JUDGMENT OF THE COURT (Second Chamber)

27 October 2005 *

In Case C-525/03,

ACTION under Article 226 EC for failure to fulfil obligations, brought on 16 December 2003,

Commission of the European Communities, represented by X. Lewis, C. Loggi and K. Wiedner, acting as Agents, with an address for service in Luxembourg,

applicant,

v

Italian Republic, represented by I.M. Braguglia, acting as Agent, assisted by G. Fiengo, avvocato dello Stato, with an address for service in Luxembourg,

defendant,

* Language of the case: Italian.

THE COURT (Second Chamber),

composed of C.W.A. Timmermans, President of Chamber, J. Makarczyk (Rapporteur), C. Gulmann, R. Schintgen and J. Klučka, Judges,

Advocate General: F.G. Jacobs,
Registrar: L. Hewlett, Principal Administrator,

having regard to the written procedure and further to the hearing on 6 April 2005,

after hearing the Opinion of the Advocate General at the sitting on 2 June 2005,

gives the following

Judgment

1 By its application the Commission of the European Communities requests the Court to declare that, by adopting Articles 1(2) and 2(1) to (3) of Ordinance No 3231 of the President of the Council of Ministers of 24 July 2002 introducing urgent measures for aerial forest firefighting on national territory (GURI No 177, 30 July 2002, p. 42; 'the contested order'), which authorise recourse to private negotiations by way of

derogation from the Community directives on public supply and service contracts and, in particular, from the common rules on advertising and participation laid down by Titles III and IV of Council Directive 93/36/EEC of 14 June 1993 coordinating procedures for the award of public supply contracts (OJ 1993 L 199, p. 1), as amended by Commission Directive 2001/78/EC of 13 September 2001 (OJ 2001 L 285, p. 1; 'Directive 93/36'), and by Titles III and V of Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts (OJ 1992 L 209, p. 1), as amended by Directive 2001/78 ('Directive 92/50'), for the acquisition of aircraft to combat forest fires and for the acquisition of firefighting services and which similarly allow for recourse to the aforementioned procedure for the acquisition of technical and computer equipment and two-way radios, without any of the lawful conditions for derogation from those common rules being satisfied and, in any event, without ensuring any form of direct advertising such as to permit a competitive comparison between potential tenderers, the Italian Republic has failed to fulfil its obligations under the said Directives and Articles 43 EC and 49 EC.

Facts

2 The contested ordinance was made in application of the decree of the President of the Council of Ministers of 28 June 2002 declaring a state of emergency until 31 October 2002 on the national territory for the purposes of aerial forest firefighting (GURI No 161, 11 July 2002, p. 4).

3 That ordinance authorised the Corpo forestale dello Stato (National Forest Rangers), firstly, to purchase aircraft to combat forest fires 'by private negotiated contract, by derogation from the statutory provisions listed in Article 4 [of that ordinance]', that

is to say in particular from the national legislation transposing Directives 92/50 and 93/36 and, secondly, to obtain, also by privately negotiated contract, two-way radio equipment for communication with firefighting aircraft. It moreover permitted the Dipartimento della protezione civile (Department of Civil Protection) to have recourse to private negotiation for the acquisition of equipment to reinforce its technological and computing resources, and for the acquisition and implementation of aerial forest firefighting services.

4 Pursuant to the contested ordinance, the Ministero delle Politiche agricole e forestali (Italian Ministry of Agriculture and Forestry) adopted Decree No 1619/2002 on 28 October 2002, authorising and approving a contract concluded with the company Agusta SpA, by private negotiation within the meaning of the said ordinance, relating to the supply of two helicopters, accompanying equipment, technical assistance, spare parts and all items necessary for the functioning of those aircraft.

The pre-litigation procedure

5 The Commission considered that the provisions of the contested ordinance authorising the award of supply and service contracts by the negotiated procedure in cases not covered by Directives 92/50 and 93/36 were contrary to those directives and to Articles 43 EC and 49 EC and, on 19 December 2002, sent the Italian Republic a letter of formal notice calling upon it to submit within one month its observations on the failure of which it was accused.

6 Not satisfied with the observations submitted by the Italian Government in reply to that letter, the Commission sent the Italian Republic a reasoned opinion on 3 April 2003 requesting it to take the measures necessary to comply with the reasoned opinion within one month of notification thereof and, in particular, to repeal or amend certain provisions of the contested ordinance and to annul and render void the acts and measures taken for the purposes of the award of public contracts on the basis of those provisions and, where contracts had been concluded, to suspend their performance.

7 Since the Commission was not convinced by the Italian Republic's responses to the reasoned opinion, it decided to bring the present proceedings.

Admissibility of the action

8 It is appropriate at the outset to emphasise that the Court may of its own motion examine the question whether the conditions laid down in Article 226 EC for the bringing of an action for failure to fulfil obligations are satisfied (see, inter alia, Case C-362/90 *Commission* v *Italy* [1992] ECR I-2353, paragraph 8, and Case C-439/99 *Commission* v *Italy* [2002] ECR I-305, paragraph 8).

9 It is of no effect in that regard that, in reply to a question put at the hearing, the Italian Republic submitted that the action was admissible although in the defence it claimed that the action was devoid of purpose on the ground that the contested ordinance had ceased to produce any effect even before the Commission disputed its legitimacy or sought to have it set aside.

10 Nor is the fact that the Italian Republic did not acknowledge the failure of which it was accused, a fact also evoked by the Commission at the hearing in support of the admissibility of its action, of any relevance since the procedure for a declaration of a failure on the part of a Member State to fulfil an obligation is based on the objective finding that a Member State has failed to fulfil its obligations under the Treaty or secondary legislation (see, inter alia, Case C-71/97 *Commission* v *Spain* [1998] ECR I-5991, paragraph 14, and Case C-83/99 *Commission* v *Spain* [2001] ECR I-445, paragraph 23).

11 It is appropriate, firstly, to state, as is clear from the form of order sought in the application initiating proceedings, that the present action for failure to fulfil obligations is limited to Articles 1(2) and 2(1) to (3) of the contested ordinance and does not seek to call into question the subsequent acts adopted pursuant to that ordinance, which were nevertheless explicitly mentioned in the reasoned opinion.

12 It is important, secondly, to recall that the Commission, in exercising its powers under the second paragraph of Article 226 EC, has the function, in the general interest of the Community, of ensuring that the Member States give effect to the Treaty and the provisions adopted by the institutions thereunder and of obtaining a declaration of any failure to fulfil the obligations deriving therefrom with a view to bringing it to an end (see, to that effect, Case C-431/92 *Commission* v *Germany* [1995] ECR I-2189, paragraph 21, and Joined Cases C-20/01 and C-28/01 *Commission* v *Germany* [2003] ECR I-3609, paragraph 29).

13 In that regard, it follows from the very terms of the second paragraph of Article 226 EC that the Commission may bring an action for failure to fulfil obligations before the Court only if the Member State concerned has failed to comply with the reasoned opinion within the period laid down by the Commission for that purpose (see Case C-362/90 *Commission* v *Italy*, cited above, paragraph 9).

14 It is, furthermore, settled case-law that the question whether a Member State has failed to fulfil its obligations must be determined by reference to the situation prevailing in the Member State at the end of the period laid down in the reasoned opinion (see, inter alia, Case C-362/90 *Commission* v *Italy*, cited above, paragraph 10, Case C-173/01 *Commission* v *Greece* [2002] ECR I-6129, paragraph 7, and Case C-114/02 *Commission* v *France* [2003] ECR I-3783, paragraph 9).

15 It must be stated that the contested ordinance had ceased to produce any legal effect at the expiry date of the state of emergency declared on Italian territory until 31 October 2002 by the decree of the President of the Council of Ministers of 28 June 2002, the duration for the application of that ordinance being limited to that fixed by the decree.

16 The effects intrinsic to the contested ordinance, which was no longer in force from 1 November 2002, had, as a consequence, been exhausted before the period laid down in the reasoned opinion expired and even before the letter of formal notice was sent. Since it relates only to that single ordinance, the failure of which the Italian Republic is accused in the present action, even if established, could in any event no longer have existed at the time that period expired.

17 It follows from all the foregoing that the Commission's application must be dismissed as inadmissible.

Costs

18 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. The Italian Republic has not applied for costs against the Commission. Consequently, each party shall bear its own costs.

On those grounds, the Court (Second Chamber) hereby:

1. **Dismisses the action as inadmissible.**

2. **Orders the Commission of the European Communities and the Italian Republic to bear their own costs.**

[Signatures]