OPINION OF ADVOCATE GENERAL GULMANN

delivered on 12 May 1993 *

Mr President,
Members of the Court,

1. In 1988, the Ufficio del Genio Civile, Bolzano, a department of the Italian Ministry of Public Works, awarded a public works contract to the Italian undertaking Collini e Rabbiosi SpA for the construction of an avalanche barrier in the 'Alpe Gallina' region, near Colle Isarco and Brennero, which is an important region as regards traffic and tourism. The contract was concluded without prior publication of the call for tenders in the *Official Journal of the European Communities.* The Commission has brought the present action for a declaration that the Italian Republic has failed to fulfil its obligations under Council Directive 71/305/EEC of 26 July 1971 concerning the coordination of procedures for the award of public works contracts. [1]

2. Title III of Directive 71/305 lays down rules concerning publication in the *Official Journal of the European Communities* of notices of public works contracts which the contracting authorities of the Member States wish to conclude. The aim of those provisions is to allow undertakings in the Community to learn about planned works and, if they wish, take part in the tendering procedures. Article 12 provides in particular that authorities wishing to award contracts by a tendering procedure are to make known their intention by means of a notice which must be sent to the Office for Official Publications of the European Communities, which then publishes it in the *Official Journal of the European Communities.*

3. The Italian Government, which does not deny that the works in question fall within the scope of the directive, contended that the non-publication of an invitation to tender was justified by Article 9(d) of the directive, which authorizes contracting authorities to award contracts for works without applying the provisions of the directive concerning advertising 'in so far as is strictly necessary when, for reasons of extreme urgency brought by events unforeseen by the authorities awarding contracts, the time-limit laid down in other procedures cannot be kept'.

4. It is apparent from the case-law of the Court and is not contested by the Italian Government that:

— being a derogation from the rules of the directive, that provision must be interpreted strictly;

— the burden of proving the existence of exceptional circumstances justifying the

* Original language: Danish.

1 — OJ, English Special Edition 1971 (II), p. 682. The directive was implemented in Italy by Law No 584 of 8 August 1977. The important change made to the directive by Council Directive 89/440/EEC post-dated the events of this case.

derogation lies on the person seeking to rely on those circumstances; [2]

— the conditions laid down in Article 9(d) for a derogation from the rules of the directive are concurrent. [3]

5. The Italian Government contends that the work of constructing an avalanche barrier in the Alpe Gallina had to be started in September 1988, which made it impossible to observe the requirement laid down in the directive to advertise a call for tenders.

The Italian Government explained that, if it were intended to ensure that the construction of the avalanche barrier had progressed sufficiently before the onset of winter, so that it would be possible to obtain during the 1988/1989 winter 'data concerning wind patterns between the altitudes of 2 030 and 2 400 metres and the behaviour of snow falls after construction of the general works', it was necessary to commence the works in September at the latest. The compilation of such data was a precondition for execution of the project and the Italian Government emphasized that, had it been necessary to defer that first part of the works until after the 1988/1989 winter, the whole project would have been set back by a year. [4] In that connection, the Italian Government indicated that between 21 September 1988, the date of commencement of the works, [5] and 4 November 1988, when work had to be interrupted for the winter, work accounting for 28% of the total cost of the project was carried out. [6]

The Italian Government also explained that it was only when the Geological Department of the Ministry of the Environment issued its report of 9 June 1988 that it became apparent how urgent it was to establish an avalanche barrier in the Alpe Gallina. According to the Italian Government, the report shows that the geological characteristics of the region, previously unknown, made the risk of avalanches highly likely, real and imminent, and the Geological Department recommended 'action as a matter of urgency'. The Italian Government stated that until 9 June 1988 it was considered that there was only a general risk of avalanches in the Alpe Gallina and that before the disclosure of the results of the first geological survey of the region it could not be foreseen that the danger was real and imminent.

The Italian Government contended that, in accordance with the conditions laid down in that regard by Article 9(d) of the directive, there was thus both *extreme urgency* and *events unforeseen by the authorities awarding contracts* and that, in the period from 10 June 1988, the date of presentation of the report, and September 1988, when the works

2 — Case 199/85 *Commission* v *Italy* [1987] ECR 1039, paragraph 14.

3 — Case C 24/91 *Commission* v *Spain* [1992] ECR I 1989, paragraph 13.

4 — The Italian Government explained that the requisite information was collected between 1 December 1988 and 30 April 1989 and revealed that it was necessary to modify the initial project on a number of points. The work of constructing the avalanche barrier in fact took about three years, being completed in October 1991.

5 — The Italian Government stated that the contract itself was not signed until 10 November 1988.

6 — The file includes a decision of the Municipality of Brennero of 28 September 1988 immediately suspending the works. The reason given is the absence of the requisite building permit. At the hearing, the Italian Government explained that, notwithstanding that decision, the works had gone on without interruption until 4 November 1988 when, as indicated, they had to be halted for the winter. Also, the decision of the Municipality of Brennero was suspended by decision No 733 of the Consiglio di Stato of 15 November 1988 and, on 10 April 1989, the Italian Constitutional Court upheld the legality of the works.

had to start without fail, it was not possible to follow the advertising procedure required by the directive.

6. The Commission denies that the conditions laid down in Article 9(d) were satisfied and put forward a number of arguments to that effect which are set out in the Report for the Hearing. In my view, it need merely be mentioned here that more than three months elapsed between the date on which the Geological Department presented its report, 10 June 1988, and the commencement of works on 21 September 1988, and that the Commission claims that, in those circumstances, the Italian Government could not claim extreme urgency as a reason for not following the advertising procedure laid down by the directive, since that procedure does not take an excessively long time. The Commission emphasized that application of the accelerated procedure for restricted procedures provided for in Article 15 of the directive enables the total time to be reduced to 22 days, namely 12 days for the receipt of applications to participate, reckoned from the date of despatch of the notice to the Publications Office of the European Communities, and 10 days for the receipt of tenders, as from the date of the invitation. [7]

7. The starting point for any conclusion to be drawn in this case should, I think, be the premiss that it was absolutely necessary to commence the works in September 1988. In a situation where, first, scientific studies show that there is a serious risk of avalanches and, secondly, the authorities of a Member State consider that it is necessary to start work immediately in order to provide a defence against avalanches, it would be unacceptable for the requirement of advertising under the directive to entail the result that those works were postponed by a year, with the concomitant greater risk of harm to people and property. Article 9(d) is specifically intended to obviate such a situation. Accordingly it may be said that the need to commence the works in September 1988 constituted a case of *extreme urgency*.

However, Article 9(d) does not merely require the existence of extreme urgency: that urgency must mean that '*the time-limit laid down in other procedures cannot be kept*' (emphasis added). It is necessary to establish whether the Italian Government has provided the proof, of which it bears the burden, that the extreme urgency in question made it impossible to observe the rules in the directive on advertising. I believe that question must be answered in the negative. Even if it were accepted that the report from the Geological Department in fact constituted an unforeseeable event in the sense that the information in it was new and that it was on that basis that the Italian administration decided that the works should start in 1988, I do not think the Italian Government has proved that it was not possible, between 10 June 1988 and 21 September 1988, that is to say within a period of *three months eleven days*, to implement an advertising procedure in the expedited form provided for in Article 15 of the directive, which takes a total of *22 days*.

8. The Italian Government explained that the national administrative procedure for the

7 — See Case C-24/91 *Commission* v *Spain*, cited above, paragraph 15.

award of contract took three months, which, it says, was a much shorter period than usual. The Italian Government goes on to say that, if the rules of the directive on advertising had been followed, it would not have been possible to start the works before the 1988/1989 winter, whether or not the accelerated procedure under Article 15 had been opted for. In its rejoinder, the Italian Government stated that the prescribed national procedure specifically involved, *inter alia*, 'the preparation of preliminary designs and plans for execution of the works to be contracted for, choice of the contractor, the clauses of the contract awarding the works and approval thereof, and the adoption of the order for the expenditure to be committed' — in other words 'the entire procedure ... from the preliminary design to the adoption of the order approving the contract and the expenditure'.

At the hearing, the Italian Government indicated that the plans for the works were drawn up on *18 June 1988*, that they were approved by the Trento Public Works Technical and Administrative Inspection Committee on *26 June 1988*, [8] and that the financial resources were made available to the competent authority on *22 July 1988*.

9. Let me say, first, that it ought to have been possible to initiate a tendering procedure in accordance with the requirements of the directive by 22 July 1988, the date on which the plans for the works were finalized and the financial resources were made available to the authorities. Even if the tendering procedure in the expedited form provided for in Article 15 of the directive had not been commenced until then, it could have been completed towards the middle of August, which is more than a month before the date set for the start of the works. As for the other parts of the national administrative procedure, among which the Italian Government expressly referred only to 'the clauses of the contract awarding the works and approval thereof', no explanation, and still less proof, was given as to why it was not possible to take those various steps at the same time as the tendering procedure, so that the commencement of the works would not be further delayed as a result.

Let me say, secondly, that the Italian Government has given no reason why the 'order authorizing commitment of the expenditure' by which the necessary financial resources were made available to the authorities was not adopted until 22 July 1988. It is clear from the file that LIT 10.5 thousand million for construction of the avalanche barrier in the Alpe Gallina had already been authorized by Finance Law No 67 of *11 March 1988*. It may also be considered that the Italian authorities were under a legal obligation to make every effort to comply with the Community rules and therefore to facilitate, as far as possible, the conduct of a tendering procedure in such a way that it could be carried out in accordance with the requirements of the directive. In view of that obligation, a delay of over a month in adopting an order of that kind does not seem justified.

I also feel prompted to ask whether it was in fact necessary to await the adoption of the

8 — And not on 26 April 1988 as indicated in Italy's reply to the formal letter from the Commission: see the telex of 15 March 1990 from the Office of the Italian Permanent Representative to the Commission.

'order authorizing commitment of the expenditure' before initiating a tendering procedure — and the Italian Government has not put forward any satisfactory explanation. Having regard to the finance law which it had adopted and bearing in mind above all that the project was urgent, I find it difficult to comprehend why the tendering procedure could not have been commenced as early as 18 June 1988, the date on which the building plans were finalized, perhaps with a clear statement being included in the invitation to tender to the effect that execution of the works would be dependent on final approval from the budgetary authorities.

10. In those circumstances, I think that it is appropriate to uphold the Commission's claim simply because the Italian Government has failed to furnish the proof required of it that the alleged extreme urgency made it impossible to meet the time-limits laid down as part of the accelerated procedure under Article 15 of the directive. [9]

11. Were the Court to consider that the Italian Government did provide the proof required of it by showing that it was not possible to conduct a tendering procedure in accordance with the provisions of the directive between 10 June 1988 and 21 September 1988, then the question would arise of the extent to which the report from the Geological Department constituted an *unforeseeable event* within the meaning of Article 9(d) of the directive.

12. It seems that the Commission rejects the view that a scientific report of that kind can constitute an unforeseeable event within the meaning of the directive. A scientific report whose conclusions are new and unforeseeable as compared with the previous state of knowledge could in my view constitute grounds for and justify a derogation from the rules of the directive.

13. The issue is not however of decisive significance in this case. It is in fact doubtful whether the report in question is really as important as the Italian Government claims.

It must be borne in mind that Article 9(d) requires the existence 'of extreme urgency *brought by* events unforeseen by the authorities awarding contracts' (emphasis added). [10] In other words, there must be a causal link between the unforeseen event alleged by the Italian Government and the extreme urgency involved in this case. Quite apart from the question of whether or not the contracting authorities could have foreseen the content of the report from the Geological Department, fulfilment of the conditions under Article 9(d) necessarily implies that the authorities' appraisal and their decision as to the necessity of beginning the works in 1988 was necessarily *brought about by* the production of that report. In my opinion, it can be inferred from the information before the Court that the Italian Government has not proved that it was the report which prompted the Italian authorities to conclude that it was necessary to commence the works in 1988. On the contrary, that information shows that the need to start the works in 1988 was perceived before presentation of

9 — See, to similar effect, Case C-24/92 *Commission* v *Spain*, cited above, paragraph 14.

10 — In the French version 'l'urgence impérieuse *resultant* d'évènements imprévisibles' (emphasis added).

the report on 9 June 1988, that the competent authorities had already started preparing the plans before that date and that they thus had sufficient time to implement an advertising procedure in accordance with the rules of the directive.

In drawing that conclusion I rely on the following details:

— The Ufficio del Genio Civile, Bolzano, drew up a report on *4 March 1986* in which it concluded that there existed in the Alpe Gallina 'an objective danger of avalanches liable, with a frequency of 50 years, to affect communications at the bottom of the valley' and that the 'author is of the opinion that the situation is now urgent and it is impossible do defer works for the construction of an avalanche barrier in the Alpe Gallina at least, in order to ensure the necessary safeguards for communications with the countries beyond the Alps'. [11]

— On *3 April 1987* a meeting was held at the request of the regional adviser, attended also by the Mayor of Brennero, the chairman of Auto-Brennero and the head of the Bolzano section of ANAS, during which the 'urgency of carrying out the works and the impossibility of postponing them ... were accepted'. [12]

— On *22 January 1988* the Mayor of Brennero stated as follows in his letter No 186: 'Having learned that in the second Finance Law for 1988 ... provision has been made for expenditure of LIT 10 500 000 000 for the establishment of an avalanche barrier in the Alpe Gallina ... and in view of the fact that those works are urgently required ... the municipal administration of Brennero requests ... that the competent administrative authorities make available ... the technical and administrative facilities necessary to enable *the works to be started immediately and carried on through this season* by placing a contract for them as a matter of the utmost urgency, avoiding the delays inherent in awards of contracts of other kinds, *thereby gaining a whole year* and removing for the future the serious danger of avalanches in this area. In our view the only way of ensuring such rapid action is to have recourse ... to the same means as those used for similar action, to general satisfaction and ahead of the deadlines set, in neighbouring areas, within the boundaries of the Municipality of Brennero' (emphasis added). [13]

— On *11 March 1988*, as I stated earlier, the finance Law allocated LIT 10.5 thousand million for the construction of an avalanche barrier in the Alpe Gallina. At the hearing, the Italian Government explained that that amount had been spread over three years: 5 thousand million in 1988, 3 thousand million in 1989 and 2.5 thousand million in 1990.

11 — That report was annexed to the Italian Government's reply to the questions put to it by the Court.

12 — See the telex of 15 March 1990 from the Office of the Italian Permanent Representative to the Commission.

13 — That letter was included as annex 2 to the Italian Government's reply to the questions put to it by the Court. I would point out in that connection that it appears from the abovementioned report of 4 March 1986 that on 24 January 1980 a contract was concluded for the anti avalanche works in the neighbouring areas with Collini e Rabbiosi, the company with which the contract for the works at issue in this case was placed.

— On *10 May 1988* the Geological Department was asked to prepare the report in question concerning the geological conditions in the region.

In other words, the report was prepared after adoption of the decision to construct the avalanche barrier, probably being linked with that decision, and everything appears to indicate that it was precisely on that basis that the plans for the works were to be drawn up. Moreover, there are solid grounds for believing that much of the technical and scientific information needed for preparation of the plans was already available before the report of 9 June 1988 was presented since it seems most unlikely that plans for the works could otherwise have been drawn up in the short space of time between 10 June 1988, the date of presentation of the report, and 18 June 1988, the date on which, according to the information provided by the Italian Government itself, the plans for the works were finalized.

The whole course of events indicates, in my opinion, that the authorities had long known that there was an urgent need to construct an avalanche barrier in the Alpe Gallina and that it was accepted, after the Finance Law was passed in March 1988, that those works should start in 1988. Thus, as early as January 1988, the Mayor of Brennero had drawn attention to the importance of 'gaining a year'. Furthermore, when replying on 15 March 1990 to the formal letter from the Commission, the Italian Government certainly did not give the impression that the report of 9 June 1988 had been decisive. On the contrary, the Italian Government stated in its letter that the report of 9 June 1988 merely confirmed 'the urgency of the situation and the impossibility of postponement' which had been known since March 1986, and it is only in its defence that the Italian Government contends that that report made a decisive contribution to the authorities' decision to arrange for the works to be started in 1988.

14. In those circumstances, its seems appropriate to conclude that, regardless of whether the report of 9 June 1988 showed that the risk of avalanches in the Alpe Gallina was more serious than had previously been believed, that report was not decisive in shaping the authorities' assessment and their decision that the work of building the avalanche barrier should start in 1988. Everything indicates that that decision was taken at an early enough stage to enable an advertising procedure to be carried out without difficulty in accordance with the requirements of the directive, without preventing the works from being started in September 1988.

15. For that reason I propose in the alternative that the Court grant the form of order sought by the Commission on the ground that the Italian Government has not provided the evidence required of it to demonstrate the necessary causal link between the unforeseeable event claimed by the Italian Government and the extreme urgency of the case.

Conclusion

I therefore propose that the Court:

— find that, by deciding to conclude a public works contract for the construction of an avalanche barrier in the locality of Colle Isarco and Brennero without sending an invitation to tender to the Office for Official Publications of the European Communities, the Italian Republic has failed to fulfil its obligations under Council Directive 71/305/EEC of 26 July 1971 concerning the coordination of procedures for the award of public works contracts; and

— order the Italian Republic to pay the costs.