REPORT FOR THE HEARING
in Case C-24/91 *

I — Facts and procedure

1. Legal context

1. Council Directive 71/305/EEC of 26 July 1971 (Official Journal, English Special Edition, 1971 (II) p. 682) coordinated the procedures for the award of public works contracts awarded in Member States on behalf of the State, or regional or local authorities or other legal persons governed by public law on the basis of the following principles: the prohibition of technical specifications that have a discriminatory effect, the adequate advertising of contracts and the fixing of objective criteria for participation.

2. The directive, which applies to contracts for an amount equal to or greater than ECU 1 000 000, provides in Title III (Articles 12 to 19), *inter alia* for adequate advertising of tenders giving all interested contractors in the Community the possibility of being informed of the procedure and of participating in it.

3. In accordance with Article 12 of the directive, notices of tenders must be sent to the official publications office of the European Communities which is to publish them in the Official Journal not later than nine days after the date of dispatch. Article 15 provides for an accelerated procedure reducing that period to five days, and reducing from 12 to 10 days the period within which requests to participate or tenders must be received.

4. Article 9 of the directive provides for a number of exemptions from the application of the provisions on advertising. In particular Article 9(d) provides for a derogation 'in so far as is strictly necessary when, for reasons of extreme urgency brought [about] by events unforeseen by the authorities awarding contracts, the time limit laid down in other procedures cannot be kept'.

5. In the meantime, Council Directive 89/440/EEC of 18 July 1989 (Official Journal 1989 L 210, p. 1) has amended Directive 71/305. The new directive, which must be transposed into national law by the Kingdom of Spain by not later than 1 March 1992, amended the financial scope of the earlier directive by raising the financial threshold for the application of the directive from ECU 1 000 000 to ECU 5 000 000.

2. Background to the dispute

6. On 9 February 1989, the governing council of the Universidad Complutense, Madrid, gave its approval for works to be carried out for the extension and renovation of the Faculty of Political Science and Sociology and the School of Social Work for a total budgeted amount of PTA 430 256 250. That amount was made

* Language of the case: Spanish.

available to it by the Ministry of Education in January 1989.

7. On 27 February 1989, the university opened a competitive tender for those works in the form of a notice published in four Spanish newspapers.

8. By a letter dated 13 March 1989, the Commission asked the Spanish permanent representation why notice of those works had not been published in the Official Journal of the European Communities.

9. By a letter dated 29 September 1989, the permanent representation replied that such publication was neither obligatory nor necessary for the contract in question.

10. On 6 December 1989 the Commission initiated the procedure provided for in Article 169 of the EEC Treaty by sending a formal letter of default to the Spanish Government.

11. The Government replied on 22 January 1990. In its reply the Spanish Government mentioned the university's need to terminate the extension and renovation works as rapidly as possible before the beginning of the new academic year. That urgency justified the award of the contract by private contract.

12. In the light of that reply the Commission issued a reasoned opinion on 15 October 1990.

13. On 27 November 1990 the Spanish Government replied to the reasoned opinion, again relying on the urgency of the works in question.

14. Since the Spanish Government did not accept the objections raised by the Commission, the Commission decided to bring this case before the Court.

3. Written procedure

15. The Commission's application was lodged at the Court Registry on 23 January 1991.

16. 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.

II — Forms of order sought by the parties

17. The Commission claims that the Court should:

declare that, inasmuch as the governing council of the Universidad Complutense, Madrid, decided to award by private treaty contracts for works connected with the extension and renovation of the university's Faculty of Political Science and Sociology and the School of Social Work, thus omitting to publish a notice of invitation to tender in the Official Journal of the European Communities, the Kingdom of Spain 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, especially Article 9 and Articles 12 to 19 thereof;

order the Kingdom of Spain to pay the costs.

18. The Spanish Government contends that the Court should:

dismiss the Commission's application;

order the Commission to pay the costs.

III — Submissions and arguments of the parties

19. The *Commission* first of all observes that the essential purpose of the Community directives with regard to the award of public contracts is to bring about transparency ensuring both equality of the conditions for participation in those contracts and supervision by the competent Community authorities of compliance with that obligation. The ninth recital in the preamble to the directive states in that connection that to ensure development of effective competition in the field of public contracts contract notices must be advertised throughout the Community.

20. The Commission considers that the Spanish authorities awarding contracts do not pay sufficient heed to the fundamental nature of the principle of transparency since they regularly omit to have notices of invitation to tender published in the Official Journal. The present case is an illustration of that general tendency which may be explained by the manner in which Spain transposed the provisions of the directive into national law. The Spanish transposition measures have created a confused situation as far as assessment of the need for a private-treaty procedure is concerned.

21. Article 9(d) of the directive permits recourse to such a procedure. Nevertheless the Commission emphasizes that, in accordance with the judgment of 10 March 1987 in Case 199/85 (*Commission* v *Italy* [1987] ECR 1039), that provision must be strictly interpreted and it is for the person placing reliance upon it to prove that the exceptional circumstances justifying the derogation do in fact exist.

22. The Commission considers that in the present case the conditions for the application of that derogating provision have not been met. In that connection it submits first that neither the large number of students wishing to follow courses in political science and sociology nor the need to create the infrastructure to receive them constitute 'extreme urgency' within the meaning of that provision. Problems connected with an influx of students had existed for years so that the arrival of new entrants merely exacerbated an existing situation. The university authorities ought therefore to have taken the necessary measures long ago. The urgency upon which they are relying is a result of their own dilatoriness. Moreover, recourse to the private award of a contract was not necessary because those authorities had

available to them other means of confronting that urgent situation. For example, they could have accommodated the new students in temporary premises, or issued an invitation for tenders on the basis of provisional credits, and thus started the works sooner.

23. Secondly, the Commission argues that the university's problems of capacity were not unforeseen from the governing council's point of view. In fact new students must register in the month of June preceding the new academic year. The governing council was therefore in a position to form a view as to the number of new students in June 1988 for the academic year 1988-89, so that it could have taken appropriate measures sooner. Moreover, the increase in numbers for the new academic year 1989 was insignificant in proportion. In that connection the Commission goes on to state that in view of the general situation of the University of Complutense the problem of excessive numbers was in no way exceptional or unforeseeable.

24. Thirdly, the Commission argues that the governing council could have published the notice of the invitation to tender in the Official Journal under the accelerated procedure provided for in Article 15 of the directive. The shorter time limits provided for in the context of that procedure enable the authorities awarding contracts to comply with the advertising obligations in less than one month. That time limit was entirely compatible with the timetable of works drawn up by the governing council. In fact in accordance with the timetable established by the architect in charge of the project, seven and a half months were needed in order to complete the works which were to be finished before the beginning of the academic year starting in October 1989. Since the necessary credits had been granted in January 1989 one and a half months remained for an award procedure under the terms of Article 15.

25. The *Spanish Government* states that the manner in which the directive was transposed into national law is not at issue in these proceedings. The Court should therefore disregard the Commission's remarks on the compatibility or otherwise of the Spanish legislation with the directive.

26. The Spanish Government goes on to argue that the principle of transparency is not absolute. It is merely one of the three principles on which the coordination of national procedures for the award of public works contracts is based, the others being the prohibition of technical specifications that have a discriminatory effect and the introduction of a joint supervision procedure to ensure observance of the two other principles. Moreover, the directive itself permits exceptions to the general rule on advertising, where such advertising is judged to prevent various priority objectives from being attained.

27. Article 9(d) of the directive provides for such an exception. Although the Court in its abovementioned judgment in *Commission* v *Italy* held that that exception is to be strictly interpreted, it did not define what was meant by urgency within the meaning of that provision. The present case specifically raises the problem of the interpretation of that term.

28. In that connection the Spanish Government considers that the governing council of the Universidad Complutense was in a situation which both had to be described as urgent and justified use being made of the award of a private contract, in accordance with Article 9(d). It proved to be the case in 1989 that the capacity of the faculty was quite inadequate for the number of students wishing to follow courses in political science and sociology. If that situation had not been remedied immediately, it would have been impossible for new students entering in October 1989 to take part in those courses. It was also impossible to accommodate those students elsewhere on a provisional basis, owing to the lack of available premises in other faculties.

29. It was therefore imperative for the extension works to be completed before the beginning of the new academic year in October. Since it was going to take seven and a half months to carry out those works and since the necessary credits had been allocated early in January, the governing council was compelled to award the contract privately. In that connection the Spanish Government states that the governing council could not commence the works on the basis of provisional credits prior to January 1989, since under Spanish budgetary law there is no system of provisional credits.

P. J. G. Kapteyn
Judge-Rapporteur