OPINION OF ADVOCATE GENERAL ALBER
delivered on 16 July 1998 *

A — Introduction

1. In the present Treaty-infringement proceedings brought against Ireland, the Commission claims that a call by the Irish Forestry Board (Coillte Teoranta) for tenders for the supply of fertiliser was not published in the *Official Journal of the European Communities*. The essential issue in this regard is whether Coillte Teoranta is a contracting authority within the meaning of Directive 77/62 [1] and therefore under an obligation to publish a notice of the call for tenders in question.

2. On 10 March 1994 Coillte Teoranta issued a call for tenders in respect of a contract to supply fertiliser but did not publish a corresponding notice in the *Official Journal of the European Communities*. The matter was brought to the Commission's attention on 18 May 1994. A contract for the supply of fertiliser, to the value of approximately IR £280 000, was concluded pursuant to the tendering procedure on 30 May 1994. On 21 June 1994, an undertaking which had unsuccessfully tendered brought proceedings before the Irish High Court challenging the failure to publish a notice of the call for tenders. [2]

3. The Commission sent a letter to the Irish Government on 30 June 1994 highlighting the failure to publish a notice of the call for tenders. That letter was based on Article 3(1) of Directive 89/665/EEC [3] and was also expressly stated to constitute a letter of formal notice within the meaning of Article 169 of the EC Treaty. A letter of the same tenor was sent to Coillte Teoranta. In its reply, the Irish Government challenged the view taken by the Commission. The Commission subsequently sent a reasoned opinion to the Irish Government on 23 February 1996. The Irish Government, however, took issue with the complaints raised, in part on the ground that the procedure under Article 169 of the EC Treaty was not applicable to the present case because national judicial proceedings were already pending and Coillte Teoranta was in any event not a contracting authority, with the result that publication in the Official Journal would have been unnecessary.

* Original language: German.

1 — Council Directive 77/62/EEC of 21 December 1976 coordinating procedures for the award of public supply contracts (OJ 1977 L 13, p. 1), as amended by Directive 88/295/EEC (OJ 1988 L 127, p. 1).

2 — The High Court has itself requested an interpretation by the Court of the term 'contracting authority' within the meaning of Directive 77/62 (Case C-306/97 *Connemara Machine Turf v Coillte Teoranta*): see the Opinion in that case delivered by Advocate General Alber on 16 July 1998 (ECR [1998] I-8761, I-8763).

3 — Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts (OJ 1989 L 395, p. 33).

4. The Commission claims that the Court should:

— declare that, in failing to comply with the provisions of Council Directive 77/62/EEC of 21 December 1976 coordinating procedures for the award of public supply contracts, as amended by Directive 88/295/EEC, and, in particular, in failing to publish its call for tender for the supply of fertilisers on behalf of the Irish Forestry Board (Coillte Teoranta) in the *Official Journal of the European Communities*, Ireland has failed to fulfil its obligations under the Treaty;

— order Ireland to pay the costs.

5. Ireland contends that the Court should:

— dismiss the application;

— order the Commission to pay the costs.

B — Relevant legal provisions

Community law

6. Article 1 of Directive 77/62 defines a contracting authority as follows:

'For the purpose of this Directive:

...

(b) "contracting authorities" shall be the State, regional or local authorities and the legal persons governed by public law or, in Member States where the latter are unknown, bodies corresponding thereto as specified in Annex I;

...'

7. Annex I to Directive 77/62, as amended by Directive 88/295, contains a list of the legal

persons governed by public law and bodies corresponding thereto referred to in Article 1(b). Point VI refers to these as being, in the case of Ireland:

'other public authorities whose public supply contracts are subject to control by the State'.

8. Directive 77/62 was repealed by Directive 93/36. [4] This new directive required to be transposed in national law by 14 June 1994, something which did not happen in Ireland. It should once again be remembered that the supply contract had already been concluded on 30 May 1994.

9. The concept of a contracting authority is henceforth defined as follows in Article 1:

'For the purpose of this Directive:

...

(b) *"contracting authorities"* shall be the State, regional or local authorities, bodies governed by public law, associations formed by one or several of such authorities or bodies governed by public law;

"a body governed by public law" means any body:

— established for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character, and

— having legal personality, and

— financed, for the most part, by the State, or regional or local authorities, or other bodies governed by public law, or subject to management supervision by those

4 — Council Directive 93/36/EEC of 14 June 1993 coordinating procedures for the award of public supply contracts (OJ 1993 L 199, p. 1).

bodies, or having an administrative, managerial or supervisory board, more than half of whose members are appointed by the State, regional or local authorities or by other bodies governed by public law;

...'

10. So far as review of compliance with the provisions for awarding contracts is concerned, the Commission is empowered under Article 3 of Directive 89/665 to:

'invoke the procedure for which this Article provides when, prior to a contract being concluded, it considers that a clear and manifest infringement of Community provisions in the field of public procurement has been committed during a contract award procedure falling within the scope of ... [Directive 77/62]'.

This procedure is regulated by Article 3(2), which provides that the Commission

'... shall notify the Member State and the contracting authority concerned of the reasons which have led it to conclude that a clear and manifest infringement has been committed and request its correction'.

As grounds for not correcting an infringement, Article 3(4) provides that reliance may be placed

'among other matters on the fact that the alleged infringement is already the subject of judicial or other review proceedings ...'.

National provisions

11. The provisions of Community law were transposed in national law by the following:

— Directive 77/62 was transposed by the European Communities (Award of Public Supply Contracts) Regulations 1992 (SI No 37 of 1992);

— Directive 89/665 was transposed by the European Communities (Review Proce-

dures for the Award of Public Supply and Public Works Contracts) Regulations 1992 (SI No 38 of 1992); and

— Directive 93/36 was transposed by the European Communities (Award of Public Supply Contracts) (Amendment) Regulations 1994 (SI No 292 of 1994).

12. The relations between the Department of Agriculture, Food and Forestry, the Department of Finance and the shareholders of Coillte Teoranta are defined by the Forestry Act 1988 and by the Memorandum and Articles of Association of the company itself. It will be necessary to return to the individual provisions of those rules for purposes of clarity when examining whether the action is well founded.

C — Analysis

Admissibility

13. The Irish Government first submits that infringement proceedings under Article 169 of the EC Treaty are not the correct form of action in this case. The Commission ought, it claims, to have used the procedure set out in Article 3 of Directive 89/665. [5] By reason of the action brought before the Irish High Court, the alleged infringement is already the subject of judicial or other review proceedings. The Commission was also notified of those proceedings; to that extent, it is bound by the procedure under Article 3 of Directive 89/665 and cannot bring any action under Article 169 of the EC Treaty.

14. Under Article 3(1) of Directive 89/665, [6] the procedure for which that article provides can be applied only if the Commission is satisfied that there has been a clear and unequivocal infringement of Directive 77/62 *before* the contract has been concluded.

15. The Commission points out that it did not send its letter of formal notice to the Irish Government until 30 June 1994, whereas the contract in question had already been concluded on 30 May 1994.

16. In regard to the temporal aspects, the Court held in *Commission* v *Netherlands* [7] that it is clear from the letter and spirit of Directive 89/665 that it is very much to be preferred, in the interest of all parties concerned, that the Commission should give notice of its objections to the Member State and the contracting authority as soon as pos-

5 — Cited above in point 10.

6 — Cited above in point 10.

7 — Case C-359/93 *Commission* v *Netherlands* [1995] ECR I-157, paragraph 12.

sible before the contract is concluded, thereby giving the Member State and the contracting authority time to answer the complaint and if necessary to correct the alleged infringement before the contract is awarded.

17. In the present case, however, the Commission did not send its letter of formal notice to Ireland and Coillte Teoranta until one month *after* the contract for the supply of fertiliser had been concluded. The procedure under Article 3 of Directive 89/665 can therefore no longer be applicable.

18. It should also be noted that the special procedure under Directive 89/665 is a preliminary measure which can neither derogate from nor replace the Commission's powers under Article 169 of the Treaty. That article gives the Commission discretionary power to bring an action before the Court where it considers that a Member State has failed to fulfil one of its obligations under the Treaty and has not complied with the Commission's reasoned opinion. [8]

19. The Commission's action brought under Article 169 of the EC Treaty is therefore admissible.

The question whether the action is well founded

20. The question first arises as to which provisions of Community law are applicable.

21. It is common ground that Directive 77/62, as amended by Directive 88/295, is relevant. In the Irish Government's view, however, Directive 93/36 or its underlying premisses should also be enlisted for the purpose of assessing the case.

22. It should, however, be pointed out that Directive 93/36 did not require to be transposed until 14 June 1994 and that Ireland had not yet done so by 22 July 1994. [9] The events of which the Commission complains occurred in May 1994 and thus at a time when Directive 93/36 had not yet been transposed in Irish law and also did not yet require to be so transposed. Directive 93/36 cannot therefore be directly applicable.

23. It is also extremely doubtful to what extent the directive which is later in time can

8 — *Commission* v *Netherlands*, cited above in footnote 7, paragraph 13.

9 — This becomes apparent from the Irish Government's reply of 22 July 1994 to the Commission's letter of formal notice.

be used for the purpose of interpreting the earlier directive. The Irish Government, which submits that the Court should proceed in such a manner, relies in this connection on the recitals in the preamble to Directive 93/36, according to which that directive was adopted primarily for reasons of clarity. Consequently, it claims, there should be no problem in construing the earlier provisions in the light of the new version.

24. It must first be noted in this regard that the wording of the definition of a contracting authority in Directive 93/36 has been substantially extended and now contains individual features which were nowhere mentioned in the earlier version. To that extent, the new version might well indeed lead to a restriction in the directive's scope; the Commission also made a reference in this connection during the oral procedure.

25. Second, the first recital in the preamble to Directive 93/36 does admittedly mention that a new version is required for reasons of clarity. However, this was also because amendments were to be made. [10] Likewise, it was intended to achieve an alignment with the provisions on the award of contracts for public works and service contracts. [11] According to the third recital, however, this alignment relates also to the introduction of a functional definition of contracting authorities. On an *a contrario* reading, however, this means that the definition now given need not necessarily be identical with that which previously applied, and extreme caution should therefore be exercised in using it as an aid to interpretation. The new directive, which has also repealed and replaced Annex I to the old version, contains in its definition of a contracting authority additional matters which do not merely amplify the previous definition or general thinking on the topic, but also constitute modifications which go further and cannot be applied retroactively. Furthermore, in interpreting a provision of Community law it is always necessary to consider its wording, its context and its aims. [12] For the present case, therefore, it follows that the facts fall to be assessed on the basis of Directive 77/62.

26. In the Commission's view, Coillte Teoranta is a contracting authority within the meaning of Directive 77/62, with the result that notice of supply contracts requires to be published in the *Official Journal of the European Communities* pursuant to Article 9 of the directive, something which was, however, not done in this case.

10 — The first recital in the preamble to Directive 93/36 states that: '... Directive 77/62/EEC ... has been amended on a number of occasions; ... on the occasion of further amendments, the said Directive should, for reasons of clarity, be recast'.

11 — Council Directive 93/37/EEC of 14 June 1993 concerning the coordination of procedures for the award of public works contracts (OJ 1993 L 199, p. 54) and 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).

12 — Case C-84/95 *Bosphorus* v *Minister for Transport, Energy and Communications, Ireland and the Attorney General* [1996] ECR I-3953, paragraph 11 and the references contained therein.

27. In support of its contention, the Commission submits that Coillte Teoranta fulfils important public functions, such as the conservation of national forests and the support of forestry development in Ireland. Coillte Teoranta owns 12 national parks and provides leisure facilities at more than 180 locations throughout Ireland. In order to meet those objectives, the company was established by statute and financially provided for by the Irish Government. It also follows from the Memorandum and Articles of Association that the Government appoints the Board and its Chairman and that the company's finances are controlled by the Government.

28. The Irish Government counters by arguing that Coillte Teoranta is simply a State-owned private undertaking. Although the State has a majority shareholding, it does not exercise any influence over the day-to-day running of the company. Coillte Teoranta is required under the Forestry Act to carry out its business in a commercial manner. State influence is limited to general commercial policy, in the same way as any majority shareholder in any other company. The objectives and tasks of the company, however, are exclusively commercial in nature. Coillte Teoranta is thus in competition with other undertakings and is in no different position whatever compared with those other undertakings. If Coillte Teoranta makes its facilities and property available to the public for leisure and recreational purposes, this is done on commercial grounds, since the benefit derived from these activities exceeds the costs. In short, neither Coillte Teoranta itself nor the conclusion by Coillte Teoranta of contracts with other undertakings is subject to influence by the State in excess of that which majority shareholders in other companies would be recognised as having.

29. As already mentioned, the State, regional or local authorities, and — in the case of Ireland — other public authorities under Point VI of Annex I whose public supply contracts are subject to control by the State constitute contracting authorities for the purposes of Article 1(b) of Directive 77/62.

30. With regard to the present case, this means that it is first necessary to consider whether Coillte Teoranta can be subsumed within the concept of the 'State'.

31. In connection with such an examination, the Court was called on in the *Beentjes* case [13] to determine the status of a body which did not have any separate legal personality, the functions and composition of which were regulated by statute and whose members were appointed by a committee of the Province in question. It was required to apply rules laid down by a central committee established by a State decree and the members of which were appointed by the Government. The State ensured compliance with the obligations arising from the body's legal transactions and

13 — Case 31/87 *Beentjes* v *Netherlands State* [1988] ECR 4635.

financed the public works contracts which it awarded.

32. The provisions applicable at that time were contained in Directive 71/305; [14] however, the definition of a contracting authority contained therein corresponds to that in Directive 77/62.

33. In *Beentjes*, the Court concluded that the concept of the State, as used in the directive, fell to be interpreted in functional terms. [15] The aim of the directive was, for the Court, to ensure '... the effective attainment of freedom of establishment and freedom to provide services in respect of public works contracts ...'. [16] The Court accordingly concluded that the body at issue in that case had to be regarded as falling within the notion of the State, since its composition and functions were laid down by legislation and it was dependent on the authorities for the appointment of its members, the observance of the obligations arising out of its measures and the financing of the public works contracts which it was its task to award. That, the Court ruled, was the case even though the body was not part of the State administration in formal terms. [17]

34. A similar approach should be adopted in the present case. The objective of the directive which is here relevant does not differ in any essential respects from that at issue in *Beentjes*. According to the first and second recitals in its preamble, Directive 77/62 is designed to ensure better supervision of the prohibition of restrictions on the free movement of goods in regard to public supply contracts. In addition, the directive — according to the 12th recital in its preamble — set itself the task of developing effective competition in the field of public contracts. In order, however, to guarantee competition free from any discrimination, those to whom the directive is addressed — namely, the contracting authorities — must be determined on the basis of a functional and not exclusively formal approach.

35. In functional terms, Coillte Teoranta cannot be regarded as part of the State. Admittedly, the company was established by statute and provided with financial means by public authorities, it must consult with the Minister for Finance in regard to issues of forestry development in areas of economic interest, its directors are Government appointees, and the annual plan for the sale of land and timber must be agreed with the Government.

36. Coillte Teoranta does, however, have separate legal personality. The public contracts which it awards are financed out of the company's capital, which, although originally provided by the Government, has in the mean-

14 — Council Directive 71/305/EEC of 26 July 1971 concerning the coordination of procedures for the award of public works contracts (OJ, English Special Edition 1971 (II), p. 682).

15 — *Beentjes*, cited above in footnote 13, paragraph 11.

16 — *Beentjes*, cited above in footnote 13, paragraph 11.

17 — *Beentjes*, cited above in footnote 13, paragraph 12.

time also been guaranteed through private commercial activities. No public contracts are awarded at the expense of the State. All things considered, State influence on the business activities of Coillte Teoranta must be regarded as being appreciably less than was the case with regard to the facts underlying *Beentjes*. The functional approach thus does not point to the company's being dependent on the State in such a way as to justify the conclusion that it constitutes part of the State.

37. Once it is held that Coillte Teoranta, in accordance with the view here expressed, cannot be subsumed within the notion of the State under Article 1(b) of Directive 77/62, it remains to be examined whether it may be a public authority whose public supply contracts are subject to control by the State within the meaning of Annex I. The decisive factor in this, apart from the fact of looking after public interests, is the degree of influence which the State may exercise on the award of public contracts.

38. The Commission takes a similar viewpoint to that on the question just discussed. It argues that, particularly in view of the fact that the company was established by statute, that its Board is appointed by the Government, and its initial capital was provided by the State, which continues to control its finances, Coillte Teoranta is an authority whose public contracts are controlled by the State.

39. Against this, the Irish Government points again to the commercial character of the company, which finds itself in competition with other private undertakings on the market in question. It does not enjoy any preferential rights such as would give it an advantageous position in relation to others. State influence is limited to that which other shareholders are recognised, or may be recognised, as having. From the legal point of view, the State has no possibility of influencing day-to-day business, nor has it ever attempted to exercise such influence. Coillte Teoranta is treated under company law in the same way as any other company. Its activities are directed at making profits and are independent of ministerial instruction.

40. The crucial question is therefore the following: were the public supply contracts which Coillte Teoranta awarded subject to control by the State, in the terms used for Ireland by Annex I to Directive 77/62?

41. Here, too, an approach should be adopted which does not consider the matter merely from the formal aspect. All public undertakings are subject to some form of State control; that, however, is not tantamount to their also being contracting authorities within the meaning of the directive.

42. The concept of public undertakings is to be found in Article 90(1) of the EC Treaty. That provision prohibits Member States from enacting or maintaining in force, in relation to such undertakings, measures that are contrary to Community competition policy. The characteristic feature of public undertakings is that public authorities can influence the conduct of their business. For that purpose, it suffices if there is a possibility of influence being exerted, and this possibility will always exist if the State holds the greater part of the company capital. [18]

43. Its status as a public undertaking, however, still provides no indication as to whether the public supply contracts which Coillte Teoranta awards are subject to control by the State. Since Annex I to Directive 77/62 refers expressly to State control over public supply contracts, this point requires to be considered in concrete terms. [19] Accordingly, the supply contract in question would, under the relevant provisions, have to be open to State control in such a way that public authorities are able to exert influence on the manner in which the contract is concluded.

44. The State initially provided Coillte Teoranta with its entire company capital. In return, the State received corresponding shares in the company. The annual land and timber sale plan must be agreed with the Department. The company directors are appointed by the competent ministers; investments exceeding a total amount of IR £250 000 require the approval and consent of the competent ministers. The Minister for Energy can set out financial objectives. The company also carries out functions in the public interest, such as the provision of leisure, recreation, sporting, educational, scientific, cultural and holiday facilities on its property. The Board of Directors looks after the day-to-day business of the company, which includes decisions on awarding contracts.

45. There is, however, no provision under which it would be possible for the Minister or for any civil servant to instruct the company or its directors to award contracts (possibly on the basis of non-commercial criteria). The company is under an obligation to carry out its business in a cost-effective and economic manner. Its directors are under an obligation to exercise their powers, in accordance with their duty of loyalty to the company, in a manner independent of their own interests. Although the company is required to abide by the principles of national forestry policy, this applies equally to every owner of forest land in Ireland. The directors must submit annually a five-year development plan, indicating in detail the plans regarding management and development of the company and its assets, as well as acquisition and sale of property, forestry objectives and profit forecasts. Here too, the relevant provisions do not grant any powers to the State authori-

18 — Joined Cases 6/73 and 7/73 *Commercial Solvents* v *Commission* [1974] ECR 223, paragraph 41, and Joined Cases 188/80 to 190/80 *France, Italy and United Kingdom* v *Commission* [1982] ECR 2545, paragraph 26.

19 — See in this connection the Opinion of Advocate General Lenz in Case C-247/89 *Commission* v *Portugal* [1991] ECR I-3659, 3670, point 59.

ties to intervene for the purpose of regulating the company's day-to-day activities.

46. Therefore, although the criteria mentioned make it possible to point to a general State influence on the company, that influence does not, under the provisions material to the present case, suffice to exercise specific control over the award of public supply contracts. The conclusion of contracts relating to public supplies is not dependent on the action of State authorities. Coillte Teoranta is for that reason not a contracting authority within the meaning of Directive 77/62.

47. It follows from the foregoing considerations that Coillte Teoranta does not come within the scope of Directive 77/62 and that the action alleging failure to fulfil Treaty obligations is therefore unfounded.

48. Even though Directive 93/36 is not applicable to the present case, given that the contracts were concluded before that directive entered into force, and since that directive also modifies and does not simply clarify, the following may, in the alternative, be pointed out in light of the parties' extensive submissions. In view of the definition of a contracting authority in Article 1(b), as extended by amendments, it would be necessary to examine whether Coillte Teoranta is a body governed by public law. It would first have to have been established for the specific purpose of meeting needs in the general interest, not having an industrial or commercial nature. This would probably have to be answered in the affirmative, since Coillte Teoranta also — or predominantly — has the function of providing leisure and recreational facilities for the public on its property. Even though these do not represent the company's only functions, this does not affect the outcome, so long as it attends to needs which it is specifically required to meet. [20] In addition, Coillte Teoranta has its own legal personality. If the company's Board consists in the majority of State appointees, Coillte Teoranta may well be a contracting authority within the meaning of the new Directive 93/36. As stated above, however, that directive is not applicable to the present case.

D — Costs

49. Under the first subparagraph of 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. Since the Commission has been unsuccessful under the solution here proposed, it should be ordered to pay the costs.

20 — See in this connection the judgment in Case C-44/96 *Mannesmann Anlagebau Austria and Others* v *Strohal Rotationsdruck* [1998] ECR I-73, in particular paragraphs 25 and 26, and the Opinion delivered on 19 February 1998 by Advocate General La Pergola in Case C-360/96 *BFI Holding* v *Gemeente Arnhem and Gemeente Rheden* [1998] ECR I-6821, I-6824.

E — Conclusion

50. In light of the above considerations, I propose that the Court should:

(1) dismiss the action;

(2) order the Commission to pay the costs of the proceedings.