step, whether taken because of an error or because the Member State initially intended to seek a financial contribution from the Community, cannot cause an exception not to apply where the exception is laid down in a provision which is wholly unambiguous and justified by reasons unaffected by that step.

2. In so far as it allows a public body for whose acts it is responsible to include in the contract specification for tender for a public works contract a clause stipulating that the materials used must be certified as complying with a national technical standard, a Member State fails to fulfil its obligations under Article 30 of the Treaty. Such a clause is liable to impede imports in so far as it may cause economic operators utilizing materials equivalent to those certified as complying with the relevant national standards to refrain from tendering.

REPORT FOR THE HEARING
delivered in Case 45/87 *

I — Facts and procedure

1. *Legal context*

1.1. *Council Directive 71/305*

On 26 July 1971, the Council adopted Directive 71/305 concerning the coordination of procedures for the award of public works contracts (Official Journal, English Special Edition 1971 (II), p. 682), hereinafter referred to as 'the directive'.

Article 10 (1) of the directive provides that the 'technical specifications may be defined by reference to national standards'. However, Article 10 (2) lays down certain conditions with which technical specifications must comply. It provides that:

'Unless such specifications are justified by the subject of the contract, Member States shall prohibit the introduction into the contractual clauses relating to a given contract of technical specifications which mention products of a specific make or source or of a particular process and which therefore favour or eliminate certain undertakings. In particular, the indication of trade marks, patents, types, or of a specific origin or production, shall be prohibited. However, if such indication is accompanied by the words "or equivalent", it shall be authorized in cases where the authorities awarding contracts are unable to give a description of the subject of the contract using specifications which are sufficiently

* Language of the Case: English.

precise and intelligible to all parties concerned.'

According to Article 3 (5) of the directive:

'The provisions of this directive shall not apply to public works contracts awarded by the production, distribution, transmission or transportation services for water and energy.'

In that regard, the sixth recital in the preamble to the directive states that:

'... it is necessary to avoid the subjection of the production, distribution and transmission or transportation services for water and energy to different systems for their works contracts, depending on whether they come under the State, regional or local authorities or other legal persons governed by public law or whether they have separate legal personality; ... it is therefore necessary to exclude from the scope of this directive those services referred to above which by reason of their legal status, would fall within its scope until such time as a definitive solution can be adopted in the light of experience'.

1.2. *Standards for asbestos cement pressure pipes and joints*

(a) ISO 160-1980

The International Organization for Standardization (hereinafter referred to as 'the ISO') is a world-wide federation of national standards institutes. Those institutes are the ISO member bodies. The ISO develops international technical standards applicable to goods and services. The work of developing those standards is carried out through ISO technical committees. Every member body interested in a subject for which a technical committee has been set up has the right to be represented on that committee. International organizations, governmental and non-governmental, also take part in the work. Draft international standards adopted by the technical committees are circulated to the member bodies for approval before their acceptance as international standards by the ISO council.

The ISO seeks to have its international standards adopted by the national standards institutes in the standards which those institutes lay down at national level. Different methods to that end are indicated by the ISO in Guide 21-1981, entitled 'Adoption of International Standards in National Standards'. An international standard may be adopted, *inter alia*, by the development and publication of a national standard which takes over the precise terms of an international standard or is equivalent thereto. ISO Guide 21 defines as 'equivalent' standards which differ by reason of 'editorial changes' or because of 'minor technical deviations'.

The conformity of a product or a service with a standard is certified by a 'certificate of conformity' or by licences permitting the placing on the products of a 'mark of conformity'. Various ISO guides recommend methods by which both systems may be implemented.

In regard to asbestos cement pressure pipes and joints, which are at issue in this case, international standard ISO 160 was developed by the technical committee on products in fibre-reinforced cement. In the Community, that standard has been approved by the member bodies in the Federal Republic of Germany, France, Greece, Italy, the Netherlands, Portugal, Spain and the United Kingdom. The standard in question specifies the conditions of manufacture, classification, characteristics and acceptance tests applicable to asbestos cement pipes. With regard to the diameter of pipes, standard ISO 160 provides that the *nominal diameter* of the pipes corresponds to the *internal diameter* expressed in millimetres, tolerances excluded. With regard to length, it provides that it should preferably be not less than 4 metres for pipes with a nominal diameter exceeding 200 millimetres. The nominal length should preferably be a multiple of 0.5 metres.

(b) IS 188: 1975

In Ireland, the Industrial Research and Standards Act 1961 authorized the Institute for Industrial Research and Standards (IIRS) to lay down technical standards. In 1984, the IIRS set up the National Standards Authority of Ireland (NSAI), which took over the duties of the IIRS in regard to standards with effect from 1 January 1985. The NSAI is the ISO member body for Ireland.

In 1975, the IIRS laid down standard IS 188: 1975 for asbestos cement pressure pipes. For information, it is stated in an annex to standard IS 188 that it is broadly similar to international standard ISO 160 and British standard BS 486: 1973. However, it can be seen from the specifications in standard IS 188 that, unlike standard ISO 160, the former defines the *nominal diameter* of the pipes as corresponding to the *outside diameter*; the internal diameter and consequently, the thickness of the pipes, are to be determined by the manufacturer. Furthermore, standard IS 188 provides for outside diameters at the ends of the pipes. Finally, it provides that the standard length of pipes is to be 4 metres but adds that 'other lengths may be supplied by agreement between the manufacturer and the purchaser'.

For the purpose of certifying conformity with standard IS 188 of asbestos cement pipes, the NSAI operates a system of marks indicating such conformity (Irish Standard Mark). That system is governed by the NSAI Irish Standard Mark Certification Schemes. Licences making it possible to apply the Irish Standard Mark to products or services under standard IS 188 are issued by the NSAI in the name of the IIRS. Until June 1986, the only companies authorized by the IIRS under IS 188 to use the Irish Standard Mark for their products were Tegral Pipes Ltd, Drogheda (Ireland), in respect of pipes of all dimensions, and Toschi Productions GmbH, Rethem (Federal Republic of Germany), in respect of pipes of 250 mm in Class 15.

(c) BS 486: 1973 and BS 486: 1981

In 1973 the British Standards Institution laid down standard BS 486 for asbestos cement pressure pipes and joints. When it was last revised in 1981, that standard was made to correspond more closely to standard ISO 160. The foreword to the standard indicates that the differences between it and ISO standard 160: 1980 are as follows:

outside diameters at finished ends are given for the range of nominal diameters in general use in the UK;

minor editorial changes have been made.

Like standard ISO 160, standard BS 486 indicates the nominal diameters of pipes, specifying that the *nominal diameter* corresponds to the *internal diameter.* The thickness of the wall of the pipes and the point at which that is measured is to be specified by the manufacturer. However, paragraph 3.5.1.4.1 of BS 486: 1981 lays down the external diameter of the finished ends as does Irish standard IS 188. The outside diameters at the finished ends laid down for different nominal diameters and classes of pipes are the same as those provided for in IS 188. The specifications concerning the length of the pipes contained in standard BS 486: 1981 are the same as those in ISO 160.

2. *Background to the dispute*

2.1. *The invitation to tender for the Dundalk Water Supply Augmentation Scheme*

Dundalk Urban District Council is the promoter of a project known as the Dundalk Water Supply Augmentation Scheme. Contract No 4 of this scheme concerns the construction of a water main to transport water from the River Fane source to a treatment plant at Cavan Hill and thence into the existing town supply system. The invitation to tender for this contract by open procedure was published in *Supplement to the Official Journal* S 50 of 13 March 1986, p. 13. At point 13 of the published notice it was stated that:

'The contract will be awarded, subject to the Dundalk Urban District Council being satisfied as to the ability of the contractor to carry out the work, to the contractor who submits a tender, in accordance with the tender documents, which is adjudged to be the most economically advantageous to the Council in respect of price, period of completion, technical merit and running costs.

The lowest or any tender need not necessarily be accepted.'

An Irish firm specializing in work of that sort, namely P. J. Walls (Civil) Ltd, hereinafter referred to as 'Walls', submitted three tenders in response to the invitation to tender:

Tender A based on the use of 700 mm diameter asbestos cement pipes supplied by Tegral Ltd (the only Irish producer of such pipes);

Tender B based on the use of 700 mm diameter 'K9' ductile iron pipes supplied by Stanton and Staveley, a UK company;

Tender C based on the use of 700 mm diameter asbestos cement pipes supplied by Uralita, of Spain.

The price quoted in Tender C was significantly below that in Tenders A and B, due

entirely to the cost of the pipes. Walls considered that in those circumstances, Tender C offered them the best possibility of obtaining the contract.

On 6 June 1986, the consulting engineers to the project, engaged by Dundalk Urban District Council, wrote to Walls inviting them to a pre-adjudication interview. The letter in question added that proof would be required that the firm supplying the pipes 'is registered with the IIRS for the purposes of the Irish Standard Mark Licensing Scheme referred to in the Specification'. There would be no point in coming to the meeting if Walls were unable to prove compliance with Clause 4.29 of the specification annexed to the contract in question. That clause provides that:

'Asbestos cement pressure pipes shall be certified as complying with Irish Standard Specification 188: 1975 in accordance with the Irish Standard Mark Licensing Scheme of the Institute for Industrial Research and Standards. All asbestos cement watermains are to have a bituminous coating internally and externally. Such coatings shall be applied at the factory by dipping.'

At the pre-adjudication interview on 24 June 1986, Walls claimed that the pipes obtained from Uralita of Spain complied with standards BS 486 and ISO 160 and were of a quality equal to that required by standard IS 188. However, the consulting engineers stated that they could not take account of Tender C since the only companies certified by the NSAI under IS 188: 1975 were Tegral Pipes and Toschi Productions.

2.2. *Steps taken by Uralita and Walls*

On that basis, an exchange of views took place between the IIRS and the NSAI, on the one hand, and Walls and Uralita, on the other, concerning the characteristics and the quality of Uralita pipes. By telex of 13 June 1986, Uralita indicated to the IIRS *inter alia* that its pipes complied with standards ISO 160: 1980 and BS 486: 1981. The difference between standard ISO 160: 1980 (or BS 486: 1981) and IS 188: 1975 (or BS 486: 1973) was that the ISO standard laid down an internal diameter, leaving the outside diameter at the finished ends to the manufactuer's discretion. However, standard IS 188: 1975 fixed the outside diameter leaving the internal diameter to the manufactuer's discretion. Uralita indicated that it could manufacture pipes to comply with IS 188: 1975, but the outside diameters would then be larger than those of pipes manufactured in accordance with the ISO standard and the pipes would be thicker than was actually required. As a result, the prices would be less competitive. Finally, Uralita indicated that the world-wide trend in asbestos cement pipe manufacture was towards a fixed internal diameter. Consequently, Uralita did not have the appropriate mandrels for manufacture in accordance with standard IS 188: 1975.

In September 1986, Uralita applied to the NSAI for certification on the basis of standard IS 188 under the NSAI Irish Standard Mark Certification Scheme. In support of its application, Uralita submitted *inter alia* a certificate from SGS Española de Control SA, a company in the international 'Société Générale de Surveillance' group. At the request of Uralita, that company carried out an inspection at Uralita's factory for the purpose of checking the quality of the pipes manufactured there. In its certificate, dated 1 September 1986, it concludes as follows:

'As per above all the test results meet entirely with ISO 160: 1980 likewise these test results meet with all BS 486: 1981 requirements. With regard to IS 188: 1975 the results do totally comply with the mechanical strengths requested in the above standard as well as with the tolerances in lengths, thicknesses, outside diameters, straightness and regularity of the internal diameters.'

In a letter of 12 September 1986, the NSAI replied as follows:

'On the basis of the data contained in certificate No 050111/37352 issued by SGS Española de Control SA, the Uralita pipes for which you have sought certification, i.e. 700 mm nominal bore, class 15, 20 and 25 do not satisfy the requirements of IS 188: 1986 with respect to outside diameter at finished ends:

Nominal bore/ class		Outside diameter at finished ends	Tolerance
		mm	mm
IS 188: 1986	700/15	761	± 1.0
	700/20	780	± 1.0
	700/25	801	± 1.0
Uralita	700/15	769	± 0.7
	700/20	790	± 0.7
	700/25	822	± 0.7

A pre-requisite for certification is that *all* the requirements of the standard specification are met.'

By letter of 23 September 1986, Uralita replied that Ireland was the only country to require a specific outside diameter. Its pipes, manufactured in accordance with standard ISO 160, provided a better performance. The consequence of manufacturing in accordance with IS 188 was that the internal diameter of the pipes was less than the nominal diameter of 700 mm thus reducing the flow capacity of the pipes. In a letter of 12 December 1986, the NSAI expressly accepted that the Uralita pipes complied with standard ISO 160: 1980, but it repeated that they did not satisfy the requirements of IS 188.

2.3. *The steps taken by the Commission*

Following the refusal of the consulting engineers to consider tenders, Walls and Uralita lodged complaints with the Commission. Since it considered that Clause 4.29 of the specification constituted an infringement of Articles 30 to 36 of the EEC Treaty and Article 10 of Directive 71/305, the Commission addressed a telex to the Permanent Representative of Ireland on 11 August 1986. By letter of 9 September 1986 the Permanent Representative replied that the Irish Government did not accept the validity of the Commission's complaint. The complainants had not submitted any evidence that their products met the requirements of IS 88 or any equivalent standard.

As a result of that reply, the Commission, acting in pursuance of Article 169 of the EEC Treaty, sent a letter to the Irish Government on 20 October 1986 calling

upon it to submit its observations within two weeks. By letter of 14 November 1986, the Irish Government replied reiterating its views and putting forward the grounds on which it considered that Clause 4.29 of the specification was objectively necessary. The use of pipes not complying with IS 188 would make it very expensive if not impossible to connect them to the existing pipe network. The cost of spares, fittings and specials as well as the handling costs of Uralita pipes was considerably higher than the difference in price between Walls's Tender C and the other tenders which were submitted. Furthermore there was a danger to public health inasmuch as Walls and Uralita had not shown that they were in a position to coat the pipes, both internally and externally, with bitumen. Finally, there were difficulties due to the fact that since the Uralita pipes had an inside diameter of 700 mm, they had a 5% greater flow than pipes manufactured to the Irish standard, which would have an inside diameter of 687 mm.

After a meeting with the Commission's officials, the Irish Government provided further explanations in a letter of 29 December 1986. That letter indicated that the Minister for the Environment had already approved the award of the contract and that although the Dundalk Urban District Council had undertaken not to proceed with the formal awarding of the contract before 31 January 1987, it would not be possible to delay the award any later unless the Court of Justice ordered such a delay.

Since it was not satisfied with those replies, the Commission, under cover of a letter of 13 January 1987, delivered a reasoned opinion stating that the inclusion in the contract specification of Clause 4.29 and the refusal to consider a tender providing for the use of asbestos cement pipes manufactured to an alternative standard providing equivalent guarantees (such as ISO 160) constituted failures by Ireland to comply with its obligations under Article 30 of the Treaty and Article 10 of Directive 71/305. Ireland was requested to take all necessary measures to comply with the reasoned opinion within 15 days following notification. By letter of 3 February 1987, Ireland re-affirmed its previous position. It also undertook not to award the contract before 20 February 1987.

Since Ireland did not comply with the reasoned opinion, the Commission brought this action.

3. *Procedure before the Court*

The Commission's application was lodged at the Court Registry on 13 February 1987.

On the same day, the Commission applied for interim measures in the form of an order that the defendant should take such measures as might be necessary to prevent, until such time as the Court had given final judgment in the case or a settlement had been reached between the Commission and Ireland, the award of a contract for work relating to the Dundalk Water Supply Augmentation Scheme: Contract No 4. That application was dismissed by order of the President of the Court of 13 March 1987.

The written procedure followed the normal course. However, since the Commission did not submit its reply within the time allowed there is neither a reply nor a rejoinder.

By an application lodged at the Court Registry on 26 June 1987, the Kingdom of Spain applied for leave to intervene in support of the Commission's conclusions. By order of 8 July 1987, the Court allowed that application. The intervener submitted its observations in a statement lodged at the Court Registry on 23 September 1987.

Upon hearing the report of the Judge-Rapporteur and the views of the Advocate General, the Court decided to open the oral procedure without any preparatory inquiry. However, it requested the applicant and the defendant to reply in writing to certain questions.

II — Conclusions of the parties

The *Commission of the European Communities*, the applicant, claims that the Court should:

(1) Declare that by allowing the inclusion in the contract specification for the Dundalk Water Supply Augmentation Scheme Contract No 4 of Clause 4.29 providing that asbestos cement pressure pipes shall be certified as complying with the Irish Standard Specification 188: 1975 in accordance with the Irish Standard Mark Licensing Scheme of the Institute of Industrial Research and Standards (IIRS) and consequently refusing to consider (or rejecting without adequate justification) a tender providing for the use of asbestos cement pipes manufactured to an alternative standard providing equivalent guarantees of safety, performance and reliability (such as ISO 160), Ireland has failed to fulfil its obligations under Article 30 of the EEC Treaty and Article 10 of Council Directive 71/305/EEC;

(2) Order Ireland to pay the costs.

Ireland, the defendant, contends that the Court should:

(1) Dismiss the Commission's application and declare it not to be well founded;

(2) Order the Commission to pay the costs.

III — Submissions and arguments of the parties

1. *Technical aspects*

Ireland puts forward a certain number of technical arguments in support of the proposition that Clause 4.29 of the contract specification in question is objectively necessary and justified. The Commission contests those arguments, claiming in particular that standard ISO 160 is equivalent to standard IS 188. The differences between the positions of the parties concern, *inter alia*, the following points.

(a) The equivalence of standard BS 486 to standard ISO 160

The Commission, relying principally on the certificate of SGS Española de Control, considers that the Uralita pipes comply both with standard ISO 160 and standard BS 486. It interprets the latter standard as not

requiring specific outside diameters at the finished ends of the pipes. However, by indicating such diameters 'for the range of nominal diameters in general use in the UK', BS 486 indicates them only for information.

Ireland relies on a statement by the British Standards Institution according to which the said outside diameters of the finished ends (identical to those laid down in standard IS 188) are compulsory. The Uralita pipes do not therefore meet the requirements of the British standard.

(b) Diameter of fittings and specials

In Ireland's view, fittings are manufactured in the United Kingdom and Ireland with an internal diameter of 687 mm, which is suitable for pipes manufactured to standards IS 188 or BS 486. Such fittings cannot be adapted to the different outside diameter of Uralita pipes. Consequently, the latter cannot be directly connected to the existing pipe network. This gives rise to problems of interchangeability and interconnectability which considerably increase the cost of using Uralita pipes.

The Commission claims that 700 mm pipes manufactured to ISO 160 have an advantage over IS 188 pipes as regards their compatibility with fittings and specials since these are manufactured to an actual internal diameter equal to the nominal diameter of 700 mm. That fact is confirmed by a telex of 6 February 1987 from the UK manufacturers, Stanton and Staveley, to Walls.

(c) Cost of spares and interconnections

According to Ireland a large stock of spares would be necessary for the Uralita pipes in order to ensure the continuity of water supply, having regard in particular to the requirements of transport and the time required for delivery.

The Commission considers that a stock of Uralita spares would be cheaper than the same stock of IS 188 spares.

(d) The length of the Uralita pipes

The Commission states that the length of the pipes may be 4 metres or 6 metres under both IS 188 and ISO 160 and is a matter for agreement between the manufacturer and purchaser.

Ireland accepts that that is the position in relation to standards but it points out that all correspondence with Uralita indicates a 6 metre pipe. However, Dundalk Urban District Council required a 4 metre pipe because of the lower cost of repairing and maintaining such pipes.

(e) Flow capacity

Noting that Uralita has emphasized that the flow capacity of its pipes is greater than that

of those manufactured by Tegral because of the slightly larger diameter at the finished ends, Ireland claims that this is in fact a disadvantage since abstraction of water from the River Fane is limited by court order.

The Commission claims that the greater flow capacity of ISO 160 pipes is an advantage since it would lead to lower energy costs.

(f) Consequential costs

According to Ireland, the possible need to test the Uralita pipes upon their arrival in Ireland and other delays linked to the use of such pipes in the completion of Contract No 4 would have the effect of causing delay in the completion of Contracts Nos 5, 6 and 7 of the Dundalk Scheme. As a result, claims would be made by the contractors carrying out the latter contracts.

The Commission considers that the risk of delay due to the use of imported pipes was a matter for the contractor to take into account in making his estimate. Furthermore, the local authority would have the remedies available to it under the contract in question.

(g) Risk to public health

Ireland considers that in regard to the three aspects of public health, namely the asbestos fibre, the bitumen coating and the sealing ring material, Uralita has not adequately demonstrated its compliance with safety equivalent to that required by standard IS 188.

The Commission points out that only white asbestos fibres (as opposed to blue asbestos fibres) are used in pipe manufacture and present no health risk. In any case, the bitumen coating was separately specified in the contract specification and Uralita quoted for pipes on that basis.

2. *Infringement of Directive 71/305*

The Commission admits first of all that Ireland is not required to apply the provisions of Directive 71/305, since Article 3 (5) thereof excludes water services from its provisions. However, it considers that Ireland itself applied the directive to the contract at issue by publishing a notice in the Official Journal and it is therefore obliged to apply the directive correctly.

However, Ireland did not correctly apply Article 10 (2) of the directive. In the first place, the condition concerning a certificate of conformity to standard IS 188 is not justified by the subject of the contract. Other standards exist for asbestos cement pipes, such as BS 486 and ISO 160, which provide equivalent guarantees of safety, performance and reliability equivalent to IS 188. The fact that pipes made to other standards need to be imported, are not interchangeable with existing stocks of spare parts and that their use may necessitate a

larger stock of spares are not valid reasons for excluding them from consideration. Furthermore, the effect of Clause 4.29 is to favour certain undertakings and to eliminate others, since the only undertaking in a position to supply the pipes required by the specification in the invitation to tender is Tegral. Finally, Article 10 (2) of the directive permits reference to a specific brand or product only if the words 'or equivalent' are added. Those words were not included in Clause 4.29.

In the second place, Ireland contends that Clause 4.29 of the contract specification does not constitute an 'indication of trade marks, patents, types, or of a specific origin or production' within the meaning of Article 10 (2) of the directive.

3. *Infringement of Article 30 of the Treaty*

The Commission also states that the fact that Clause 4.29 of the contract specification is incompatible with the directive makes the rejection of Walls's Tender C incompatible with the directive.

The Commission states *in limine* that Dundalk Urban District Council is a body for whose acts Ireland is responsible in Community law. Moreover, the Council has to obtain the authorization of the Department of the Environment before accepting a tender.

The Kingdom of Spain maintains in particular that the fact of advertising the tender procedure in the Official Journal, which is optional, makes it subject to all the rules laid down by the directive. Otherwise, it would serve no purpose to procure competition between tenderers from the various Member States without applying to the tender procedure the rules laid down to ensure that such competition is fair.

It then submits that the tender procedure at issue constitutes a restriction on trade incompatible with Article 30 of the EEC Treaty inasmuch as it excludes the use of pipes manufactured in other Member States which provide equivalent guarantees of safety, performance and reliability in the construction of pipelines. If Clause 4.29 had not been included in the contract specification, other contractors might have submitted tenders providing for the use of imported pipes. If the contract specification had provided for the use of pipes complying with other standards, the contractors could have taken account of additional requirements (length, coating and the need for a stock of spare parts). They would therefore have been able to avoid having their tender rejected on the basis of arguments or pretexts alleging the necessity to impose such conditions.

Ireland observes in the first place that the directive does not apply to this case, as can be seen from its terms, including the explicit exclusion from its scope of contracts relating to water services. The fact that Ireland initially acted as if the directive applied to the contract in question is irrelevant. No Member State can make a directive apply to circumstances expressly excluded from its scope.

The arguments put forward by Ireland, particularly in its reply to the reasoned opinion, must be rejected. In the Commission's view, specifications in public works contracts restricting the use of imported goods fall under Article 30 even if there is no general restriction on imports. Furthermore, asbestos cement pipes are used solely in public works. Ireland wrongly maintains that manufacturers in other Member States can have their products certified as complying with standard IS 188. There is no justification in requiring manufacturers in other Member States, manufacturing pipes to equivalent standards, to change their manufacturing techniques or apply for certification from the IIRS. The argument to the effect that Article 30 is inapplicable because the rules applying to public contracts are laid down in Directive 71/305 is also without foundation. Since Ireland relied on the judgment of 22 March 1977 in Case 74/76 *(Ianelli* v *Meroni* [1977] ECR 557), the Commission observes that that judgment is merely authority for the proposition that Article 30 does not apply to obstacles to trade covered by other provisions of the Treaty. The directive is not a provision of the Treaty.

The Commission goes on to maintain that the requirement to obtain a certificate of conformity with standard IS 188 is not justified by Article 36 of the Treaty or by 'a mandatory requirement' in the sense of the case-law of the Court. Such a justification is lacking since pipes manufactured in conformity with standards such as ISO 160 and BS 486 provide equivalent guarantees. In so far as the use of 'equivalent' pipes has an influence on the cost of the work, account must be taken of that factor in selecting a particular tender. It does not justify the exclusion of such pipes *a priori.*

The Kingdom of Spain supports the Commission's arguments, in particular by drawing attention to the basic principles of the Court's case-law in regard to the free movement of goods and the inferences that the Commission drew from the judgment of the Court of 20 February 1979 in Case 120/78 *(Rewe* v *Bundesmonopolverwaltung für Branntwein* [1979] ECR 649).

Ireland maintains in the first place that public works are not subject to Article 30 of the Treaty but to Articles 59 *et seq.* concerning the provision of services. Were it not for the fact that the contract at issue in this case related to water services, Directive 71/305 would have applied to it. However, the directive was adopted on the basis of Articles 57 (2), 66 and 100 of the Treaty and the recitals in the preamble thereto make it clear that further rules applicable to public works contracts relating to water services are to be adopted in the future. The application of the rules concerning the provision of services is justified by the fact that the many provisions that make up a public works contract constitute a single unit in the context of the contractual obligations being undertaken. In all cases the requirements relating to materials must be viewed as being subsidiary to those relating to the supply of the services necessary to turn such materials into finished works.

If the provisions of the Treaty concerning the provision of services apply, Article 30 of the Treaty cannot apply. The Court stated in its judgment of 22 March 1977, cited

above, that 'however wide the field of application of Article 30 may be, it nevertheless does not include obstacles to trade covered by other provisions of the Treaty'.

Ireland maintains secondly that in any event, even if Article 30 of the Treaty applied to public works contracts, a technical specification such as Clause 4.29 cannot be regarded as a 'trading rule' likely to hinder intra-Community trade. That clause does not therefore have an effect equivalent to a quantitative restriction within the meaning of the case-law of the Court.

Finally, Ireland states that Clause 4.29 applies both to imported asbestos cement pipes and those manufactured in Ireland and the interests it is designed to protect, namely, a high standard of quality and uniformity of design in such piping and a capacity to cope efficiently with Irish conditions and pre-existing services, must be regarded as 'mandatory requirements' in the sense of the case-law of the Court in regard to the free movement of goods. Furthermore, the clause is justified by reasons connected with the protection of health within the meaning of Article 36 of the Treaty. It is imperative for the protection of the health of the people of Dundalk and the surrounding area that there be no delay in improving their water supply. Furthermore, the requirements of IS 188 in regard to bitumen coating are based upon an urgent need to ensure the health and safety of persons using potable water flowing through the pipes in question.

IV — Replies to questions put by the Court

1. *Question to the applicant*

'The Commission has requested the Court to declare that Ireland has failed to fulfil its obligations

"by allowing the inclusion in the contract specification . . . of Clause 4.29 providing that [the] pipes shall be certified as complying with the Irish Standard Specification 188 . . . " and
"consequently refusing to consider . . . a tender providing for the use of . . . pipes manufactured to an alternative standard providing equivalent guarantees of safety, performance and reliability . . . ".

The Commission is requested to indicate:

(i) whether those are two separate claims or whether the second part merely serves as evidence in support of the first;

(ii) whether, in that second part, the Commission is asking the Court to determine that Tender C submitted by P. J. Walls (Civil) Ltd was the most economically advantageous tender.'

Answer

The Commission states that the two claims are separate. The first claim alleges a potential barrier to trade which affected all tenderers and suppliers. The second alleges

an actual barrier to trade concerning a specific tenderer and a specific supplier. The Commission attaches considerable importance to the second claim. It wishes to establish that a refusal by a public authority or its agents to consider a tender incorporating imported materials, or the unjustified rejection of such a tender, constitutes a measure which may be contrary to Article 30 of the EEC Treaty. As regards the second part of the question, it is important to note that Walls's Tender C was rejected by the consulting engineers because it was not based on the use of pipes bearing the Irish Standard Mark in accordance with the contract specification. The Commission therefore considers that Walls's Tender C was wrongfully rejected because it was not properly considered on its merits by the promoter. It is not therefore necessary on this view for the Court to enter into the technical and economic arguments advanced by Ireland in its defence. It is only if the Court should come to the view that Walls's Tender C was properly considered that it would be necessary to examine whether the rejection was well founded and in particular whether Walls's Tender C was the economically most advantageous tender.

2. *Question to the defendant*

'It would appear from the documents in the case that the authorities concerned first refused even to consider Tender C submitted by P. J. Walls (Civil) Ltd which was based on the use of pipes manufactured by the Spanish company Uralita on the ground that the pipes did not comply with Irish Standard Specification 188. In the course of its correspondence with the Commission, the Irish Government gives the impression that that refusal was also justified on other grounds of a technical and economic nature. The Irish Government is requested to indicate:

(i) whether the initial refusal was in fact decided on without any examination of the pipes in question;

(ii) whether such an examination was carried out subsequently.'

Answer

Ireland states that the initial refusal was decided on without any examination of the pipes in question. That is in accordance with standard practice. Materials are never examined at the stage at which the consulting engineers verify whether the tenders comply with the conditions laid down in the specification. An examination of the pipes was also not carried out subsequently. An examination is carried out only of materials delivered to a project site by an appointed contractor to ensure that those materials in fact comply with the required specification.

T. Koopmans
Judge-Rapporteur