OPINION OF ADVOCATE GENERAL JACOBS
delivered on 23 March 2000 *

1. In this case, the Commission alleges a failure by the French authorities to comply with the Community rules governing the use of negotiated procedures for the conclusion of procurement contracts by entities operating in the water, energy, transport and telecommunications sectors, in a specific instance where a negotiated procedure was followed without a prior call for competition. The main issue is whether those rules applied to the procedure in question; the French Government disputes the Commission's contention that they were in force at the material stage of that procedure. If the rules were applicable, it must be determined whether the conditions were met for a derogation from the obligation to issue a call for competition.

The relevant Community legislation

2. Council Directive 93/38 [1] applies to contracting entities operating, *inter alia*, public transport networks either in their capacity as public authorities or public undertakings or on the basis of special or exclusive rights granted by a competent authority of a Member State (Article 2(1) and (2)(c)).

3. It provides for three types of procedure whereby such entities may award contracts in the fields covered: open, restricted and negotiated procedures. These are defined in Article 1(7) as follows:

'(a) in the case of open procedures, all interested suppliers, contractors or service providers may submit tenders;

(b) in the case of ... restricted procedures, only candidates invited by the contracting entity may submit tenders;

(c) in the case of negotiated procedures, the contracting entity consults suppliers, contractors or service providers of

* Original language: English.

1 — Council Directive 93/38/EEC of 14 June 1993 coordinating the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors, OJ 1993 L 199, p. 84.

its choice and negotiates the terms of the contract with one or more of them'.

4. Under Article 4(2): 'Contracting entities shall ensure that there is no discrimination between different suppliers, contractors or service providers.'

5. Article 20(1) provides: 'Contracting entities may choose any of the procedures described in Article 1(7), provided that, subject to paragraph 2, a call for competition has been made in accordance with Article 21' (which indicates the forms to be used in notices of calls for competition and prescribes that they are to be published in the *Official Journal of the European Communities*).

6. However, under Article 20(2): 'Contracting entities may use a procedure without prior call for competition in the following cases:

...

(c) when, for technical or artistic reasons or for reasons connected with protection of exclusive rights, the contract may be executed only by a particular supplier, contractor or service provider;

...'

7. In accordance with Article 45, Member States were to adopt the measures necessary to comply with the provisions of Directive 93/38 and to apply them by 1 July 1994.

8. Article 45 also provided that Directive 90/531 [2] — which contained [3] provisions identical for present purposes to those of Directive 93/38 cited above — should cease to have effect as from the date on which the latter was applied by the Member States. Member States had been required to comply with Directive 90/531 by 1 January 1993. [4] Prior to that directive, procurement procedures in the 'utilities' sectors had not been subject to Community regulation.

2 — Council Directive 90/531/EEC of 17 September 1990 on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors, OJ 1990 L 297, p. 1.

3 — In Articles 1(6), 4(2), 15(1) and (2)(c) and 16.

4 — Article 37(1) and (2).

The relevant French legislation

9. The rules governing public procurement in France are contained principally in the Code des Marchés Publics (Public Procurement Code, hereinafter also 'the Code').

10. Article 104(I) of the Code requires negotiated contracts to be preceded by a call for competition. Article 104(II) concerns exceptions for which no call for competition is needed. The text applicable at the material times in the present case provides, in so far as is relevant:

'Negotiated contracts may be entered into without a prior call for competition when only one specific contractor or supplier is capable of carrying them out.

This applies in the following cases:

(1) when requirements can be met only by [work or supplies] which necessitate recourse to a patent, a licence or exclusive rights held by a single contractor or supplier;

(2) when requirements can be met only by [work or supplies] which, by reason of technical necessity, substantial preliminary investment, special plant or equipment or know-how, can be contracted out only to a specific contractor or supplier;

...'

11. During the relevant period, France had not transposed Directive 93/38.[5] However, Directive 90/531 appears to have been transposed by Law No 92-1282 of 11 December 1992[6] and Decree No 93-990 of 3 August 1993.[7] Article 2 of the latter contains an exhaustive list of cases where a procedure may be used without a prior call for competition, and item 4 on that list reproduces the terms of Article 15(2)(c) of Directive 90/531, which were identical, as regards contractors and suppliers, to those of Article 20(2)(c) of Directive 93/38.

5 — See the judgment in Case C-311/96 *Commission* v *France* [1997] ECR I-2939.

6 — *Journal Officiel de la République Française* (JORF) 1992, p. 16952. That Law essentially lays down the entities and activities covered, with the detailed rules governing publicity and procedures to be adopted by subsequent decree (see Article 1). Article 9 states that its provisions were to be applicable as from 1 January 1993.

7 — Published on 10 August 1993; JORF 1993, p. 11266.

Factual background

12. Briefly stated, this case concerns a lengthy process to award a contract for the construction of an urban light railway line. The relevance of the different stages in that process lies essentially in determining whether it comprised a single, uninterrupted award procedure or whether a second procedure was commenced at a relatively late stage of the overall process. That issue is relevant in turn when determining the applicability of the Community rules to one of the initial steps in the procedure leading to the final award.

13. Public transport in the conurbation of Rennes in France is the responsibility of a joint grouping of all the constituent municipalities, the Syndicat intercommunal des transports collectifs de l'agglomération rennaise ('Sitcar'), which apparently comes under the authority of the District Council for the conurbation ('the District Council'). Decisions are taken by the District Council or by Sitcar's committee, composed of delegates from the various municipalities. The transport service is actually managed by the semi-public company 'Semtcar'.

14. From 1984 onwards, Sitcar investigated ways of improving the service by creating a 'reserved-track' system, that is to say a tram or light railway network. On 26 October 1989, its committee voted, *inter alia*, to confirm previous decisions to provide a reserved-track network, to opt for the 'VAL' automatic light railway system, to seek government funding and to authorise consultations with a view to awarding a contract for drawing up preliminary specifications. The report on which that vote was taken stated that the VAL system was produced by the two companies Matra (Matra Transport, now apparently known as Matra Transport International) and Alsthom (GEC Alsthom Transport). The contract for drawing up preliminary specifications was, it was stated at the hearing, later awarded to and performed by Matra.

15. From the minutes of its committee meeting of 19 July 1990 it appears that Sitcar, having previously issued an invitation to tender for 'civil engineering work and equipment not linked to the system' and selected the successful tenderer, agreed on that date that the *'contrat d'ensemblier'* (turnkey contract, that is to say a contract for the complete work to the point of readiness for operation) for the 'system and equipment linked to the system' would be awarded to Matra once a guaranteed guide price had been determined.

16. In a report read to the committee at its meeting on 12 July 1991, concerning the contract for civil engineering and equip-

ment not linked to the system, the chairman of Sitcar stated that negotiations with Matra were not yet complete but would lead to the conclusion of a turnkey contract.

17. In response to a request from the Court, the French Government has produced a letter from Matra to Sitcar, dated 9 July 1991 and apparently received on 12 July 1991 (though perhaps too late to be mentioned in the report delivered on that date). That letter appears to accompany a file containing Matra's proposal for the 'system' portion of the work on the first VAL line in Rennes. It confirms a guaranteed price of FRF 987 000 000 or, with certain possible modifications to the programme, of FRF 953 200 000, both excluding tax and at January 1991 prices.

18. On 15 February 1993, the Prefect of Ille-et-Vilaine, the *département* in which Rennes is situated, issued a declaration of public interest in respect of the first line of the VAL light railway network. That declaration was a precondition for proceeding with the project, in particular for making expropriations.

19. On 30 March 1993, the District Council approved the turnkey contract negotiated by Semtcar with Matra for FRF 966 420 000, excluding tax, at January 1993 prices, and authorised its signature. The contract was for the supply of a complete system, including not only track, control post and train sets, but also security, workshop, power-supply and track equipment, together with spare parts and staff training.

20. However, that stage had not been reached without political opposition. A 'Comité pour une alternative au VAL' had been set up in 1991 and most of the relevant resolutions had been opposed by a minority. In addition, the ecological movement 'Rennes Verte' had applied to the Tribunal Administratif (Administrative Court), Rennes, to have the Prefect's declaration of public interest set aside. On 16 February 1994, that court annulled the declaration on the ground that the preliminary inquiry was incomplete as regards analysis of certain required criteria.

21. As a result, by letter of 30 March 1994, the Minister for Infrastructure, Transport and Tourism informed the Chairman of the District Council that government funding, although still in principle available, could not be provided until the administrative procedure had been recommenced and completed as required by that judgment.

22. On 22 September 1995, the District Council passed two linked resolutions. First, it voted to withdraw its previous

resolution of 30 March 1993 approving the contract with Matra and authorising its signature by Semtcar, 'that resolution not having been implemented even inchoately and having become redundant'. The report on the basis of which the vote was taken stated that government authorisation had not been granted within the necessary time, thus affecting the terms of performance of the contract, in particular as regards deadlines.

23. Second, the District Council requested Semtcar to 'resume detailed negotiation/finalisation ["*reprendre la mise au point*"] of the contract with Matra' within the framework of the provisional budget for the operation and to submit it anew to the District Council for approval.

24. In a letter dated 29 July 1996 to two councillors hostile to the project, who had challenged an alleged refusal to communicate the 1993 turnkey contract for the 'system' portion of the VAL line, the Chairman of the District Council stated, *inter alia*, that the contract could not be communicated because it had never existed, having been neither signed by the competent authority nor forwarded to the Prefect, and that the withdrawal of the resolution approving it called into question the very existence of the project. The decision embodied in that letter was, however, subsequently set aside by a judgment of the Tribunal Administratif of 16 July 1997, which held, *inter alia*, that the existence of the contract was attested by the terms of the resolution of 30 March 1993 and it could not be deemed inexistent on the ground that it was neither signed nor notified; it was a completed document, having been the subject of negotiation and having been approved by the District Council.

25. On 4 October 1996, the Prefect issued a new declaration of public interest and government funding consequently became available. As a result, the District Council voted on 22 November 1996 to 'approve the terms of the draft negotiated contract to be concluded with the company Matra Transport International for the work on the system and equipment linked to the system' and authorised Semtcar to sign the contract.

Procedure

26. Following a complaint submitted to it in late 1996 — apparently by councillors hostile to the VAL project — the Commission requested clarification from the French Republic, which replied, essentially, that the contract had been awarded in 1989, before the entry into force of Directives 90/531 or 93/38, and that Matra was the only company able to meet the requirements and had already made substantial investments. The Commission sent the French authorities a letter of formal notice in June 1997. Considering the reply to that letter unsatisfactory, it then sent a reasoned

opinion under Article 169 of the EC Treaty (now Article 226 EC) concluding that the provisions of Directive 93/38 had been infringed and requiring the French Government to comply with the opinion within two months. In its reply dated 12 June 1998, the French Government maintained its position.

27. The Commission brought the present action on 14 September 1998. It seeks a declaration that, as a result of the resolution of 22 November 1996 awarding Matra the turnkey contract for the Rennes District light railway project, the French Republic failed to fulfil its obligations under Directive 93/38, and in particular Articles 4(2) and 20(2)(c) thereof. The specific infringement to which the Commission refers is a failure to issue a prior call for competition in order to avoid discrimination between undertakings.

Analysis

28. The Commission's case is, essentially, that the procedure in issue was initiated on 22 September 1995, that at that date the conditions for the application of the derogation contained in Article 20(2)(c) of Directive 93/38 were not met and that by failing to issue a call for competition the French authorities thus infringed that directive. The French Government maintains that the procedure was commenced (and indeed concluded) at a much earlier date, and that it is the date of commencement which must be decisive when determining whether the Community rules were applicable. In response to the latter point, the Commission argues that, although the date of commencement may be taken into consideration, an unreasonable length of time must not elapse, as it did here, before the actual award of the contract. The French Government submits in the alternative that, if the Commission's main contention is accepted, the conditions for application of the derogation were in any event met.

29. In those circumstances, although the main issue to be decided is whether a new procedure was commenced on 22 September 1995, it is helpful to clarify the context first by considering the more general issue of the applicability of newly-introduced Community rules to procedures already under way. I shall then examine the main issue of the date of commencement of the procedure. Finally, I shall consider whether the conditions for application of the derogation may have been met.

Directive 90/531 and Directive 93/38

30. In so far as they are relevant to the present case, the rules contained in Direc-

tive 90/531 and in Directive 93/38 are identical; the changes introduced by the latter merely extend them to cover contracts for services, as well as for works and supplies. The Commission, however, seeks a declaration of failure to fulfil obligations in respect of Directive 93/38 alone.

31. Consequently, any finding that the provisions of Directive 90/531 were breached during the period when they were applicable but Directive 93/38 was not applicable would be *ultra petita*. None the less, I consider it useful to bear both directives in mind when analysing the situation in this case.

Applicability of the directives to a procedure already commenced

32. The general principle is that, in the absence of a clear provision and unless the purpose to be achieved so demands, legislation is not to be interpreted as having a retroactive effect. [8] In this case, neither of the directives contains any such provision — or indeed any transitional provisions — nor is there any reason to conclude that their purpose requires any form of retroactive effect.

33. The Court has also recognised the principle that amending legislation applies, unless otherwise provided, to the future consequences of situations which arose under the previous legislation. [9]

34. Those principles, however, do not directly resolve the question of the immediate application of new rules to a procedure already under way at the date by which they were to be transposed. The measures necessary to comply with the provisions of Directive 90/531 should have been applied from 1 January 1993 and those of Directive 93/38 from 1 July 1994 at the latest.

35. Although in a different legislative context, a similar question of application of new Community rules to procedures already under way has been examined by the Court in several cases involving Directive 85/337 [10] on environmental impact

8 — See, for example, Case 88/76 *Exportation des Sucres* v *Commission* [1977] ECR 709, paragraph 17 of the judgment, Case C-368/89 *Crispoltoni* [1991] ECR I-3695, paragraphs 17 and 20, and Case C-244/95 *Moskof* v *EOK* [1997] ECR I-6441, paragraph 77.

9 — See, for example, Case 125/77 *Koninklijke Scholten-Honig* v *Hoofdproduktschap voor Akkerbouwprodukten* [1978] ECR 1991, paragraph 37 of the judgment, and the recent judgment of 29 June 1999 in Case C-60/98 *Butterfly Music* v *CEMED*, paragraph 24, together with the case-law cited there.

10 — Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment, OJ 1985 L 175, p. 40.

assessments, which also contains no transitional provisions. The Court has held that obligations imposed by that directive must apply to a consent procedure commenced after the deadline for their transposition into national law but before that transposition was actually effected. [11] In order to determine whether the directive rules apply, for reasons of legal certainty the sole criterion must be whether the application for consent was formally lodged before or after the deadline for transposition. [12] The directive was designed to cover projects likely to require a long time to complete, so that complex procedures already initiated under national law and situations already established should not be affected by it. [13]

36. If that reasoning is transposed to the present case, the result is that the rules contained in Directives 90/531 or 93/38 cannot apply to procurement procedures commenced before the dates from which they should have been applied.

37. However, I would not necessarily exclude, as a general rule, the possibility that certain provisions of a directive may be applicable to *subsequent* stages of procedures already under way at the date of the deadline for their transposition into national law. The Court's approach in the environmental impact assessment cases cited above may have been influenced by the consideration that it could not be determined with certainty at what stage in a procedure the assessment required by the directive should take place, whereas the commencement of the procedure by the lodging of a formal application was a clearly ascertainable event.

38. Such a consideration need not apply where new rules come into effect at an identifiable stage in a sequence of steps making up a complete procedure. What can be excluded, however — in line with the requirement of legal certainty to which the Court has referred — is any 'application' of such rules to stages of a procedure which have already been completed. Indeed, unless such stages were already in compliance with the new rules, the only way in which they could be brought into compliance would be by repeating them, requiring a recommencement of the whole procedure in cases where the initial stages are in issue — and that intention cannot be attributed to the Community legislature in the absence of a clear indication.

39. In either event, whether the rules in the directives can apply to subsequent stages of procedures already under way or not, I conclude that they cannot have any effect

11 — Case C-396/92 *Bund Naturschutz in Bayern and Others* [1994] ECR I-3717, paragraphs 18 to 20 of the judgment.

12 — Case C-431/92 *Commission* v *Germany* [1995] ECR I-2189, paragraph 32 of the judgment.

13 — Case C-81/96 *Burgemeester en Wethouders van Haarlemmerliede en Spaarnwoude and Others* v *Gedeputeerde Staten van Noord-Holland* [1998] ECR I-3923, paragraphs 23 and 24 of the judgment.

on stages completed before the dates on which they were to be applied.

40. In the specific context of a Community procurement directive not transposed within the period prescribed, that conclusion is consistent with the Court's ruling in *Tögel*,[14] that 'Community law does not require an awarding authority in a Member State to intervene ... in existing legal situations ... where those situations came into being before expiry of the period for transposition'. Although that ruling concerned a situation in which the contract itself had been concluded before, but for a period extending beyond, that date, the principle is in my view of general application: it applies to whatever and however many stages of a procurement procedure have been completed before expiry of the period for transposition.

Applicability of the directives in the present case

41. It is clear from the evidence before the Court that the stage at which a call for competition might have been issued in the original procedure was completed well before 1 July 1994, when the period for transposition of Directive 93/38 expired, and even before 1 January 1993, by which date the provisions implementing Directive 90/531 were to be brought into force.

42. The issuing of a call for competition must be prior to the commencement of negotiations. Here, it is clear that negotiations had already commenced by 19 July 1990 at the latest — prior to even the adoption of Directive 90/531 — and had been substantially completed by 9 July 1991. Agreement was reached by 30 March 1993. Indeed, at the hearing, the Commission appeared to accept that if the contract had been carried out as approved on the latter date the Community procurement rules would not have been infringed.

43. However, the Commission's case is based on the premiss that the original procedure outlined above came to an end on 22 September 1995 and that a new procedure was then commenced. France, on the other hand, contends that there was no such conclusion and recommencement but a single continuing procedure delayed at one stage by an administrative hitch.

44. The question to be answered is thus: what were the effects of the withdrawal of

14 — Case C-76/97 *Tögel* v *Niederösterreichische Gebietskrankenkasse* [1998] ECR I-5357, paragraph 54 of the judgment.

the resolution approving the 1993 contract and of the decision to resume detailed negotiations with Matra?

45. The contract approved on 30 March 1993 was, it appears, never signed. The Court has been presented with various arguments as to whether a binding award was none the less made at that date or at an earlier stage when agreement was reached on terms. The Commission considers that the award was made on 30 March 1993, there having been no final, unconditional agreement prior to that date. The French Government argues that Matra had acquired a right to the contract by its firm commitment as to price on 9 July 1991.

46. We have also heard conflicting views on whether, assuming there was such an award, the contract was rendered void by the withdrawal of the resolution approving it. The Commission argues that the withdrawal meant, in French administrative law, that the resolution was deemed never to have existed. The French Government asserts that the position was simply that, until a new declaration of public interest was issued and the funding conditional thereupon released, it was impossible to *sign* the contract with Matra; a binding decision to award the contract to that company had none the less been taken and remained in existence unless and until a competent court should decide otherwise.

47. As for the significance of the resolution requesting Semtcar to '*reprendre la mise au point*' of the contract, the Commission sees it as clear evidence of the commencement of a new procedure, the French Government as a resumption and continuation of the original procedure. The contract approved on 22 November 1996 is invoked by both parties in support of their positions: the Commission claims it diverges in substantial respects from the 1993 contract, whereas the French Government asserts that it was substantially the same, the only differences being the choice of a marginally different model as a result of technical developments in the intervening period and an updating of the price.

48. The Commission's action is brought in respect of the procedure leading to the award of the contract approved for signature on 22 November 1996. What is at issue is whether that award was the outcome of the original procedure or whether the latter had come to a close on or before 22 September 1995.

49. Directive 93/38 lays down certain requirements to be observed before, during and following the 'award' stage of a procedure but does not specify how it is to be determined when that award has taken place. This is understandable. The Community procurement directives do not effect a complete harmonisation of procedures but lay down requirements to be observed where specified criteria are met, in particular as regards the value of the contract. All other applicable rules, includ-

ing those which determine the stage at which a contract is awarded or concluded, takes effect or becomes binding, will be found in national law. Since the Court is not competent to rule on matters of French law, a number of hypotheses will have to be considered.

50. When considering those hypotheses, however, it must be borne in mind that in proceedings against a Member State for a declaration of failure to fulfil an obligation, it is incumbent on the Commission to prove that the obligation has not been fulfilled and to place before the Court the information necessary to enable it to determine whether that is so. [15]

51. Three possibilities may be envisaged when considering when the original procedure was brought to an end: it may have been concluded by the approval of the contract by the District Council on 30 March 1993, by an award at some earlier stage, perhaps when firm agreement had been reached, or by some later event.

52. If approval by an elected body is necessary and a procedure is concluded by the decision approving the contract and authorising its signature, then the resolution of 30 March 1993 would appear to have brought the original procedure to an end. However, on the Commission's own argument, the withdrawal of that resolution means that it is deemed never to have existed. Thus, it seems inevitable, the original procedure must be deemed not to have been terminated. In those circumstances, the negotiations in 1995 and 1996 could qualify as a continuation of that procedure.

53. If a procedure is concluded by a separate award and that award is made when, say, firm agreement is reached between the contracting entity and the future contractor, so that approval by the elected body, whilst essential for other reasons, does not affect the existence of that award, [16] then it would seem to follow that withdrawal of that approval can likewise not affect the existence of the award, although presumably there must be some new approval before the contract can take effect. In those circumstances the award, if made before 30 March 1993, would have remained in existence after 22 September 1995, since the only measure withdrawn on that date was the resolution approving the contract and authorising its signature, and could have been subsequently approved anew by the resolution of 22 November 1996.

54. If the original procedure was not concluded either on or before 30 March 1993,

15 — See, most recently, the judgment of 25 November 1999 in Case C-96/98 *Commission* v *France*, ECR I-8531, paragraph 36.

16 — Cf. the judgment of the Tribunal Administratif of 16 July 1997 referred to in paragraph 24 above.

then it must have been concluded by some later event. The withdrawal of the resolution of 30 March 1993 could not, in that hypothesis, have been that event. If the procedure were to have been terminated by the withdrawal of a decision, it would have had to be one actually constituting the procedure — such as the decision to carry out the project, to seek a supplier for a light railway system or to negotiate with Matra. No such decision was withdrawn. In that case, the contract approved on 22 November 1996 would appear to be the outcome of the original procedure, to the initial stages of which the Community rules could not apply.

55. However, the conclusions I have set out in those three hypotheses are all dependent on a further element: it must be established whether the negotiations conducted in 1995 and 1996 were in fact a continuation of those which took place prior to 1993 and/or concerned merely a permissible refinement of the agreement reached at the earlier stage or whether, on the contrary, they represented a new departure.

56. In that regard, the language used in the second resolution of 22 September 1995 — "*reprendre la mise au point*" — is highly indicative of both a resumption and a refinement of negotiations. Moreover, the French Government has produced a letter from Matra to Semtcar dated 30 November 1995, stating that Matra had examined the impact of readjusting the timetable for the project and, taking account of an agreed updating of the administrative specifications, confirmed that its tender negotiated in early 1993 would be maintained until 30 September 1996. Those two documents are strong evidence, not refuted by the Commission, that negotiations were in fact resumed shortly after 22 September 1995 on the basis of everything that had gone before. In that context, the contracting entity could hardly be expected to remain irrevocably burdened with an outdated model as a result of forced delays, whatever their cause, and both the change of model and the updating of the price seem wholly legitimate adjustments. The Commission having provided no evidence of any greater 'substantial difference' between the two, I consider that the contract approved on 22 November 1996 may legitimately be regarded as the outcome of a continuation of the earlier negotiations and/or a permissible refinement of the agreement reached at the earlier stage.

57. I thus reach the view that it has not been established that the original procedure was concluded at an earlier stage in any of the three possible hypotheses, so that the contract approved on 22 November 1996 may be regarded as the conclusion of that procedure, at the commencement of which Community procurement rules did not apply to contracts awarded by entities operating public transport networks. Consequently, the fact that no prior call for competition was issued cannot constitute an infringement of those rules.

The derogation in Article 20(2)(c) of Directive 93/38

58. I shall nevertheless consider in the alternative the hypothesis that a new procedure was commenced after the expiry of the period allowed for transposition of Directive 93/38. In that event, the question would arise whether, as the French Government argues, the criteria in Article 20(2)(c) were met.

59. It may be noted here that, although critical of Article 104(II) of the French Public Procurement Code, the Commission does not seek any declaration of failure to fulfil obligations with regard to the inclusion in that provision of a derogation on the basis of substantial prior investment. Nor, in its defence, does France seek to rely on that article; it argues, rather, that the Community derogation applied. That aspect may thus be ignored, and it is also irrelevant for present purposes whether there may be any contradiction between Article 104(II) of the Code and Article 2(4) of Decree 93-990, implementing Directive 90/531. [17] The question to be answered is: was there a breach of Article 20(2)(c) of Directive 93/38 as a result of conduct after 1 July 1994?

60. The Commission submits that there should have been a call for competition because more than one undertaking could have provided a VAL system or equivalent. It produces letters from Alsthom and another undertaking — ANF Industrie, of the Bombardier Eurorail group — to the opponents of the VAL system, dating from 1995, 1996 and 1997, which it claims indicate that those undertakings would have been able at that time to submit bids in conformity with the specifications. The derogation could therefore not apply at the time of the resolution of 22 November 1996. At the hearing, the Commission argued that it was not required to prove that other undertakings could have provided equivalent systems but merely that a call for competition was required in order to establish whether that was so.

61. The French Government considers that the conditions for the derogation were met as regards both 'technical reasons' and 'reasons connected with protection of exclusive rights'. The basic elements and certain essential parts of the VAL system were protected by 11 patents and one design registered by Matra in France between 1975 and 1993, each with a validity of 20 years, the majority of them being extended to other Member States. Only two of them expired during the relevant period, in 1995. The name 'VAL' was registered by Matra as a trade mark in 1987. In 1996, Alsthom stated to Semtcar that it could not meet the terms specified as regards deadlines and previous construc-

17 — See paragraphs 10 and 11 above.

tions. A system proposed by Alsthom for Toulouse would not receive type certification until the year 2006, whereas the Rennes system was to start operating in November 2001. No other undertakings were in a position to provide a system meeting the specific requirements of the Rennes project, nor has the Commission produced any evidence that they were.

62. The evidence before the Court is thus not unequivocal, and its assessment depends largely on the burden and standard of proof.

63. As I have pointed out, [18] it is for the Commission to prove its case and to place the necessary evidence before the Court.

64. However, where a Member State relies on a derogation from a general rule, the Court has regularly held the burden of proof to be reversed. [19] It has taken that approach in a number of cases concerning provisions of procurement directives either identical in substance or closely comparable to Article 20(2)(c) of Directive 93/38. [20] It has held that such provisions, 'which authorise derogations from the rules intended to ensure the effectiveness of the rights conferred by the Treaty in relation to public works contracts, must be interpreted strictly and that the burden of proving the existence of exceptional circumstances justifying a derogation lies on the person seeking to rely on those circumstances'. [21]

65. This means, I consider, that where a Member State seeks to rely on a derogation, it is for the Member State to justify its claim and not for the Commission to prove that the conditions for the derogation were not met. However, the overall burden of proof remains with the Commission; where evidence has been put forward to justify the derogation, it is up to the Commission to refute that evidence. On the totality of the evidence presented to it, the Court must be satisfied that the Commission has established its case.

18 — See above, paragraph 50.

19 — See, for example, as regards exceptions to the principle of free movement of goods, Case C-128/89 *Commission* v *Italy* [1990] ECR I-3239, paragraph 23 of the judgment, and Case C-205/89 *Commission* v *Greece* [1991] ECR I-1361, paragraph 9.

20 — Article 9(b) and Article 9(d) (later Article 5(3)(c)) of Council Directive 71/305/EEC concerning the coordination of procedures for the award of public works contracts, OJ, English Special Edition 1971(II), p. 682, and Article 6(1)(b) of Council Directive 77/62/EEC of 21 December 1976 coordinating procedures for the award of public supply contracts, OJ 1977 L 13, p. 1.

21 — Case C-318/94 *Commission* v *Germany* [1996] ECR I-1949, paragraph 13 of the judgment; see also Case 199/85 *Commission* v *Italy* [1987] ECR 1039, paragraph 14, Case C-107/92 *Commission* v *Italy* [1993] ECR I-4655, paragraphs 12 to 14, Case C-328/92 *Commission* v *Spain* [1994] ECR I-1569, paragraph 16, and Case C-57/94 *Commission* v *Italy* [1995] ECR I-1249, paragraph 23.

66. In the present case, the French Government has produced two documents indicating that Alsthom would not have been able to provide a light railway system to specification. One is a brief letter from Alsthom to Semtcar dated 30 October 1996 (more than a year after the decision was taken to resume negotiations with Matra and less than a month before the contract with that company was finally approved) showing that Alsthom had in fact been consulted but was unable to offer a system compatible with the infrastructure already planned within the strict timetable required or to provide as a reference an identical system already in operation. The other is an extract from the minutes of Sitcar's equivalent body in Toulouse, dated 2 March 1998, from which it appears that for the second line of the light railway network in that city Alsthom proposed a system which would be operational in 2006, whereas the Rennes line was to start operating in November 2001.

67. The Commission has produced a letter from Alsthom to one of the councillors opposed to the VAL project, dated 23 November 1995 (two months after the decision to resume negotiations with Matra and one year before the final approval of the contract). It is clear from that letter that at that date Alsthom, having supplied similar though not identical systems in the past, considered itself perfectly capable of providing a fully automatic reserved-track system in Rennes in accordance with the specifications and wished to submit a tender if given the opportunity. In addition, Alsthom stated that several industrial undertakings were in a position to supply a system and that a failure to allow them to compete with Matra would be anomalous under the current legislation. The Commission has also produced technical descriptions by ANF Industrie of automatic urban light railway systems supplied by it in the USA and Canada prior to 1995.

68. Those documents, I consider, adequately refute the evidence produced by the French Government and establish that at least one other contractor could and would have responded had a call for competition been issued in September 1995.

69. In those circumstances, I take the view that, if the procedure leading to the final award is held to have commenced in September 1995, it cannot be concluded from the totality of the evidence before the Court that for technical reasons or reasons connected with the protection of exclusive rights the contract could be executed only by a particular contractor; the derogation in Article 20(2)(c) of Directive 93/38 thus did not apply and, by not publishing a call for competition in the *Official Journal of the European Communities*, the French Republic failed to fulfil its obligations under that provision and consequently also under Article 4(2) of the same directive.

Conclusion

70. Nevertheless, on the basis of the view I have reached as to the applicability of the Community rules to the initial stages of the procedure in issue, I conclude that the Court should:

(1) dismiss the application; and

(2) order the Commission to pay the costs.