REPORT FOR THE HEARING
in Case C-351/88 *

I — Legal background

1. *National provisions*

1. The facts giving rise to the main proceedings are essentially concerned with Italian rules under which a percentage of public supply contracts is reserved to undertakings located in regions of the Mezzogiorno (Southern Italy).

2. The principle of the 'reserved quota' appeared previously in the Italian Decree Law CPdS No 40 of 18 February 1947 which authorized the State authorities to obtain up to one sixth of their supplies from undertakings located in certain regions of the Mezzogiorno. Subsequently, Law No 835 of 6 October 1950 made the reserved quota system mandatory.

3. The reserved quota system was confirmed and maintained in force by various laws governing the question of assistance for the Mezzogiorno; the most recent such provision is Law No 64 of 1 March 1986 ('Disciplina organica dell'intervento straordinario nel Mezzogiorno', hereinafter referred to as 'Law No 64/86').

4. Article 17(16) and (17) of Law No 64/86 provide as follows:

'(16) The obligation to reserve a part of the supplies and services referred to in Article 113(1) of the aforementioned consolidated instrument shall extend to all public authorities, regions, provinces, municipalities, local health authorities, mountain communities, companies and bodies in which the State has a shareholding, universities and independent hospital establishments.

(17) Such bodies, undertakings and authorities are required to obtain at least 30% of their supplies of the material which they require from industrial, agricultural and small-scale undertakings which have establishments and fixed plant in the areas referred to in Article 1 of the aforementioned consolidated instrument in which the requisite products must have undergone at least partial processing.'

5. The consolidated instrument to which the provision refers is Decree No 218 of 6 March 1978 of the President of the Republic (Consolidated Laws on the Mezzogiorno), Article 113(1) of which required certain authorities to reserve each financial year 30% of the contracts for supplies and services, with the exception of contracts which were technically not divisible, to undertakings with the necessary technical capacity which were based or, in any event, had establishments in the Mezzogiorno.

* Language of the case: Italian.

6. Law No 64/86 significantly extended the scope of Article 113(1) of Decree No 218, first by extending the obligation to reserve a proportion of public contracts to a number of bodies not originally covered by the system, including the local health authorities, and secondly by imposing the reserved quota (no longer 30% but at least 30%) not only as regards industrial undertakings but also agricultural undertakings and small businesses, and by stipulating that the undertakings must at least have establishments in the areas concerned in which at least partial processing of the relevant products takes place.

2. *Community provisions*

7. The Council has adopted in this field Directive 77/62/EEC of 21 December 1976 coordinating procedures for the award of public supply contracts (Official Journal 1977 L 13, p. 1) with a view to eliminating, in respect of public supply contracts, restrictions on free movement of goods contrary to Article 30 of the EEC Treaty.

Article 26 of that Directive provides as follows:

'This Directive shall not prevent the implementation of provisions contained in Italian Law No 835 of 6 October 1950 (Official Gazette No 245 of 24 October 1950 of the Italian Republic) and in modifications thereto in force on the date on which this Directive is adopted; this is without prejudice to the compatibility of those provisions with the Treaty.'

8. Article 16 of Council Directive 88/295/EEC of 22 March 1988 amending Directive 77/62/EEC relating to the coordination of procedures on the award of public supply contracts and irepealing certain provisions of Directive 80/767/EEC (Official Journal 1988 L 127, p. 1) replaced Article 26 of Directive 77/62/EEC by the following provision:

'*Article 26*

1. This Directive shall not prevent, until 31 December 1992, the application of existing national provisions on the award of public supply contracts which have as their objective the reduction of regional disparities and the promotion of job creation in the most disadvantaged regions and in declining industrial regions, on condition that the provisions concerned are compatible with the Treaty and with the Community's international obligations.

2. ....'

II — Facts and procedure in the main proceedings

1. On 25 February 1987 Laboratori Bruneau Srl received a letter from Unità Sanitaria Locale RM/24, Monterotondo (Rome) (hereinafter 'USL') containing an 'invitation to take part in a restricted tendering procedure reserving a 30% quota under Law No 64/86'.

2. The tendering procedure concerned, in particular, the supply to USL of suturing materials with respect to 30% of its total estimated annual requirements.

3. The explicit reference to Article 17 of Law No 64/86 and the statement that the offer concerned 30% of the estimated annual supply made it clear that the offer, to which the invitation to tender referred, was reserved for undertakings complying with the conditions laid down in Article 17(17) of Law No 64/86, that is to say 'undertakings . . . which have establishments and fixed plant in the areas referred to in Article 1 of the aforementioned consolidated instrument in which the requisite products must have undergone at least partial processing'.

4. Although it had neither establishments nor fixed plant in the areas referred to in Article 17(17) of Law No 64/86, Laboratori Bruneau applied to take part in the tendering procedure; it also asked the awarding authority to enter in the minutes a prior declaration in which Laboratori Bruneau Srl stated that the procedure was unlawful and contrary to the rules of the EEC Treaty.

5. Following that declaration, the President of the awarding authority suspended the tendering procedure but, as the administration which issued the tender had neither revoked nor amended its decisions so as to waive the application of Article 17(16) and (17) of Law No 64/86, Laboratori Bruneau Srl brought proceedings on 8 April 1987 before the Tribunale Amministrativo Regionale del Lazio (Regional Administrative Court, Lazio) for a declaration that the tendering documents were unlawful, on the ground that the applicable provisions of national law were inconsistent with Community law.

After examining the application, the national court decided to refer to the Court of Justice a question for a preliminary ruling on

'whether, firstly, Articles 30 and 92 of the EEC Treaty must be interpreted as meaning that national rules reserving a percentage of public supply contracts to undertakings located in particular regions of national territory constitute "measures of equivalent effect to quantitative restrictions" or "aids" and, secondly, whether they preclude such rules?'

6. The request for a preliminary ruling was registered at the Court Registry on 6 December 1988.

7. Pursuant to Article 20 of the Protocol on the Statute of the Court of Justice of the European Communities, written observations were lodged on 14 February 1989 by the plaintiff in the main proceedings, represented by E. Baretta and A. Bozzi, of the Milan bar, G. Bozzi, of the Rome Bar, and A. May of the Luxembourg Bar; on 14 March 1989 by the Government of the Italian Republic, represented by P. G. Ferri, acting as Agent; and on 15 March 1989 by the Commission of the European Communities, represented by G. Berardis, acting as Agent.

8. Upon hearing the report of the Judge-Rapporteur and the views of the Advocate General the Court decided to open the oral procedure without any preparatory inquiry.

9. By Decision of 24 April 1991, pursuant to Article 95(1) and (2) of the Rules of Procedure, the Court assigned the case to the Fourth Chamber.

III — Written observations submitted to the Court

1. The *plaintiff in the main proceedings* commences by expounding the historical development of the relationship between the national and Community rules on public supply contracts. It examines the different stages of development in order to determine the compatibility or incompatibility of the Italian rules on public supply with the provisions of the EEC Treaty.

As regards the compatibility of the system of reserving quotas for public supply contracts, as supplemented by the provisions of Article 17(16) and (17) of Law No 64/86, with Article 30 of the Treaty, Laboratori Bruneau first observes that the system has created in Italy a restricted market which is reserved to undertakings in the Mezzogiorno and is completely outside and distinct from the European common market.

The plaintiff next observes that the abovementioned system, which previously applied only to departments of State and certain authorities, was raised by Law No 64/86 to the status of a general rule within the area of public supply. First, that Law extended the quota obligation to all public authorities and all companies and bodies in which the State participates; secondly, it authorizes a quota of even 100% of public supplies, thereby legalizing the exclusion of all companies not established in the south from all public supply contracts in Italy.

That interpretation follows, according to the plaintiff, from the words 'at least 30%', used in Article 17(17) of the abovementioned law; those words fix a minimum quota below which it is forbidden to go, but they also imply that it is lawful to apply higher quotas of up to 100% of supplies, because no upper ceiling is laid down beyond which a reserve is not authorized.

The plaintiff examines further the national rules at issue in the light of Article 92 of the Treaty. In that regard, it considers, referring for support to the case-law of the Court, that the concept of aid includes not only financial payments but also measures exempting or alleviating the financial costs of undertakings. It must therefore involve advantages provided by means of public funds.

In the present case, the measure merely excludes undertakings which are not from the south of Italy from the area of public supply by requiring the public sector to obtain its products from undertakings included in special lists set up in favour of undertakings in the south of Italy.

According to the plaintiff, the measure therefore does not consist in transferring funds to those undertakings but simply in directing the demand for products in their favour. The commercial advantage does not flow from the transfer of public funds, nor from exemption from tax or social security burdens, nor from taxation or particular deductions from costs, but in the guarantee of obtaining contracts for public supply, that

is to say the possibility of having access to tenders where competition is limited to undertakings from the south of Italy.

The economic result of that protectionist policy is, according to the plaintiff, that there is an increase in the sale of products where the money paid by the authority issuing the order is not an 'aid' but simply consideration in respect of the supply of goods and services.

However, there is no reason to accept the idea that setting up a market for reserved companies is a state aid under Article 92 and is not, on the contrary, a typical case of a discriminatory and protectionist practice which is expressly forbidden by Articles 30 et seq. of the Treaty and which does not come within any of the situations contemplated in Article 36 of the Treaty.

Lastly, Laboratori Bruneau observes that the relations between Articles 30 and 92 of the Treaty are governed by the principle that no aid can be introduced, modified or authorized in the form of commercial discrimination or of obstacles (direct or indirect, actual or potential) based on the origin of goods. According to the plaintiff, the possibility of granting aid under Article 92(3) can never involve a breach of Article 30.

In conclusion, the plaintiff asserts that the reserving of part of a market in favour of certain national products constitutes the very type of unlawfulness aimed at and prohibited by Article 30 and that unlawfulness cannot be justified by the mere fact that it was approved at the same time as exceptional measures in favour of the Mezzogiorno, without being bound or subject to those arrangements from a functional point of view.

For all those reasons, Laboratori Bruneau claims that the Court should declare that:

(1) Article 92 of the EEC Treaty must be interpreted as meaning that the reservation, even partially, of public supply contracts to national undertakings which have their seat or are established in the economically least developed regions does not constitute 'aid' under that Article;

(2) Article 30 of the EEC Treaty must be interpreted as meaning that the said reservation, even partial, of public supply contracts constitutes a measure having an effect equivalent to a quantitative restriction prohibited by the Article.

2. In the view of the *Italian Government*, the reserved quota of the markets for public supply laid down in Article 17 of Law No 64/86 has the features of an aid under Article 92 of the Treaty, inasmuch as it is a measure adopted by the State where the public authorities bear the burden of an advantage granted to a specific category of producers, according to where their activities are situated.

According to the Italian Government, because the reserved quota has the features of an aid, it must be subject to the procedure laid down in Article 93 of the

Treaty and the decision that the Commission has to take on the point cannot be anticipated or replaced by a judgment of the Court of Justice under Article 177 of the Treaty.

Secondly, the Italian Government observes that the aid derives its legitimacy under Community law from Article 92(3)(a) and that provision, unlike Article 92(3)(c), does not make the lawfulness of aid dependent on the condition that 'such aid does not adversely affect trading conditions to an extent contrary to the common interest'. The Italian Government argues that this means that State aid intended to favour the development of underdeveloped regions takes on, in the Community context, a positive role of prime importance which is not subordinated to other Community objectives.

According to the Italian Government, although the reserved quota of public supply contracts is a measure of internal law benefiting national undertakings, it does not come within the scope of Article 30 of the Treaty, since it confers a preference only on undertakings situated in certain regions, determined on the basis of a criterion (underdevelopment) which can be objectively verified and is of Community-wide importance.

Furthermore, it maintains that the national measures within the contemplation of Article 30 of the Treaty are those which are capable of creating discrimination between national products and the products of other Member States. According to the Italian Government, that situation does not arise in the present case, because the system of the reserved quota confers a privileged position only on operators established in the Mezzogiorno, whereas the disadvantageous position extends to all other Community undertakings, including those established in Italy outside the Mezzogiorno.

The Italian Government states that, according to Article 2(3)(k) of Commission Directive 70/50/EEC of 22 December 1969, for there to be a measure having an effect equivalent to a quantitative restriction on imports, it is necessary that the obstacle should affect the products as imported products and that the preference should favour national products.

3. The *Commission* recalls at the outset the case-law of the Court of Justice according to which incitements to purchase national products constitute measures having effects equivalent to quantitative restrictions, prohibited by Article 30 of the Treaty, inasmuch as they are capable of hindering directly or indirectly, actually or potentially, intra-Community trade. According to the Commission, the same analysis can be applied when national rules provide for public authorities to reserve to national producers certain orders for supplies.

The Commission refers next to Directive 70/32/EEC of 17 December 1969 concerning the supply of products to the State, its local authorities and legal persons governed by public law, which provides, in particular, for the abolition of national provisions limiting supplies to national products or else conferring on them a preference other than an aid under Article 92 of the Treaty.

Further, the Commission refers to Directive 77/62/EEC and declares that it is based on the principle that restrictions, applied to the free movement of goods applied in the area of public supply are prohibited under Article 30 et seq. of the Treaty.

In the light of the foregoing, the Commission wonders whether national provisions which reserve a proportion of public supply contracts to undertakings located in specific regions are measures which, by virtue of their selective character, are not measures having an equivalent effect under Article 30 but instead aid under Article 92.

In that regard, the Commission considers, first, that those provisions have the same effects on imports as those which apply a reserved quota in favour of all national producers. The Commission indicates, moreover, that the scope of those effects does not depend on the number of products favoured but on the size of the public authorities' needs in respect of which satisfaction by imported products is excluded, limited or made more difficult.

Secondly, the Commission considers that, for the purposes of a legal characterization of the provisions in question, it is not relevant to take account of the Member States' objectives, for example with respect to regional policy or social policy, as freedom of movement of goods is a fundamental principle of the Treaty and its breach can be permitted only on the grounds indicated in Article 36 and for certain 'imperative' reasons laid down in the case-law of the Court. According to the Commission, neither sets of grounds appears to apply in the present case.

Moreover, the Commission continues, a measure does not cease to be classified as a measure having an equivalent effect solely on the ground that selective quotas disadvantage not only products from other Member States but also other national products which are not covered. The essential feature of that classification is the restrictive effect witnessed on trade.

As regards the concept of aid under Article 92 of the Treaty, the Commission asserts that it follows from the actual text of the Article and the case-law of the Court on the matter that the concept of aid includes not only positive benefits taking the form of financial payments but also measures alleviating burdens which would normally be a cost to the undertaking and which, in that way, without strictly speaking being subsidies, are of the same nature and have identical effects. Those measures are achieved through employing the State's financial resources.

The Commission adds that it is inconceivable that Article 92 prohibits measures which are already prohibited by other provisions of the Treaty. It concludes that, when Article 92 prohibits aid, it must of necessity concern measures other than customs duties and charges or measures having an equivalent effect. Consequently, the scope of Article 92 is restricted solely to measures by public bodies consisting in the use of the State's financial resources in favour of recipient undertakings.

According to the Commission, the result is that the Italian provisions cannot be considered to be 'aids' under Article 92 because they do not involve, either directly or indirectly, the employment of the State's financial resources. All the State does is to require the public sector to obtain its supplies from certain undertakings, thereby restricting the possibility for them to obtain those supplies from other undertakings. The Commission states, moreover, that the money spent by the State in such cases represents only the price paid for the goods purchased according to the conditions applying in the market. No grant is involved but just consideration for a supply.

Consequently, the Commission considers that the Italian measures at issue are a direct obstacle to the import of competing products and are not 'aids' under Article 92 of the Treaty.

In the event of the measures being considered aid under Article 92, the Commission argues that it does not necessarily follow that the aid must be considered to be compatible with Article 30. In that regard the Commission refers to the consistent case-law of the Court, from the judgment in Case 74/76 *Iannelli* v *Meroni* [1977] ECR 557, to Case 10/84 *Commission* v *Italy* [1986] ECR 1759, according to which Articles 92 et seq. of the Treaty cannot in any way frustrate the Treaty rules on free movement of goods.

Lastly, the Commission draws attention to the fact that preferential schemes analogous to the type of scheme at issue are also incompatible with the provisions of Directive 77/62/EEC. The Commission concedes that it is correct that Article 26 of the said Directive states that the Directive 'shall not prevent the implementation of provisions contained in Italian Law No 835 of 6 October 1950 . . . and in modifications thereto in force on the date on which this Directive is adopted'.

The Commission adds that it none the less remains the case that, first, the content of the national legislation referred to by the national court (Law No 64/86) is, in part, different and more extensive than it was at the time that the Directive was adopted and, secondly, the Directive in any event applies without prejudice to the compatibility of those provisions with the Treaty.

The Commission contends that the Court should answer the questions submitted by the national Court as follows:

'(1) Article 92 of the Treaty must be interpreted as meaning that the reservation, even partial, of orders in respect of public supplies to particular national undertakings does not constitute "aids" within the meaning of that article.

(2) Article 30 of the Treaty must be interpreted as meaning that the said reservations constitute measures having an effect equivalent to quantitative restrictions on imports prohibited by that article.'

M. Díez de Velasco
Judge-Rapporteur