference to a product of a specific make, namely the UNIX data-processing system developed by Bell Laboratories of ITT, without mentioning that it is open to the supplier to use an equivalent system.

It should be borne in mind that the Commission gave the Netherlands and the contracting authority notice of those criticisms, in accordance with the procedure laid down in Article 3(1) and (2) of Council Directive 89/665/EEC on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts. [5] The Commission stated that notification was to be treated as formal notice for the purposes of Article 169 of the Treaty and that the subsequent communication from the Netherlands Government would be treated as the observations provided for in that article.

* Original language: Italian.

1 — OJ 1977 L 13, p. 1.

2 — OJ 1980 L 215, p. 1.

3 — OJ 1988 L 127, p. 1.

4 — The notice in question was published in OJ S 233 of 10.12.1991, p. 25, under No. 91/S233-37730/NL.

5 — OJ 1989 L 395, p. 33.

2. It would be helpful to recall the relevant provisions of the directive in question in order to arrive at a proper understanding of the allegations made against the defendant and of the latter's arguments.

Article 9(5) of the directive requires the contracting authorities to draw up the notices in accordance with the models set out in Annex III. If the contract is to be awarded by 'open' procedure, as it was in the case under consideration, the notice must contain, in particular, the following information (Point 7 of the Annex):

'(a) Persons authorized to be present at the opening of tenders'

and

'(b) the date, time and place of this opening.'

Article 7(6), added to Title II of that directive, provides that:

'Unless such specifications are justified by the subject of the contract, Member States shall prohibit the introduction into the contractual clauses relating to a given contract of technical specifications which mention goods of a specific make or source or of a particular process and which have the effect of favouring or eliminating certain undertakings or products. In particular, the indication of trade marks, patents, types or specific origin or production shall be prohibited; however, such an indication accompanied by the words "or equivalent" shall be authorized where the subject of the contract cannot otherwise be described by specifications which are sufficiently precise and fully intelligible to all concerned.'

Finally, Article 3 of Directive 89/665/EEC introduces a 'swift' procedure for taking action against the competent authorities of the Member States and the contracting authorities, which may be invoked by the Commission when, prior to a contract being concluded, it considers that 'a clear and manifest infringement of Community provisions in the field of public procurement has been committed during a contract award procedure'. In such cases, therefore, the Commission is to notify the abovementioned authorities of the infringements found and request their correction; from that moment, the Member State has 21 days in which to communicate to the Commission confirmation that the infringement has been corrected or the reasons why no correction has been made or else notice that the contract award procedure has been suspended.

3. Before turning to the substance of the case, I must consider the objection put forward by the Netherlands Government that the action is inadmissible in two respects.

The basis of the second plea of inadmissibility put forward by the Netherlands Government is that even the Commission had used the same technical specification, namely the UNIX system, in a contract notice published after the one at issue in these proceedings. [7] This shows that NIC was quite justified in believing that the use of that specification would not give rise to objections from the point of view of Community law, since the Commission itself regarded the UNIX system as a generally accepted technical specification in current use.

The Netherlands maintains that the Commission's conduct did not comply with the requirements of Article 3(1) and (2) of Directive 89/665/EEC. As mentioned above, the purpose of the procedure provided for therein is to inform the Member State and the contracting authority concerned in good time, and in any event before a contract is awarded, of the fact that a clear and manifest infringement of Community law has been committed. The Commission's complaints were communicated to the Netherlands six months after the notice in question was published, on the day before the contract was entered into. The contracting authority, for its part, did not receive notification until some days later, which the Commission acknowledges, [6] when the contract had already been awarded. As a result, in the defendant's view, there was a breach of the duty of cooperation between Member States and Community institutions under Article 5 of the Treaty, in that it is unreasonable to expect an award procedure begun some months previously to be suspended within the space of one working day, taking into account above all the delay in transmitting the request concerned to the contracting authority.

4. The Netherlands Government's criticisms of the Commission's conduct are understandable. However, since it seems to me that it is from the legal point of view alone that it is necessary to ascertain whether they have any substance, there is no doubt that they are incapable of justifying a ruling of inadmissibility. At least, I am unable to propose to the Court that it should make such a ruling.

To start with, the fact that it was late in initiating the special procedure provided for by Article 3 of Directive 89/665 for the correction of infringements of Community provisions in the field of public procurement can

6 — In its reply, the Commission admits that the registered letter containing the complaints was sent on 25 June 1992 but only to the Netherlands Government, not to NIC, which did not, therefore, receive a copy until 29 June when the competent department in the Commission sent a fax.

7 — Namely the contract notice published under No 92/S116-223439/FR, in OJ S 116 of 17 June 1992, p. 77.

certainly not preclude the Commission from bringing an action against the State concerned under Article 169 of the Treaty for a declaration that such infringement has been committed. As we know, that right of action is not subject to any time-limit, because it represents a means of exercising the permanent duty entrusted to the Commission by Article 155 of the Treaty to ensure compliance with Community law; [8] accordingly, any doubt on that head is removed by plain considerations of priority between rules.

Moreover, while the declared aim of the Article 3 procedure is, as is clear from a reading of the preamble to the directive, [9] to establish a mechanism by means of which the Commission may swiftly take action vis-à-vis the competent authorities of the Member States before a procurement contract is concluded, in order to prevent the irreparable damage that can occur as a result of the unlawful award of such a contract, in actual fact the means provided neither enhances nor detracts from the powers available to the Commission under Article 169. It is the procedure under Article 169 to which the Commission must in any event have recourse where there is no reply, or an inadequate reply, to the notification given under Article 3, if it intends to seek a declaration that the State concerned has failed to fulfil its obligations under Community rules on procurement contracts.

5. In the light of those considerations, the fact that proceedings were initiated simultaneously under Article 3 of Directive 89/665 and under Article 169 of the Treaty is in keeping with requirements of procedural economy which I have no difficulty in endorsing. The sole consequence of the Commission's delay in taking action, and from this point of view I cannot but support the complaints against it, is the risk that its action may not be as effective as the special procedure in question was intended to ensure.

Moreover, once the vigorous powers initially conferred on the Commission to take action [10] had been removed from the final version of the directive adopted by the Council, the speeding-up of procedural time-limits under Article 169 by setting a maximum period of 21 days for replying to the Commission's letter of notification is, in essence, the only factor which fulfils one of the aims of the directive, namely to strengthen at Community level as well the

8 — See the judgment in Case 324/82 *Commission* v *Belgium* [1984] ECR 1861, paras 11 and 12.

9 — See, in particular, recitals 2, 7 and 8.

10 — Especially the possibility of suspending, in urgent cases, the course of the contract award procedure where there have been particularly serious infringements of Community rules: see Articles 4 and 5 of the proposal for a directive (OJ 1989 C 15, p. 8).

effectiveness of the means of monitoring the application of legislation concerning public procurement contracts.

The article in question merely specifies the period to be considered 'reasonable' in this area, under the Article 169 procedure, to enable the Member State concerned to reply to the letter of notification and, if appropriate, prepare a defence to the charges levelled against it. [11] But it was certainly not intended to set a time-limit for the lapse of the Commission's right of action.

6. The basis of the second plea of inadmissibility put forward by the defendant is the need to safeguard the legitimate expectations as to the compatibility with Community law of the technical specification at issue, aroused in the Netherlands authorities as a result of the use of that specification by the Commission itself in a public contract notice.

On this point, I shall confine myself to observing that there are two possibilities. The first is that the use of the specification at issue is not incompatible with the rules on tenders and, therefore, both the Community institutions and the national authorities were and are entitled to make use of it in describing the subject-matter of a contract. If this is the case, the action brought by the Commission must be dismissed on its merits, at least with regard to this point.

If, instead, there is a conflict, I fail to see how the fact that the Commission too has infringed the rules of the directive can remedy any infringement by the Netherlands authorities. Community institutions are also bound to observe the rules on procurement contracts; if they do not, there is no principle of law authorizing Member States not to do so. Nor is an institution prevented from bringing an action for a declaration that a Member State has committed an infringement merely because it has committed a breach of the same kind.

This objection of inadmissibility must consequently be rejected as well.

7. Since it is not disputed that the directive is applicable in this

11 — See the judgment in Case 293/85 *Commission* v *Belgium* [1988] ECR 305, paras 13 and 14.

case, [12] I shall go on to examine the substance of the allegations against the defendant.

First of all, the Commission claims that the contracting authority, as already stated, infringed Article 9(5) of the directive in that when it drew up the tender notice it failed to comply with the conditions contained in Annex III to the directive, referred to in Article 9(5), which at point 7 requires the notice to indicate the persons authorized to be present at the opening of tenders and also the date, time and place of opening. The Netherlands Government shares the Commission's view as to the existence of a duty on the part of the contracting authorities to draw up notices in accordance with the model set out in Annex III and as to the unconditional nature of the requirement referred to in point 7 of the Annex. It contends, however, that the information in question is necessary only where the contracting authority intends to restrict the opportunity to be present at the opening of tenders by, for example, allowing only the suppliers who have submitted them to attend. If, as in this case, they are opened in public and anyone interested may attend, such information is unnecessary.

Furthermore, because the tenders are usually complex and bulky, which precludes their being read out in full when they are opened, the opportunity for suppliers at this stage of the procedure to check the conduct of the contracting authority and, if appropriate, to take action in time to protect their rights, is wholly unrealistic.

8. I cannot support the Netherlands Government's arguments on that point either. In the first place they have no basis in the wording of the directive. In specifying what information must appear in contract notices where the open procedure is used, Annex III to the directive draws a clear distinction between mandatory and optional information. The second category includes information concerning any time-limit for delivery of the goods to be supplied (point 4), the amount and terms of payment of any sum payable in order to obtain documents relevant to the contract from the administrative service concerned (point 5(c)) or the legal form to be taken by the grouping of suppliers to whom the contract is awarded (point 10).

There is, on the other hand, no possibility of derogating from the requirements contained in point 7, especially with regard to the procedure followed when the tenders are opened. That is perfectly in keeping with the spirit of the rules in question, which treat

12 — In this respect, while denying that the NIC may be regarded as a contracting authority for the purposes of the directive, the Netherlands Government subsequently acknowledges that the directive applies to the award procedure at issue, inasmuch as in the case in point the NIC acted in the name and on behalf of the Koninklijk Nederlands Meteorologisch Instituut (Royal Meteorological Institute of the Netherlands) which, conversely, is to be regarded as a contracting authority in accordance with the directive.

transparency in all the operations and procedures for supplying the contracting authorities as one of the most effective means of opening up the market in public supply contracts. It should also be borne in mind that in many cases proper application of Community legislation can be ensured only if infringements of the latter are met with a timely response. It is therefore understandable that it may be important for suppliers participating in an award procedure to be present when the tenders are opened, if only, as the Commission observes, to discover the identity of their competitors and to be able to check, even at that stage, whether they meet the criteria for qualitative selection contained in Article 20 et seq. of the directive. It is clear, therefore, that their opportunity to do so would be completely thwarted if the practical conditions attached to opening (in public as well) were not disclosed.

9. As to the alleged infringement of Article 7(6) of the directive and Article 30 of the Treaty, as a result of introducing into the general terms and conditions of the disputed contract a technical specification mentioning a particular product, the Netherlands Government contends that those terms and conditions actually refer to a class of products, in so far as the UNIX system is to be regarded, in the field of information technology, as a technical specification generally recognized by traders in that sector. Accordingly, the fact that it deliberately failed to include the words 'or equivalent' alongside UNIX was intended to convey to the suppliers concerned that NIC meant to refer not to a particular product but to a product with well-defined characteristics. In support of its argument, the Netherlands Government refers to the fact that in the end the contract was awarded to a supplier who does not use the UNIX system but a similar one.

I would point out, in this connection, that the defendant acknowledges that the UNIX system is not a standardized system, that is to say a technical specification approved by an international standards institution recognized in the field of information technology. The system was produced within one of the unofficial bodies set up by producers and consumers for the purpose of speeding up the standardization process, to be precise, X/OPEN, which undertakes the standardization of operational systems based on AT&T's UNIX. [13] It is only when the results of the work carried out by those bodies have been adopted by the administrative authorities that the technical specifications thus drawn up become standards. Consequently, it seems to me to be difficult to claim, as the Netherlands Government does, that the conduct of the contracting authority is in accordance with Council Decision 87/95/EEC of 22 December 1986 on standardization in the field of information technology and telecommunications, [14] which requires the Member States to make refer-

13 — See, on that point, the document 'Standardization-Fact Sheet 4', drafted in October 1990 by the Commission's Directorate-General XIII, to which both the parties in the case refer.

14 — OJ 1987 L 36, p. 31.

ence to European and international standards in public procurement orders relating to such technology, in that, as the defendant itself acknowledges, the UNIX system does not fall within that category.

Since, therefore, UNIX is the trade mark of a particular product, the insertion into the contract notice of a clause referring to it, without adding the words 'or equivalent', constitutes an infringement of Article 7(6) of the directive. Furthermore, since such a clause reserves the contract, at least at first, solely to those suppliers who propose to use the system specifically indicated, its effect is to impede the flow of imports in intra-Community trade and it is therefore also in breach of Article 30 of the Treaty. [15]

10. Nor does it seem to me that that conclusion can be altered by the fact that the contract in question was subsequently awarded to a supplier using a system equivalent to the one specifically mentioned in the notice, since to include such a clause in the general terms and conditions may in any case cause traders who use systems similar to the one requested to refrain from tendering, precisely on account of that clause.

11. In the light of the foregoing considerations, therefore, I propose that the Court:

Declare that, by failing to indicate in the tender notice at issue the persons authorized to be present at the opening of tenders as well as the date, time and place of

15 — See the judgment in Case 45/87 *Commission* v *Ireland* [1988] ECR 4929, in particular paras 12 to 27.

opening, and by including in the general terms and conditions a technical specification defined by reference to a product of a specific make, the Kingdom of the Netherlands has failed to fulfil its obligations under Council Directive 77/62/EEC, as amended by Directives 80/767/EEC and 88/295/EEC, and also under Article 30 of the Treaty;

Order the Kingdom of the Netherlands to pay the costs.