OPINION OF ADVOCATE GENERAL ALBER

delivered on 14 March 2000 *

I — Introduction

1. In the present infringement proceedings the Commission alleges that the French Republic has failed to fulfil its obligations under Article 59 of the EC Treaty (now, after amendment, Article 49 EC) as well as under Directive 71/305/EEC, as amended by Directive 89/440/EEC, in particular Articles 12, 26 and 29 thereof, and under Directive 93/37/EEC, in particular Articles 8, 11, 22 and 30 thereof, concerning the award of public works contracts, in that it failed duly to carry out various procedures for the award of public works contracts for the construction and maintenance of school buildings conducted by the Nord-Pas-de-Calais Region and the Département du Nord. The Commission objects specifically to infringements of the advertising rules — in particular those concerning prior information notices and the number of tenderers — and complains of the use of an inadmissible criterion for the award of contracts. It further objects to discriminatory technical specifications used to describe lots and discriminatory proof of professional experience and capability and also complains of a lack of information on the award of contracts and a failure to communicate the written reports.

II — Legal background

A — *Council Directive 71/305/EEC of 26 July 1971 concerning the coordination of procedures for the award of public works contracts,* [1] *as amended by Council Directive 89/440/EEC of 18 July 1989,* [2] *and Council Directive 93/37/EEC of 14 June 1993 concerning the coordination of procedures for the award of public works contracts* [3]

2. The provisions of Directive 71/305, which had been amended substantially and on a number of occasions, were consolidated by Directive 93/37 'for reasons of clarity and better understanding', according to the first recital in the preamble thereto. Apart from a number of changes in wording, the provisions of Directive 71/305 which are of relevance to the present case

* Original language: German.

1 — OJ, English Special Edition 1971 (II), p. 682.
2 — OJ 1989 L 210, p. 1.
3 — OJ 1993 L 199, p. 54.

are identical to those of Directive 93/37. Since Directive 93/37 did not enter into force until 14 January 1993, but the Commission objects to certain infringements which were committed in part before that time, both directives apply in this case. Moreover, Article 36 of Directive 93/37, by which Directive 71/305 is repealed, states that references to the repealed Directive are to be construed as references to the new Directive.

The articles cited below without reference to a specific directive are those of Directive 93/37.

(a) Award procedure

3. Article 8 — which corresponds to Article 5a of Directive 71/305 — states:

'...

3. For each contract awarded, the contracting authorities shall draw up a written report which shall include at least the following:

— the name and address of the contracting authority, the subject and value of the contract,

— the names of the candidates or tenderers admitted and the reasons for their selection,

— the names of the candidates or tenderers rejected and the reasons for their rejection,

— the name of the successful tenderer and the reasons for his tender having been selected and, if known, any share of the contract the successful tenderer may intend to subcontract to a third party,

— for negotiated procedures, the circumstances referred to in Article 7 which justify the use of these procedures.

This report, or the main features of it, shall be communicated to the Commission at its request.'

(b) Prior and subsequent information

4. Article 11 — which corresponds to Article 12 of Directive 71/305 — states:

'1. Contracting authorities shall make known, by means of an indicative notice, the essential characteristics of the works contracts which they intend to award and the estimated value of which is not less than the threshold laid down in Article 6(1). [4]

...

5. Contracting authorities who have awarded a contract shall make known the result by means of a notice....

...

7. The contracting authorities shall send the notices referred to in paragraphs 1 to 5 as rapidly as possible and by the most appropriate channels to the Office for Official Publications of the European Communities....

...'

(c) Effect of the prior information notice on the time-limit for submitting tenders

5. Article 12 — which corresponds to Article 13 of Directive 71/305 — states:

'1. In open procedures the time-limit for the receipt of tenders fixed by the contracting authorities shall be not less than 52 days from the date of dispatch of the notice.

2. The time-limit for the receipt of tenders laid down in paragraph 1 may be reduced to 36 days where the contracting authorities have published the notice [provided] for in Article 11(1), drafted in accordance with the specimen in Annex IV A, in the *Official Journal of the European Communities*.

...'

4 — The threshold referred to in Article 6(1) is ECU 5 million.

6. Article 13 — which corresponds to Article 14 of Directive 71/305 — provides as follows:

'...

3. In restricted procedures, the time-limit for receipt of tenders fixed by the contracting authorities may not be less than 40 days from the date of dispatch of the written invitation.

4. The time-limit for the receipt of tenders laid down in paragraph 3 may be reduced to 26 days where the contracting authorities have published the notice provided for in Article 11(1), drafted in accordance with the model in Annex IV A, in the *Official Journal of the European Communities*.

...'

(d) Number of tenderers

7. Article 22 — which corresponds to Article 22 of Directive 71/305, as amended by Directive 89/440 — provides that:

'...

2. Where the contracting authorities award a contract by restricted procedure, they may prescribe the range within which the number of undertakings which they intend to invite will fall. In this case the range shall be indicated in the contract notice. The range shall be determined in the light of the [nature] of the work to be carried out.... The range must number at least 5 undertakings and may be up to 20.

In any event, the number of candidates invited to tender shall be sufficient to ensure genuine competition.

...'

(e) Evidence of capability

8. Article 27 — which corresponds to Article 26 of Directive 71/305 — states:

'1. Evidence of the contractor's technical capability may be furnished by:

(a) the contractor's educational and professional qualifications and/or those of the firm's managerial staff and, in particular, those of the person or persons responsible for carrying out the works;

(b) a list of the works carried out over the past five years, accompanied by certificates of satisfactory execution for the most important works. These certificates shall indicate the value, date and site of the works and shall specify whether they were carried out according to the rules of the trade and properly completed. Where necessary, the competent authority shall submit these certificates to the contracting authority direct;

(c) a statement of the tools, plant and technical equipment available to the contractor for carrying out the work;

(d) a statement of the firm's average annual manpower and the number of managerial staff for the last three years;

(e) a statement of the technicians or technical bodies which the contractor can call upon for carrying out the work, whether or not they belong to the firm.

2. The contracting authorities shall specify [in the notice or] in the invitation to tender which of these references are to be produced.'

(f) Criteria for the award of contracts

9. Article 30 — which corresponds to Article 29 of Directive 71/305 — provides as follows:

'1. The criteria on which the contracting authorities shall base the award of contracts shall be:

(a) either the lowest price only;

(b) 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.

2. In the case referred to in paragraph 1(b), the contracting authority shall state in the contract documents or in the contract notice all the criteria it intends to apply to the award, where possible in descending order of importance.

...'

III — Pre-litigation procedure and facts

10. The subject-matter of the present infringement proceedings is the result of two separate pre-litigation procedures.

11. In the first case, at the beginning of 1993, an unsuccessful tenderer drew the Commission's attention to the tendering procedure for a public works contract issued by open procedure. That procedure related to the construction of a multipurpose secondary school in Wingles (Nord-Pas-de-Calais Region). The contract notice was published in the *Official Journal of the European Communities* of 21 January 1993. The Commission had a number of criticisms of that contract notice. In a formal letter of notice of 27 September 1993, it alleged that the French authorities had set too short a time-limit for the receipt of tenders, that the classification of the lots by reference only to technical specifications used in France was inadequate, and that it was unlawful to require evidence of the contractors' technical capability by means of certificates which were used only in France and to refer to a national law in respect of the award criteria. Finally, the Commission complained about the refusal of the French authorities to communicate to it the records of the contested procedure. In the view of the Commission, the French authorities' reply of 20 December 1993 was not satisfactory. Consequently, on 8 September 1995, it sent a reasoned opinion to the French Republic. That letter went unanswered.

12. In the second case, meanwhile, the Nord-Pas-de-Calais Region published 14 contract notices in the Official Journal of 18 February 1995 as part of the 'Plan Lycées' programme. The aggregate value of the contracts amounted to approximately FRF 1.4 thousand million. It was a restricted procedure relating to modernisation and maintenance works over a period of 10 years. The notices set out the award

criteria. In that respect an 'additional criterion' relating to the promotion of employment was laid down. That was based on a ministerial circular of 29 December 1993.

13. By letter of 21 November 1995, the Commission gave the French authorities formal notice to submit their observations on certain complaints about the calls for tenders relating to, for example, the failure to publish a prior information notice, the use of the additional award criterion relating to the promotion of employment, the failure to admit an adequate number of potential tenderers and the use of qualification criteria having discriminatory effect.

14. The Commission investigated the award procedure practised by the Nord-Pas-de-Calais Region and the Département du Nord over a period of three years. On 8 May 1996, it sent a supplementary letter of formal notice to the French authorities. They replied by letter of 9 August 1996 stating that they intended to improve the award procedures in respect of new contracts.

15. On 7 April 1997, the Commission sent a reasoned opinion summarising the complaints, to which the French authorities did not reply. On 18 June 1998, the Commission thus brought the present action which was registered at the Court of Justice on 22 June 1998.

16. The Commission claims that the Court should:

— declare that, in the course of the various procedures for the award of public works contracts for the construction and maintenance of school buildings by the Nord-Pas-de-Calais Region and the Département du Nord over a period of three years, the French Republic has failed to fulfil its obligations under Article 59 of the EC Treaty (now, after amendment, Article 49 EC) as well as under Directive 71/305/EEC, as amended by Directive 89/440/EEC, in particular Articles 12, 26 and 29 thereof, and under Directive 93/37/EEC, in particular under Articles under 8, 11, 22 and 30 thereof.

In the reply it further claims that the Court should:

— order the French Republic to pay the costs.

17. The French Republic contends that the Court should dismiss the action.

18. I will return to the arguments of the parties and the further details of the case in my consideration of the individual complaints.

19. The same applies to the questions which the Court of Justice referred to the Commission as regards the legal consequences of a failure to publish a prior information notice and the practice of the contracting authorities in the Community in publishing prior information notices, and in respect of the French Government's observations on the Commission's replies.

IV — The individual complaints

20. The Commission bases its action on several complaints which can be grouped as follows. The order corresponds to that used in the application.

A — *Infringement of Article 12 of Directive 71/305 or Article 11 of Directive 93/37 by failing to observe the prior information procedure* (see points 4 to 6 above for the wording of the article)

Arguments of the parties

21. The Commission considers that the French authorities infringed Article 12 of Directive 71/305 or Article 11 of Directive 93/37 in that they only rarely adhered to the prior information procedure. It follows from those articles that the prior information procedure constitutes a compulsory preliminary for any tendering procedure to be organised pursuant to the Directive. In essence, the French authorities have not denied that allegation.

22. However, on 18 February 1995, the Nord-Pas-de-Calais Region published 14 contract notices without having recourse to a preliminary prior information procedure within the meaning of the provision. Furthermore, the prior information procedure was only rarely followed between 1993 and 1995. As regards the Département du Nord, no prior information notices were published in the *Official Journal of the European Communities* during the period under investigation. A prior information

notice was published only in respect of Wingles secondary school and a training centre for apprentices.

23. The French Government does not deny that Article 11(1) of the Directive imposes an obligation. However, it claims that the duty to publish prior information notices must be qualified in the light of Articles 12 and 13 of that directive. Articles 12(1) and 13(3) of the Directive provide that the time-limit for the receipt of tenders is, in principle, 52 or 40 days. The contracting authority may, under Articles 12(2) and 13(4), reduce that time-limit where it has published in the *Official Journal of the European Communities* the notice provided for in Article 11(1). According to the French Government, if the publication of a prior information notice were always compulsory, the precondition for reducing the time-limit would be satisfied in every award procedure. As a result, Article 11 is incompatible with Articles 12 and 13. Consequently, several interpretations are possible depending on whether the prior information procedure is regarded as compulsory, in accordance with Article 11(1), or as optional, in accordance with Articles 12 and 13. The French authorities have opted for the second interpretation. Furthermore, the Nord-Pas-de-Calais Region republished the contract notices in question, this time complying with the prior information requirement.

24. The Commission considers that the French authorities' argument that the prior information procedure is optional is incorrect. It is irrelevant that the contracting authorities did not intend to benefit from the reductions in the time- limit for the receipt of tenders provided for in Articles 12 and 13.

Analysis

25. Since the Nord-Pas-de-Calais Region responded to the Commission's criticisms in the formal notice within the period laid down in the reasoned opinion — albeit without informing the Commission thereof — the action could have become inadmissible on that point.

26. The aim of infringement proceedings is to establish whether the State concerned has failed to fulfil its obligations and has not rectified that failure within the time-limit laid down in the reasoned opinion. As the Court of Justice has consistently held, in infringement proceedings the question whether a Member State has failed to fulfil its obligations must be determined by reference to the situation in the Member State as it stood at the end of the period laid down in the reasoned opinion. By that time the French authorities had retrospectively published prior information notices in so far as that was still possible. Thus, the French authorities complied with the Commission's demands within the time-limit laid down in the reasoned opinion. An essential precondition for the admissibility

of the action for failure to fulfil obligations is therefore not satisfied.

27. However, in the proceedings before the Court of Justice, the French Government contended that the prior information notice provided for in Article 11 of the Directive is not compulsory. To that extent it did not acknowledge, as a matter of fact, the alleged failure to fulfil its obligations. Therefore, there continues to be an interest in ruling on the disparity in the interpretation of Article 11, read in conjunction with Articles 12 and 13, and consequently the action is admissible in that respect. Furthermore, the changes were not communicated to the Commission.

28. In the context of a substantive analysis, the parties agree that Article 11(1), viewed in isolation, requires a contracting authority to publish beforehand the essential characteristics of works contracts. However, it is uncertain whether that interpretation must be qualified in the light of Articles 12(2) and 13(4). The expression 'where the contracting authorities have published the notice' contained in Articles 12(2) and 13(4) may indicate that it does. However, the opposite is indicated firstly by the fact that Article 11, on the one hand, and Articles 12 and 13, on the other, govern two fundamentally different matters. Article 11 requires a contracting authority to make known its works contracts, whereas Articles 12 and 13 lay down the time-limits for the receipt of tenders. It would be contrary to the system to conclude that Articles 12(2) and 13(4) were intended, in addition, to lay down rules on the publication of prior information notices even though those rules had already been laid down in unequivocal terms.

29. Moreover, the spirit and purpose of the Directive indicate that there is a general duty to publish prior information notices. The aim of the Directive is to create effective competition in the field of public contracts. Therefore, it is necessary for an unlimited range of tenderers from all the Member States to have an opportunity to obtain timely and comprehensive information on forthcoming award procedures. However, that necessary broad effect is not achieved if a contracting authority is able to decide about publication — even if only a prior information notice is involved.

30. The French Government's argument that that interpretation regularly results in the time-limits' being reduced from 52 to 36 or from 37 to 26 days respectively cannot be accepted. Even though there is a general duty to publish a prior information notice, the rules in Articles 12(1) and (2) and 13(1) and (4) are not deprived of their purpose. The time-limit may be reduced only where a prior information notice has been duly published. Consequently, the facility to reduce the time-limit is merely an optional provision which the contract-

ing authority need not invoke. The different time-limits are an exception which, where it consists of a reduction in time-limits, is subject to a condition in the form of the due publication of a prior information notice.

31. It may indeed be concluded from the statement that time-limits may be reduced only where a prior information notice has been published that, in spite of the general duty to publish such notices, it is possible to conceive of cases where such publication has not taken place. Furthermore, at the hearing the Commission pointed out that it is not always possible to publish a prior information notice for objective reasons. For example, budgetary reasons might be responsible for a prior information notice's not being published in due time where the award of contracts is subject to existing funds whose availability may vary at different times.

32. At the hearing the Commission pointed out that that problem was identified when Article 12 of Directive 71/305 was amended. At the time it was proposed that a qualification along the lines of 'except where that is not possible' be incorporated into the text of the legislation. However, neither that nor any similar expression was incorporated into the text of the Directive.

33. Therefore, as a rule, a prior information notice is compulsory. Where no such prior information notice is published, the contracting authority must be in a position to state the reasons why that is so. Compliance with the longer time-limit for the receipt of tenders is then an inevitable consequence of the failure to publish a prior information notice. However, there is no automatic effect in the sense that where longer time-limits, which are the norm, are set, there is no need to publish a prior information notice provided for in Article 11 of the Directive, but the opposite does apply, that is to say that a time-limit may be reduced exceptionally only after a prior information notice has been published.

34. The first complaint is consequently admissible and founded.

B — *Infringement of Article 30 of Directive 93/97 — which corresponds to Article 29 of Directive 71/305 — by using an inadmissible award criterion* (see point 9 above for the wording of the article)

35. As is evidenced by the annexes attached to the documents before the Court, in their contract notices the French contracting authorities specifically referred at several junctures in the section entitled 'Criteria for award of contracts' to the employment criterion as an 'additional criterion' over and above the price, time-limit for completion, and so on.

Arguments of the parties

36. The Commission considers that the French Republic has infringed Article 30 by making the promotion of employment an award criterion. In the view of the Commission, that aspect can be used only as a condition of performance. In that respect the Commission relies on the judgment of the Court of Justice in *Beentjes*. [5]

37. The Commission points out that in the present case the additional criterion relating to the promotion of employment is based on a ministerial circular of 29 December 1993. In accordance therewith, it is possible to take local measures to combat unemployment and promote employment in connection with the award of public contracts.

38. However, Article 30 of Directive 93/37 provides for only two possible award criteria, firstly, the criterion of the lowest price and, secondly, the most economically advantageous tender. Consequently, the French authorities infringed Article 30 in that they specifically took account of the employment criterion when they adopted their decision on the award of contracts.

5 — Case 31/87 *Beentjes* v *Netherlands State* [1988] ECR 4635.

39. The French Government, on the other hand, considers that *Beentjes* specifically allows an additional award criterion. In that respect it cites paragraphs 28 and 37(iii) of the judgment which read as follows:

'As regards the exclusion of a tenderer on the ground that it is not in a position to employ long-term unemployed persons, it should be noted in the first place that such a condition has no relation to the checking of contractors' suitability... or to the criteria for the award of contracts referred to in Article 29 of the Directive.'

'[T]he condition relating to the employment of long-term unemployed persons is compatible with the Directive if it has no direct or indirect discriminatory effect on tenderers from other Member States of the Community. An additional specific condition of this kind must be mentioned in the contract notice.'

40. However, the French Government argues that whereas, according to *Beentjes*, the employment criterion must be referred to expressly in the contract notice, there is

no evidence to support that in the model contract notices in Annex IV to Directive 93/37. They contain no heading relating to such indications. [6]

41. Moreover, even if the employment criterion were regarded as a performance criterion, it would be on the basis of national legislation, not the Directive. In that case Article 30 of the Directive would not be relevant and the Commission's allegation would be incorrect. Finally, the French Government points out that it instructed the contracting authorities to act in accordance with the circular of 29 December 1993. The circular states quite clearly that the additional criterion relating to employment must not be treated in the same way as the criteria referred to specifically in Article 30 of the Directive. Instead, it is a secondary criterion for the award of contracts.

42. However, even if the Court concurs with the Commission's view, the French Government considers that its actions comply with the Directive also in that respect.

Analysis

43. In *Beentjes* the Court ruled that an employment criterion (in that case a condition relating to the employment of long-term unemployed persons) had no relation to the criteria for the award of contracts referred to in Article 29 of Directive 71/305. [7]

44. Therefore, it is necessary to clarify whether criteria relating to the promotion of employment are precluded not only as award criteria for the purpose of Article 30(1)(b) of Directive 93/37, but also as secondary criteria.

45. In the view of the French Government employment is admissible as a secondary criterion where several tenders of equal value have been submitted. However, in such cases that would result in the employment criterion ultimately being granted the status of the sole, decisive award criterion, a possibility which is specifically ruled out in the light of *Beentjes*. The employment criterion does not serve directly to determine the most economically advantageous tender. Otherwise, in certain circumstances, it would have even greater importance than the criteria referred to in Article 30(1)(b) of the Directive, since the employment aspect alone could be decisive.

6 — Annex IV lists between 7 and 18 headings to be included in the call for tenders, depending on the type of award procedure.

7 — See paragraph 28 of the judgment in *Beentjes* (cited in footnote 5).

46. Article 30 of the Directive has been infringed in so far as the French authorities made the employment criterion an additional award criterion. Consequently, it is irrelevant whether the employment criterion is laid down at national level by the ministerial circular of 29 December 1993 since Article 30 of the Directive takes precedence.

47. It should be borne in mind that the employment aspect is now probably perceived differently in terms of social policy from when the Directive was adopted: from today's perspective, the Directive focuses more on microeconomic, and less on macroeconomic, factors. However, any change would be for the legislature.

48. The Directive would not be infringed if the requirement to promote employment were expressed as a condition — as in *Beentjes* — and in that respect assumed the character of a performance criterion, as was stated by the Commission.

49. However, since the French authorities regarded the employment criterion as a separate award criterion, Article 30 of the Directive was infringed.

C — *Infringement of Article 22 of Directive 93/37 by limiting the number of candidates selected* (see point 7 above for the wording of the article)

50. Where a contracting authority awards a contract by restricted procedure, it may, under Article 22(2) of the Directive, prescribe the range within which the number of undertakings which it intends to invite will fall. The range must number at least five undertakings, as the fourth sentence of Article 22(2) expressly stipulates.

51. Under heading 13 in the contract notice published in the Official Journal of 18 February 1995 the French contracting authorities stated: 'Maximum number of candidates which may be invited to submit a tender: 5'.

Arguments of the parties

52. The Commission takes the view that that indication gives the impression that the number of tenderers might also be less than five. That would constitute an infringement of the fourth sentence of Article 22(2) of the Directive.

53. The French Government does not share that view. It contends that limiting the number of tenderers to five fulfils the preconditions laid down in the fourth sentence of Article 22(2) of the Directive. There is nothing in Article 22 to indicate that the number of tenderers may not be limited to five. Effective competition is ensured. The Commission has been unable to adduce any evidence to the contrary.

Analysis

54. The indication chosen by the French contracting authorities poses problems in two respects. Firstly, Article 22(2) refers to a 'range'. No range is clear from the wording of the notice in question. There could be such a range at most if the number five implied a range of one to five, but that would be incompatible with Article 22(2).

55. However, if the indication of five for the number of tenderers to be invited is regarded as an absolute requirement in the sense that at least five tenderers are to be invited, it could be compatible with the requirements of the Directive. However, the French Government interpreted the indication at issue as meaning that 'a maximum' of five tenderers may be admitted. It takes the view that effective competition is ensured under those conditions. However, that view is incompatible with the requirements of the Directive which expressly lays down a minimum number of five tenderers. Therefore the objective wording of that indication, in conjunction with the interpretation placed on it in the contract notices, renders it incompatible with Article 22(2) of the Directive.

D — *Infringement of Article 29(2) of Directive 71/305 or of Article 30(2) of Directive 93/37 as a result of the method known as award by reference to the legislation of a Member State* (see point 9 above for the wording of the article)

Arguments of the parties

56. In its application the Commission also maintains that Article 29(2) of Directive 71/305 and Article 30(2) of Directive 93/37 have been infringed. It claims they have been infringed since, in most of the contract notices, the contracting authorities employed the method known as 'award by reference to the Code des Marchés Publics' in order to indicate the award criteria.

57. In support of that view the Commission refers to the case-law of the Court. In paragraph 35 of its judgment in *Beentjes* the Court held that Article 29(1) and (2) of the Directive requires that the criteria be stated in the contract notice or the contract documents. A general reference to a provision of national legislation cannot satisfy the publicity requirement.

58. However, the French Government claims first of all that the Commission's complaint was made too late and is thus inadmissible. The Commission made that complaint for the first time in the reasoned opinion. As the Court has held, [8] enlargement, in the reasoned opinion, of the scope of the complaint made in the initial letter constitutes an irregularity which cannot be cured.

59. However, in the event that the Court considers that the complaint is admissible, the French Government points out that Article 30(2) of Directive 93/37 does not require the contracting authority to state the award criteria in the contract notice but gives it the choice of including them in the contract documents or in the contract notice. The French Government concludes that the Commission was wrong to make the complaint since the criteria are contained in the contract documents and the national provisions applicable in accordance with the Code des Marchés Publics are largely identical in content to Directive 93/37.

60. As regards the admissibility of the abovementioned complaint, the Commission contends that the letter of formal notice of 8 May 1996 has drawn attention to the problem in a sufficiently precise manner. In that letter the Commission had pointed out that, under the 10th recital in the preamble to Directive 93/37, the information contained in contract notices must enable contractors to determine whether the proposed contracts are of interest to them. For this purpose, it is appropriate to give them adequate information on the works to be undertaken and the conditions attached thereto. Furthermore, in the letter of formal notice the Commission had already referred to the case-law of the Court, in particular *Beentjes*.

61. Consequently, the action taken is in conformity with the case-law of the Court, as is evident from the judgment in Case 274/83 *Commission* v *Italy*. [9] Moreover, at no time have the French authorities

8 — Case 51/83 *Commission* v *Italy* [1984] ECR 2793.

9 — Case 274/83 *Commission* v *Italy* [1985] ECR 1077.

allowed the Commission to view the contract documents on which the French Government bases its arguments.

Analysis

62. Firstly, it is necessary to consider whether the Commission's complaint is admissible in the context of the present infringement proceedings. In Case 51/83 *Commission* v *Italy* the Court did rule that enlargement, in the reasoned opinion, of the scope of the complaint made in the initial letter constitutes an irregularity which cannot be cured. [10] The action should therefore be dismissed as inadmissible to the extent that it goes beyond the complaints made in the letter of formal notice. However, in Case 274/83 *Commission* v *Italy* the Court of Justice subsequently clarified its case-law to the effect that the Commission may set out in detail in the reasoned opinion the complaints which it has already made more generally in its initial letter. [11]

63. In the present case the Commission initially complained generally in the letter of formal notice about the contract notices in question. It also made specific complaints. It commented on the award criteria. It pointed out that the notices must enable contractors to determine whether the proposed contracts are of interest to them. That requires the provision of adequate information. Furthermore, the Commission referred to the case-law of the Court, in particular *Beentjes*, in which the Court ruled specifically on the criteria for the award of contracts. The Commission's subsequent criticism in the reasoned opinion of the award criteria constitutes a lawful clarification of the complaints raised in the letter of formal notice. Since the Commission made no fundamentally new complaints, the complaint about the method of award by reference to the legislation of a Member State does not constitute an inadmissible enlargement of the scope of the complaints. On the contrary, the Commission narrowed down its complaint. It thus enabled the French authorities to rectify the irregularity in the award procedure. In doing so the Commission took adequate account of the spirit and purpose of the pre-litigation stage of infringement proceedings. The subject-matter of the dispute was set out in the letter of formal notice in such a way that the French authorities could have taken action.

64. Consequently, the complaint made by the Commission must be regarded as admissible.

65. The wording of Article 30(2) of Directive 93/37 states that 'the contracting

10 — Judgment cited in footnote 8, paragraphs 6 and 7.
11 — Judgment cited in footnote 9, paragraph 21.

authority shall state in the contract documents or in the contract notice *all* the criteria it intends to apply to the award'. [12] In addition, in *Beentjes* the Court expressly held in respect of the award criteria that a general reference to a provision of national legislation cannot satisfy the publicity requirement. [13] Therefore, the possibility can be ruled out that certain award criteria can be laid down in national legislation to which the contract notice refers.

66. The French Government's objection that the national rules laid down in the Code des Marchés Publics are frequently identical in content to the rules in Directive 93/37 is irrelevant. The publicity principle is infringed by the general reference and cannot be remedied by the fact that the national legislation displays similarities to the Directive since a potential tenderer is unable to detect possible substantive similarities from the contract notice.

67. Consequently, it must be found that the complaint relating to the inadmissible reference to the legislation of a Member State in order to fix the award criteria is admissible and well founded.

12 — Emphasis added.

13 — Judgment cited in footnote 5, paragraph 35.

E — *Infringement of Article 59 of the Treaty by using discriminatory technical specifications in the mode of designating the lots and the evidence requested as to the undertakings' capability*

Arguments of the parties

68. In its application the Commission claims that the French Government infringed the provisions on the freedom to provide services contained in Article 59 of the Treaty. When the contracting authorities designate the lots they use the same technical specifications in respect of the requirements on tenderers as those used by French professional organisations. For example, the notices refer to qualifications such as 'Mandataire EFF6 CA11...'. The Commission considers that the technical specifications adopted by the contracting authorities might result in French undertakings being favoured. They are familiar with that system of quality certification and are accustomed to submitting documents or services in accordance with the references required in the contract notice. Undertakings established in other Member States, on the other hand, might be deterred from submitting tenders. They have no means of determining beforehand whether their qualifications comply with the technical specifications in the absence of any reference to equivalent qualifications. The fact that the French authorities merely wish that those

technical qualifications were in conformity with those national references does not alter that assessment in any way.

69. The French Government, on the other hand, takes the view that the technical specifications of the French professional organisations adopted by the contracting authorities are merely indications and have no discriminatory effect. It is not a question of specifying, in the notice, information relating to the selection criteria or the criteria for the award of contracts, since that is done in the contract documents. Instead, only indications as to the nature of the lots have to be provided.

70. Furthermore, the French Government points out that the new notices in respect of the award of public works contracts published in January 1996 and January 1997 no longer contain any references to the technical specifications of the French professional organisations.

71. As regards this final objection, the Commission points out that when the time-limit laid down in the reasoned opinion expired there was nothing to indicate that the grounds for the complaint had ceased to exist.

Analysis

72. It is first necessary to consider the admissibility of this complaint. Since the French authorities discontinued use of the contested specifications in contract notices published after the expiry of the time-limit laid down in the reasoned opinion, the infringement could be regarded as remedied and there might be no interest in ruling on the matter.

73. However, in the proceedings before the Court the French Government still claims that the contested specifications are not liable to have a discriminatory effect.

74. Therefore, there is still a need for legal clarification.

75. Furthermore, the present complaint could be inadmissible from a different point of view. In respect of this complaint the Commission relies solely on Article 59 of the Treaty, whereas Article 26 of Directive 71/305 contains specific rules on proof of undertaking's technical capability. Therefore, the question arises as to the extent to

which it is possible to have recourse to the primary law provisions of the Treaty where the situation is governed by the Directive.

76. Article 26 of Directive 71/305 contains a list of the documents which may be used to prove technical capability. It consists of a series of documents which are intended to adduce proof of an undertaking's capabilities. The contracting authority is entitled to choose which of those documents are to be submitted. In the words of the Directive:

'The authorities awarding contracts shall specify in the notice or in the invitation to tender which of these references are to be produced.'

The way in which certain technical capabilities are to be indicated is governed at most indirectly by Article 26 of Directive 71/305 which, moreover, must be interpreted in the light of the Treaty, like any provision of a directive. Therefore, there is certainly scope for Article 59 of the Treaty to be applied to technical specifications having discriminatory effect.

77. In substantive terms it must be concluded that the technical specifications adopted are so specific and abstruse that, as a rule, only French candidates are able to detect their significance immediately. Consequently, it is easier for French undertakings to submit documents or services which comply with the coded references contained in the contract notice. Candidates from other Member States, on the other hand, find it considerably more difficult to submit tenders within the brief period prescribed since they must first obtain information from the contracting authority on the relevant specifications and qualifications. That may involve considerably more work and expenditure than for French competitors. The French authorities failed to set out the basic requirements in a clear and generally intelligible form or with reference to Community rules. Consequently, the contested designation of the lots constitutes covert discrimination.

78. In that context the French Government's objection that the technical specifications adopted are merely indications, even though in practice only French candidates are able to understand the specifications without outside help, is irrelevant. To candidates from other Member States they are not indications, but a dissuasive description of the necessary preconditions for qualification. If the contracting authorities wish merely to provide indications, they can do so in a non-discriminatory manner.

79. It must be noted that the Commission's complaint that the French Government has infringed Article 59 of the Treaty is, in substantive terms, well founded.

F — *Infringement of Article 59 of the Treaty by requiring registration with the French Ordre des Architectes as one of the 'minimum standards for participation'*

80. The Commission contends that the Département du Nord has also failed to fulfil its obligations under Article 59 of the Treaty in that it imposed in a certain number of notices restrictions on the freedom of Community architects to provide services, for example by requiring proof of registration with the French Ordre des Architectes.

81. The French Government does not dispute the Commission's claim. It simply refers to the contracting authorities' inexperience in applying Community law in relation to the award of public contracts.

82. There is no need to consider this complaint in substantive terms since it has been expressly accepted by the French Government. The French authorities have infringed Article 59 of the Treaty in that they unlawfully restricted the freedom of architects from other Member States to provide services. That infringement of Community law cannot be justified by the inexperience of the contracting authorities.

The Commission's application must be allowed also in respect of this complaint.

G — *Further complaints in respect of the failure to communicate the written reports to the Commission as provided for in Article 8(3) of Directive 93/37 and failure to provide subsequent information on contract awards as provided for in Article 11(5) of Directive 93/37* (see points 3 and 4 above for the wording of the articles)

83. The French Government does not in principle dispute the Commission's other complaints regarding the failure to provide the necessary information after the contracts were awarded and gives the reason for them as inexperience on the part of the contracting authorities. Since it expressly accepts these complaints, the failure to fulfil obligations under the Treaty can be determined without further substantive consideration.

V — Costs

84. Under 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 pay the costs.

VI — Conclusion

85. In the light of the foregoing I propose that the Court should:

(1) declare that, in the course of the various procedures for the award of public works contracts for the construction and maintenance of school buildings conducted by the Nord-Pas-de-Calais Region and the Département du Nord over a period of three years, the French Republic has failed to fulfil its obligations under Article 59 of the EC Treaty (now, after amendment, Article 49 EC) as well as under Directive 71/305/EEC, as amended by Directive 89/440/EEC, in particular Articles 12, 26 and 29 thereof, and under Directive 93/37/EEC, in particular Articles 8, 11, 22 and 30 thereof;

(2) order the French Republic to pay the costs.