OPINION OF MR ADVOCATE GENERAL DARMON
delivered on 4 May 1988 *

Mr President,
Members of the Court,

1. The questions referred to the Court by a judgment of 28 January 1987 of the Arrondissementsrechtbank, The Hague, relate to the interpretation of certain provisions of Council Directive 71/305/EEC of 26 July 1971 concerning the coordination of procedures for the award of public works contracts. [1]

2. They arose in proceedings in which Beentjes BV claimed damages from the Netherlands State in respect of the loss arising from the fact that although it had submitted the lowest tender under an invitation to tender for a public works contract issued by the Waterland Local Land Consolidation Committee (hereinafter referred to as 'the local committee'), did not obtain the contract, which was awarded to the tenderer with the next lowest price. The local committee justified its rejection of Beentjes' tender on the ground that it was less well qualified. Since Beentjes' claim was based directly on the alleged failure of the local committee to comply with provisions of the directive, the national court took the view that it was necessary to obtain clarification from the Court of certain conditions for its application.

3. The first question concerns the scope of the directive. It seeks to establish whether the directive governs the award of public works contracts by a body such as a local land consolidation committee in the Netherlands.

4. According to the preamble to the directive, the coordination of national procedures for the award of public works contracts is, together with the abolition of restrictions, one of the means necessary for 'the simultaneous attainment of freedom of establishment and freedom to provide services in respect of public works contracts awarded in Member States on behalf of the State or regional or local authorities or other legal persons governed by public law'. [2] As regards the substantive rules, Article 1 (b) of the directive defines the 'authorities awarding contracts' governed by its provisions as 'the State, regional or local authorities and the legal persons governed by public law specified in Annex I'. Annex I refers to the local authorities in all the Member States; in the Netherlands specifically, it mentions various categories of bodies, in particular university bodies.

5. According to the information provided by the national court, the local land consolidation committee is a body which 'has no legal personality of its own' and is responsible for carrying out land consolidation. It is appointed by the Provincial Executive of the province concerned and must comply with rules laid down by a Central Committee set up by Royal Decree, whose members are appointed by the Crown.

* Translated from the French.

1 — OJ, English Special Edition 1971 (II), p. 682.

2 — First recital in the preamble.

6. In view of the fact that the local committee does not have legal personality, a fact to which the national court expressly drew attention, it is in my view unnecessary to attribute any other significance to the expression 'body' used in its first question than that of 'organ' or 'authority'.

7. The argument put forward in the main proceedings by the Netherlands Government that the directive does not apply to the award of contracts by bodies such as the local committee is based on a simple comparison of the characteristics of this committee with the abovementioned provisions of the Community measure. Since the local committee is not a department of the State administration, an administrative department of a local authority or one of the 'legal persons governed by public law specified in Annex I' of the directive, in the Government's view public works contracts awarded by the body in question are not covered by the directive.

8. In this regard one should not ignore the paradoxical position of the local land consolidation committee inasmuch as, according to the information expressly provided by the judgment of the national court, Article 35 of the rules drawn up by the Central Committee required the local committee to apply the directive when awarding works contracts. It may therefore be asked whether the applicability of the directive, which is the subject of the first question, can genuinely be in doubt, since the Netherlands public authorities — and here I refer to the express terms of paragraph 5.4 of the national court's judgment — have decided that it is necessary for the local committee to implement its provisions.

9. Nevertheless, for reasons of legal precision, the Court must reply in terms of principle to the question referred by the national court. The mere finding that a rule in fact applies can be explained by the use of discretionary power, and is therefore not sufficient to establish the existence of a legal obligation.

10. In fact, the Court is faced with a phenomenon which is common in the administrative life of developed societies: the 'fragmentation of the administration'. With increasing frequency, the laws of States entrust functions which are by definition public to organs which are not attached to the traditional administrative organization, but nevertheless have no legal personality of their own. This fragmentation reflects a desire to associate closely with the functions concerned persons from outside the administration — this being reflected in the composition of the organs — or to reinforce the independence of such organs in the eyes of the public, by means of the fact that the traditional administrative authorities may not give them instructions. Indeed, it may also correspond to a mixture of the two concerns. Thus, for example, we have witnessed for a number of years the appearance in certain States of 'independent administrative authorities' endowed with important powers, in particular that of laying down rules. But even leaving aside these recent creations, the everyday organization of the administration has for a long time given rise to organs such as examining boards whose activity is in substance administrative but is carried out separately and independently from the traditional structures of the administration, which, because it has no hierarchical authority, is in functional terms held at arm's length.

11. In so far as local land consolidation committees in the Netherlands are in my

view an expression of this phenomenon of fragmentation of the administration, the fundamental question put to the Court amounts to whether or not it is possible for organs outside the traditional structures of the administration which have no legal personality of their own but carry out functions which normally fall within the competence of the State or local authorities to evade the effect of Community rules binding on the latter.

12. In this respect it is important not to confuse functional independence and autonomy. While such organs are not subordinate in hierarchical terms to the 'traditional' administration, whether central or local, their activities are carried out in the pursuit of interests which are not distinct from those of the State or a local authority. Their objectives fall within the normal competence of the State or a local authority. When an examining board issues diplomas it does so in the name of the State or, depending on the relevant legislation, a local authority, and not in the name of undefinable separate interests. The fact that the interests of the general public are taken into account, either in the composition of the organs or by their functional independence, is not sufficient to transform their purpose, which, since they have no legal personality of their own, is merely to represent, in an innovative way, the State or a local authority. It follows that in the absence of specific provisions the Community rules applicable to the State or to local authorities must automatically govern the activities of organs of the type considered here.

13. In examining the application of the Community rules in question, however, it is necessary to determine the criteria for deciding whether certain organs are in fact inseparable from the State or local authorities.

14. In my view, where an organ which has no legal personality of its own and whose members are appointed by the State or a local authority has a function which falls within the ordinary competence of such authorities or the State and is endowed by them with the means enabling it to carry out such functions, the award of works contracts relating to the exercise of those functions is governed by the provisions of the directive.

15. This approach which I propose, that of not keeping strictly to the letter of expressions such as the 'State' or 'regional or local authorities' is not new to the Court.

16. Thus, in an action against a Member State for failure to fulfil its obligations, in the judgment of 24 November 1982 in *Commission* v *Ireland*,[3] the Court considered that where a government 'appoints the members of the Management Committee' of an organ, 'grants it public subsidies which cover the greater part of its expenses and, finally, defines the aims and the broad outline of the campaign conducted by that institution to promote the sale and purchase of [national] products . . .', it cannot 'rely on the fact that the campaign was conducted by a private company in order to escape any liability it may have under the provisions of the Treaty'.[4]

17. Moreover, in a reference for a preliminary ruling, in the judgment of 6 October 1981 in *Broekmeulen*,[5] the Court held that the 'Appeals Committee for General Medicine' established by the Royal Netherlands Society for the Promotion of

3 — Case 249/81 [1982] ECR 4005.

4 — Case 249/81, cited above, at paragraph 15.

5 — Case 246/80 [1981] ECR 2311.

Medicine, an association governed by private law, was to be regarded, 'in the absence, in practice, of any right of appeal to the ordinary courts . . . in a matter involving the application of Community law', as a court or tribunal within the meaning of Article 177 of the Treaty since it operates with the consent and cooperation of the public authorities and its decisions, taken after contentious proceedings, are as a matter of fact recognized as final.

18. It therefore seems to me to be consistent with the realistic approach adopted by the Court in its decisions to regard the Community provisions governing the award of public works contracts by the State and regional and local authorities as applying to the award of works contracts by an organ whose constitutive documents, while establishing its functional independence, show that it acts on behalf of the State or a regional or local authority.

19. In this instance, the committee in question is responsible under legislation for carrying out land consolidation at local level. In view of the fact that its activity in this respect must comply with the instructions of a central committee whose members are appointed by the Crown and that under the Netherlands law concerning appeals against administrative decisions it is regarded as an administrative organ of the central authorities, it is clear that the local committee, which has no legal personality of its own, performs an administrative function on behalf of the State. In addition, its members are appointed by the Provincial Executive, a public authority, and the expenses which it incurs are financed by the public authorities.

20. If the Court accepts this analysis, it must find that the public works contracts awarded by organs such as a local land consolidation committee in the Netherlands are awarded on behalf of the State and, accordingly, are governed by the provisions of the directive.

21. The second question relates to the substance of the directive and seeks to establish whether, under its provisions, it is possible to exclude a tenderer on the basis of various qualitative criteria not expressly specified in the contract notice.

22. Article 20 of the directive lays down, as a matter of principle, a distinction between criteria for checking the suitability of contractors and criteria for awarding the contract:

'Contracts shall be awarded on the basis of the criteria laid down in Chapter 2 . . . after the suitability of contractors . . . has been checked by the authorities awarding contracts in accordance with the criteria of economic and financial standing and of technical knowledge or ability referred to in Articles 25 to 28.'

23. The directive deals with the assessment of whether contractors are qualified under two heads: financial and economic standing on the one hand (Article 25), and technical knowledge and ability on the other (Article 26).

24. With regard to economic and financial standing, which has not been disputed in the main proceedings but is mentioned in the national provisions cited by the Netherlands State and referred to in the wording of the

question, it may be seen that, pursuant to Article 25 of the directive, proof may be furnished 'as a general rule' by one or more of three 'references' described in the three indents (a) to (c) of that article; the awarding authorities must specify in the contract notice which reference or references they have chosen and 'what references other than those mentioned under (a), (b) and (c) are to be produced'.

25. Article 26 provides that proof of technical knowledge or ability 'may be furnished by' references described under the five indents (a) to (e) of that article and that the awarding authorities must specify in the notice which of these references are to be produced.

26. This brief summary of the provisions of the directive concerning the assessment of the suitability of contractors calls for three comments.

27. In the first place, contrary to the affirmations of the Netherlands State referred to at paragraph 6.2 in the national court's judgment, it appears that the purpose of Articles 25 and 26 of the directive is not solely to standardize the documents which may be required in applying criteria of qualitative selection. They also fix these criteria, as is shown by Article 20. In so far as Articles 25 and 26 set out the various references which may be demanded by the awarding authorities, it must be concluded that the qualitative criteria to which these references relate constitute the criteria referred to in Article 20.

28. Clearly these criteria are to some extent incomplete, because, as Mr Advocate General Mischo noted in his Opinion delivered on 11 June 1987 in cases concerning questions referred to the Court for a preliminary ruling by the Belgian Conseil d'Etat,[6] the references set out in Article 25 and 26 designate qualitative aspects — for instance work carried out previously, tools, plant and technical equipment, average manpower — without laying down any requirement as to the standard. It follows that with regard to such requirements the awarding authorities are left a certain leeway. However, those requirements must apply to the qualitative criteria concerned by the references set out in Articles 25 and 26, under the conditions which I now propose to specify.

29. My second comment is drawn from a comparison of the wording of Article 25 and Article 26 and is that the criteria derived from the technical references described under indents (a) to (e) of Article 26 are exhaustive in character since the awarding authorities are not empowered to seek 'other references', as they may do under Article 25 with regard to financial and economic standing. They are therefore not entitled to apply criteria concerning additional qualitative aspects not referred to in the indents in question. In the *Transporoute* judgment of 10 February 1982[7] the Court has already emphasized the exhaustive nature of the references other than those concerning economic and financial standing.

30. My third comment concerns the legal effects of statements in the contract notice. Articles 25 and 26 provide that the awarding authorities must specify, in the notice, 'the references . . . [which] are to be produced'. In view of the importance of the references described in these articles, which

6 — Judgment of 9 July 1987 in Joined Cases 27 to 29/86 [1987] ECR 3347.

7 — Case 76/81 [1982] ECR 417.

in the light of Article 20 must be interpreted as both listing the qualitative factors for assessment and describing the documents to be used for that assessment, it seems to me that by requiring the awarding authorities to specify in the notice the references which are to be produced the directive imposes upon them *inter alia* a duty to inform contractors of the qualitative aspects, in other words the criteria, on the basis of which their suitability will be checked. Accordingly, in my view, the provisions in question prohibit an awarding authority from excluding a contractor on the basis of qualitative aspects in respect of which references were not required in the contract notice. To decide otherwise would, I believe, create a risk of destabilizing the structure erected by the directive and of deliberately disregarding the obligations which it lays down concerning the exchange of information between awarding authorities and contractors.

31. In accordance with the model contract notice set out in Annex I to Council Directive 72/277/EEC concerning the details of publication of notices of public works contracts and concessions in the *Official Journal of the European Communities*,[8] the notice must state, under heading 11, 'the minimum economic and technical conditions required of the contractors'. Without wishing to underestimate the value, in particular in budgetary terms, of standardizing the publication of contract notices in the *Official Journal of the European Communities*, I think it would be excessive to consider that the references concerning economic and financial standing and technical knowledge and ability required by awarding authorities must appear exclusively, if the notice is to be valid, under heading 11 and that a reference concerning the qualitative aspects provided for in Articles 25 and 26 but appearing under another heading in the notice would be void. This approach cannot in my view be reconciled with the intention behind the adoption of Directive 72/277/EEC or with the concerns addressed by the Community legislature in the basic measure, Directive 71/305/EEC.

32. In the case which is the subject of the national proceedings, the contract notice, section 11 of which was blank, stated *in fine* that

'the work-force must be made up of at least 70% long-term unemployed persons employed through the regional employment office'.

This gives rise to the observation that, although qualitative aspects may properly be mentioned in the contract notice without being formally included under section 11, they must nevertheless fall within the compass of Articles 25 and 26, as, moreover, is required under Article 16 (l) of Directive 71/305/EEC. A statement such as that referred to above cannot by definition be a reference capable of proving economic and financial standing in accordance with Article 25, and does not appear to have any relation to one of the indents of Article 26, which, as I have stressed, are exhaustive. This situation may seem paradoxical in so far as the absence in the invitation to tender of any valid statement of criteria regarding economic and financial standing means that there is no condition whatsoever as to the suitability of contractors and thus that in principle any undertaking is suitable. However, it must be stressed that it is the awarding authority which, by wrongly applying the directive, has placed itself in this situation. The paradox is therefore the result not of the directive but of a failure to comply with it.

8 — OJ, English Special Edition 1972 (III), p. 823.

33. For the sake of completeness in the discussion of the second question, I think it is also necessary to clarify, having regard to the situation which gave rise to this reference for a preliminary ruling, the conditions of application of the provisions of the directive concerning the criteria for awarding the contract.

34. Under Article 20 contracts must be awarded on the basis of the criteria laid down in Chapter 2. In that chapter, Article 29 (1) provides that:

'the criteria on which the authorities awarding contracts shall base the award of contracts shall be:

either the lowest price only;

or, when the award is made to the most economically advantageous tender, various criteria according to the contract: e. g. price, period for completion, running costs, profitability, technical merit'.

Article 29 (2) states that in the event of an award on the basis of the most economically advantageous offer,

'the awarding authorities shall state in the contract documents or in the contract notice all the criteria they intend to apply to the award, where possible in descending order of importance'.

35. It may be noted that although Article 29 contains no exhaustive list of the criteria for awarding the contract when the lowest price is not the sole criterion, it does draw attention to a common factor to be shared by such criteria: they must, like those expressly cited, concern the nature of the work to be carried out or the manner in which it is to be done, to the exclusion of any considerations relating to the contractor. In simpler terms, it may be said that the criteria for the award 'to the most economically advantageous tender' concern the 'product' and not the 'producer', the quality of the 'work' and not that of the contractor.

36. The directive thus draws a clear distinction between the criteria for checking the suitability of a contractor, which concern the qualities of the contractor as such, and those for awarding the contract, which relate to the qualities of the service which he offers, of the work which he proposes to carry out.

37. In those circumstances, compliance with the provisions of the directive requires that the criteria should not be confused and that criteria relating to the contractor's suitability should not be taken into account in connection with the award of the contract. In this respect I agree with the Italian Republic's analysis. I do not however feel able to endorse its suggestion of a rigid chronological division between the two stages, that of the checking of the contractor's suitability and that of the award of the contract. A criterion of suitability cannot be used as a criterion for making the award, but I do not think that the directive places a time-limit on the assessment of suitability. An awarding authority belatedly informed of a reason for a contractor's unsuitability must be able to rely on it up to the last moment, so long as there is no misuse of powers and it is not a disguised refusal to allow the criteria for awarding the contract to operate in the normal way.

38. The contract notice did not include any statement under section 13, which pursuant

to Directive 72/277/EEC is reserved for 'criteria for the award of the contract'. The sole 'criterion' appearing in the notice was that referred to above, concerning the employment of a certain quota of unemployed persons to carry out the work. This criterion, which has no relation to the intrinsic qualities of the work to be carried out, of the service to be provided, of the 'product', could not be regarded as one of the criteria for the award of the contract within the meaning of the directive, and consequently constitute a ground for excluding a tenderer. In such a situation, in which no criterion for awarding the contract has been validly specified in the contract notice or the contract documents, it appears that under the actual terms of Article 29 only the criterion of the lowest price may be applied.

39. Accordingly, in my view the Court should reply to the second question by stating that under the directive it is permissible to exclude a contractor only on the basis of one or more of the suitability criteria concerning the factors set out in Articles 25 and 26 and specified in the contract notice, or on the basis of one or more of the criteria for the award of contracts laid down in Article 29 and specified in the contract notice or the contract documents, in which case the criterion of the lowest price is not applied.

40. The third question may be considered more briefly. As the Commission pointed out, the direct effect of the provisions concerned appears already to have been confirmed, at least by implication, in the Court's judgment in the abovementioned *Transporoute* case.

41. In the present case, the national court asks whether the provisions of the directive, whose substance I have just discussed, may be relied upon by an individual

'if in the incorporation of those provisions . . . in national legislation the contracting authority is given wider powers to refuse to award a contract than are permitted under the directive'.

In the *Transporoute* judgment, with regard to national provisions which, in the words of Mr Advocate General Reischl, did not reproduce exactly the terms of Article 29 of the directive, the Court held that the provisions of the article should be applied by the awarding authority, which clearly implies that the provisions in question are directly applicable. The Court held that

'the aim of the provision, which is to protect tenderers against arbitrariness on the part of the authority awarding contracts, could not be achieved if it were left to that authority to judge whether or not it was appropriate to seek explanations'.

42. In this case we are asked to consider several provisions of the directive, including Article 29, whose purpose, which is identical, may be frustrated by a national implementing provision leaving a general discretion to the awarding authority. In my view the same reply must be given as in the 1982 judgment. It is clear that the legal structure defined in Articles 20, 25, 26 and 29 of the directive is intended, through the fixing of criteria of suitability and criteria for the award of the contract, to protect the tenderer from arbitrariness on the part of the awarding authority. It is equally clear that this structure would be undermined by

a provision such as Article 21 (2) of the Uniform Rules, the national measure implementing the directive, whose effect is to release the awarding authority from the duty to comply with the criteria laid down in the directive. Accordingly it is my view that the tenderer must be given the protection intended by the directive, whose relevant provisions must override the national implementing provision.

43. Consequently, I propose that the reply to the questions submitted by the Arrondissementsrechtbank, The Hague, should be as follows:

(1) The provisions of Council Directive 71/305/EEC apply to works contracts awarded by a body which has no legal personality of its own where its composition, its function and the means it has for carrying out that function show that it acts on behalf of the State or a regional or local authority.

(2) Under these provisions a contractor may be excluded only on the basis of one or more of the criteria of suitability concerning the aspects set out in Articles 25 or 26 and specified in the contract notice, or on the basis of one or more of the criteria for the award of contracts contained in Article 29 and specified in the contract notice or the contract documents, where the lowest price is not taken as the exclusive criterion for awarding the contract.

(3) A public awarding authority is bound to comply with those provisions, and may not rely on a national implementing provision which confers on it a general discretion concerning assessment of the contractor and his tender.