OPINION OF MR ADVOCATE GENERAL LENZ
delivered on 13 January 1987 *

Mr President,
Members of the Court,

A — 1. In the case to be considered today the Italian Republic is charged with having failed to comply with the Council Directive of 26 July 1971 concerning the coordination of procedures for the award of public works contracts (Official Journal, English Special Edition 1971 (II), p. 682), which was incorporated into Italian law by Law No 584 of 8 August 1977.

2. The directive provides that, where public works contracts above a specific value are to be awarded by the State or regional or local authorities, notice thereof must be published in the *Official Journal of the European Communities* (Article 12). The purpose of that provision is to ensure that all interested undertakings in the Community are able to participate in the procedure. However, under Article 9, public works contracts may be awarded without applying the provisions of the directive, *inter alia*,

'(b) when, for technical or artistic reasons or for reasons connected with the protection of exclusive rights, the works may only be carried out by a particular contractor;

...

(d) 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;

...'.

3. The following facts must be known about the present proceedings.

4. In the Municipality of Milan during the 1970s the Azienda Municipale Nettezza Urbana di Milano, that is to say the Municipal Refuse Disposal Corporation, operated two refuse incinerators built by it. It was decided to build two more plants. It was considered that these plants, together with additional refuse dumps, would be sufficient for the disposal of waste.

5. After the notorious accident at Seveso in which dioxin played a significant part, the Azienda was (according to the Municipality of Milan) forced to close one of the incinerators and to limit the operation of the other in view of the fact that the existing incinerators emitted dioxin into the air. It also had to abandon the plan to construct two additional incinerators because the Regional Pollution Committee advised against their construction. In addition, local citizens had blockaded the existing refuse dumps. It thus became necessary to construct another plant for the recycling of solid waste. To that end, the board of the Azienda established an advisory technical commission in September 1978 which considered the tenders of a number of undertakings — including non-Italian undertakings — which might carry out the work. Some months later it concluded in

* Translated from the German.

favour of awarding the contract to three Italian undertakings. After that preliminary work had been studied by a group of experts appointed in April 1979, the board of the Azienda decided, in July 1979, to award the aforementioned building contract by private contract to a consortium of three Italian undertakings. On 15 November 1979 the Municipal Council of Milan adopted a resolution approving that decision.

6. After the Commission became aware of those facts and the fact that no contract notice had been published in the Official Journal, letters were sent to the Italian Government between 1980 and 1983 in which the Commission expressed misgivings about the application of the aforementioned directive and requested information. Since the views expressed by the Municipality of Milan appeared unsatisfactory, the Commission formally instituted the procedure provided for by Article 169 of the EEC Treaty in August 1983. In a letter dated 1 August 1983 the Commission raised the matter of an infringement of Article 12 of the directive — on the ground of the failure to publish a notice — and stated that reliance on Article 9 (b) and (d) was unjustified. With regard to Article 9 (b), the Commission did not accept that the only suitable candidate was a consortium of three Italian undertakings on account of their special technical skills and existing exclusive rights; it took the view, after examining the documents in the case, that other undertakings in the Community were also capable of carrying out the proposed works. With regard to Article 9 (d), the Commission did not accept the argument that this case was extremely urgent (put forward on the basis that, in view of the adverse opinion of the Regional Pollution Committee, the additional incinerators which had orginally been planned could no longer be constructed after the Seveso accident). In that connection the Commission stated that Article 9 (d) had to be interpreted strictly and according to such an interpretation it laid down three requirements, each of which had to be satisfied. In relation to the events of 1979 they were, however, not satisfied since the need for a new plant was not unforeseen and secondly the works were not limited to what was strictly necessary (namely the *replacement* of existing plant) but were intended to increase capacity.

7. The Mayor of Milan gave his views in a letter of November 1983 which was forwarded to the Commission. With regard to Article 9 (b), it was stated that the plant proposed by the three Italian undertakings to whom the contract had been awarded would guarantee the greatest degree of efficiency and that it involved the use of exclusive rights belonging to those undertakings. With regard to Article 9 (d), reference was again made to the need to change the earlier plans as a result of the Seveso accident.

8. Not convinced by those arguments, the Commission delivered a reasoned opinion under Article 169 of the EEC Treaty in March 1984. In that opinion the Commission, after pointing out that other undertakings in the Community were capable of carrying out the works, objected that the Municipality of Milan had given no details of the alleged exclusive rights of the three Italian undertakings to whom the contract had been awarded (patent number, entries in the register of patents). It also objected with regard to Article 9 (d) that the necessary technical evidence had not been produced and, in addition, pointed out that Article 15 of the directive provides for an accelerated procedure. At the end of the

opinion, which is based on an assumed infringement of Community law by the Municipality of Milan, the Italian Republic is again called upon 'to adopt the measures necessary to comply with this reasoned opinion within 30 days' ['ad adottare le misure necessarie per conformarsi al presente parere motivato'] and, since the Commission presumed that the allegedly urgent works had virtually been completed and that the contracts which had been awarded could no longer be suspended or rescinded, it added 'by necessary measures is meant above all a written undertaking by the Municipality of Milan that it will comply with all the provisions of Directive 71/305/EEC in future' ['per misure necessarie, deve essere inteso soprattutto un impegno scritto del Comune di Milano di rispettare in futuro tutte le disposizioni della direttiva 71/305/EEC'].

9. Thereupon the Italian Minister for the Interior instructed the Prefect of Milan to enjoin the Municipality of Milan to comply with the directive in future and to provide a written undertaking to that effect. In April 1984 the Mayor of Milan complied with that request by issuing a declaration in which he declared — after an examination of the Commission's reasoned opinion and in the conviction that the municipal administration had acted lawfully — that 'the Municipality of Milan will ensure that, in the future, too, its administrative action is in conformity with the provisions of primary and secondary legislation, including all the provisions of Directive 71/305/EEC, by according them full respect, in both form and substance' ['il Comune di Milano uniformerà anche per il futuro la sua azione amministrativa alle norme di legge e di regolamento, ivi comprese le disposizioni tutte della direttiva 71/305/EEC, assicurandone il pieno rispetto, sia nella forma, che nella sostanza'].

10. As the Court is aware, the Italian Government considers that the Municipality of Milan has thereby complied with the Commission's reasoned opinion in good time and that there are no grounds for instituting proceedings before the Court for a declaration that it has failed to fulfil its obligations.

11. Nevertheless, in June 1985 the Commission instituted proceedings before the Court seeking a declaration that the Italian Republic, and in particular the Municipality of Milan, as a regional or local authority, by deciding to award by private contract a contract for the construction of a plant for the recycling of solid urban waste and failing to publish notice thereof in the *Official Journal of the European Communities,* had failed to fulfil its obligations under Directive 71/305.

12. The Commission takes the view that the declaration by the Mayor of Milan is ambiguous and that it does not provide any guarantee for the future of proper compliance with the reasoned opinion. In addition, in 1984 the Commission discovered — as a result of an application for finance submitted to the European Investment Bank on which the Commission had to give an opinion — what it considered to be a further infringement of the directive in the award by the same authority of a contract for the same works (namely a plant at Muggiano for the processing of solid urban waste with thermal energy recuperation and the salvage of various substances). By a telex message in December 1984 the Commission drew attention to that fact and stated that since the conduct of which it had complained had continued it could not accept the Mayor of Milan's declaration. The Commision states that subsequently (after the statement in defence had been lodged) it also discovered that the works which had been decided upon in 1979 had never been commenced — a fact

which strengthened its position. During the proceedings before the Court and in answer to a question posed by the Court it was learnt that the project decided upon in 1979 has not in fact been realized (namely because in 1982 new rules for the disposal of waste were introduced which necessitated considerable alterations), that apart from those alterations the plant intended to be built at Muggiano corresponds to the plant decided upon in 1979, that the task of constructing the plant had also been entrusted to the three aforementioned Italian undertakings and that (in August 1986) only the preliminary work had been carried out (whereas according to the Commission's submissions at the hearing work on the plant had not been begun at all).

B — 13. In the light of all the written and oral submissions presented to the Court, the issues before the Court call for the following observations.

I — Admissibility

14. The Italian Government takes the view that the application is inadmissible and restricts its written submissions to that contention. A precondition for instituting proceedings under Article 169 of the EEC Treaty is that the Member State in question must have failed to comply with the Commission's reasoned opinion, within the period laid down. In the Italian Government's opinion, no such failure has occurred in this case since the reasoned opinion required above all ('suprattutto') a written declaration by the Municipality of Milan that it would comply with the provisions of the directive in future and that requirement was satisfied by the delivery of the declaration by the Mayor of Milan dated 19 April 1984. In so far as the Commission also refers to events in 1984 (contract for the construction of a plant at Muggiano), it is clear, in the Italian Government's view, that they cannot fall within the scope of these proceedings since the Italian Government has still not had the opportunity to submit its observations in the preliminary procedure provided for by Article 169 of the EEC Treaty.

1. 15. As far as that argument is concerned, it must be admitted in the light of the sparse facts with which the Court has been acquainted that the second part thereof appears to be justified. According to the strict interpretation given to Article 169 in the Court's case-law, it is in fact impossible to deal in these proceedings with events which occurred in 1984 and which were not mentioned in the communication commencing the procedure or in the Commission's reasoned opinion. In particular, those events cannot be considered in view of the fact that the Italian Government stated in answer to a question asked by the Court that the original plans underwent significant changes in 1982 and that therefore the new plans did not simply amount to a postponement of the original project and the fact that this was not disputed by the Commission.

16. Consequently, where the application lodged by the Commission, which is worded in very broad terms, refers to the award of a contract for the construction of a plant for the recycling of solid urban waste by the City of Milan, that can only mean the aforementioned events of 1979 and the question whether or not the directive has been observed is to be examined only in relation to those events.

2. 17. However, I am inclined to the view that once the subject-matter of the proceedings is so defined there can be no question of inadmissibility.

(*a*) 18. With regard to the defendant's main objection, it is in fact difficult to accept — if

my understanding of the general tenor of the Commission's reasoned opinion is correct — that the requirement at the end thereof, to give a written undertaking to comply with the directive in the future, was satisfactorily met by the Mayor of Milan's aforementioned declaration.

19. If one tries to find a logical explanation for that requirement (whether or not it was expressed correctly in the Italian Minister for the Interior's letter of 29 March 1984 cannot be decisive), one finds that it entails — and here I agree with the Commission — an implied *recognition* of the fact that the conduct of the Municipality of Milan in 1979 was unlawful. That interpretation arises from the fact that such a requirement is to be regarded as altogether unusual (for compliance with the requirement involves no legal changes since the duty to comply with the directive arises directly from the directive itself in conjunction with the national measures implementing it; moreover, it involves no change in the factual situation since as far as the legal position was concerned the matter had already been pointed out to the Municipality of Milan by the Commission's letter of August 1983). As far as the addressees of the requirement were concerned, the undertaking sought could only be taken to mean that the Commission was acting on the assumption that the contract which had been awarded had been completed and could not therefore be rescinded and that its only concern was to ensure that such conduct was not repeated, which, however, undoubtedly implies that the conduct was unlawful.

20. However, there is absolutely no recognition in the Mayor of Milan's declaration that the award of the contract in 1979 did not conform to the directive; on the contrary, it begins with the express statement that the Mayor is convinced that the Municipal Administration had acted in a lawful manner ('abbia agito legittimamente').

21. The Mayor then goes on to state in the declaration — and this is another important point — that the Municipality of Milan will ensure that, in the future, *too*, its administrative action is in conformity with the directive. Apparently, he is saying that in the future the Municipality will, if the situation arises, act as it had done in 1979.

22. Viewed in that light and contrary to the view of the Italian Government the aforementioned declaration cannot in fact be regarded as a categorical guarantee that the provisions of the directive will be observed. The Commission was right to complain that the declaration was incomplete and that, because of the reservation in the first sentence, it was not clear. Consequently, it cannot be said that, by giving his declaration, the Mayor of Milan did everything that was necessary to comply with the Commission's reasoned opinion.

(*b*) 23. There is also a further reason why it cannot be said that the reasoned opinion was complied with in full.

24. Although it is stated in the final paragraph of the reasoned opinion that the necessary measures mean *above all* a written undertaking by the Municipality of Milan that it will comply with the directive in the future, the preceding paragraph refers quite generally to the measures which must be adopted to comply with the reasoned opinion. That could only mean that, if the Commission's assumption that the contract had been performed was to prove incorrect (and the addressee of the reasoned opinion knew or should have known that was in fact the position since at that time not even a site for the proposed plant had been found), the

Commission's concern was that the conduct of the Municipality of Milan should be brought into conformity with the reasoned opinion. Viewed in that light, the reasoned opinion therefore also required the award of the contract to be rescinded (which appeared quite feasible on the assumption that it was unlawful) and a proper procedure for the award of a contract to be instituted. The defendant should therefore have given directions to that effect or (if it is correct that in serious cases the government has only limited influence on independent municipalities which are essentially subject to the regional supervisory committees) it should at least have given clear indications about the need for efforts at the municipal level to rescind the contract and recommence the procedure for the award of contracts.

25. At least in so far as nothing of the kind was done and in his letter to the Prefect of Milan the Minister for the Interior merely requested that the Municipality of Milan should produce the written declaration, it certainly cannot be said that everything necessary was done to comply with the reasoned opinion within the period laid down and that therefore there were no grounds for instituting proceedings before the Court.

(*c*) 26. Finally, it is necessary to consider, with regard to the facts known to the Court and in connection with the question of admissibility, whether the Commission has any *interest* at all in proceedings which are limited to events that occurred in 1979 when it is now clear that the original decision was never put into effect.

27. I am inclined to think that, if indeed such an interest matters in proceedings under Article 169 of the EEC Treaty, the Commission has such an interest in this case and it is a sufficient interest. The important point in this regard is that in 1979 in Milan a procedure for the award of a contract was commenced and brought to a formal conclusion in contravention of the basic rules of the directive. However, as has been made clear in a different context, it is perfectly possible for proceedings under Article 169 to be instituted in relation to matters which have occurred entirely in the past. Also of relevance is the fact that in relation to the form of the procedure the Municipality of Milan relies upon provisions of the directive whose clarification is of fundamental importance since they may become relevant again and again (at the hearing the Commission referred to a number of other cases where local authorities had failed to comply with the directive). Not least, it is also of interest that the events of 1979 clearly formed a sort of basis and starting point for subsequent actions involving a further failure to follow the correct procedure under the directive. In fact the contract to construct the plant which was subsequently decided upon was awarded to the same three undertakings which had been awarded the contract for the original project in 1979, which suggests that there was no new procedure for awarding the contract but that the contracts concluded in 1979 were simply amended.

(*d*) 28. Consequently, there are really no decisive reasons why the application should not be admissible. Nothing should therefore prevent the Court of Justice from interpreting the Council directive in the light of the circumstances of this case in order to clarify the obligations which arise therefrom for the Member States.

II — Substance

29. It is not disputed that in 1979 the Municipality of Milan awarded a public

works contract without following the procedure laid down in Article 12 of Directive 71/305 which provides as follows:

'Authorities awarding contracts who wish to award a public works contract by open or restricted procedure shall make known their intention by means of a notice.

Such notice shall be sent to the Office for Official Publications of the European Communities and shall be published in full in the *Official Journal of the European Communities* in the official languages of the Communities . . . '.

30. However, its action constitutes an infringement of Community law only if Article 9 is not applicable (paragraphs (b) and (d) of that provision are relied upon by the Municipality of Milan). Article 9 provides as follows:

'Authorities awarding contracts may award their works contracts without applying the provisions of this directive, except those of Article 10, in the following cases:

. . .

(b) when, for technical or artistic reasons or for reasons connected with the protection of exclusive rights, the works may only be carried out by a particular contractor;

. . .

(d) 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;

. . . '.

31. The crucial question is therefore the meaning to be given to the provisions just cited and whether it has been shown that the conditions for their application were satisfied in 1979. In that connection we can only rely — as far as the Italian side is concerned — on the not very detailed statements made by the Municipality of Milan in the preliminary procedure since the Italian Government has restricted itself during the proceedings before the Court almost entirely to the question of admissibility.

1. 32. With regard, first, to *Article 9 (b)*, it is certainly necessary to agree with the Commission that the provision is a derogation which in principle must be strictly construed and that the awarding authority which relies on it must prove that the conditions for its application are satisfied.

33. It also appears that the Commission's conclusion that, according to its investigations, undertakings in the Community other than those to whom the contract was awarded were also in a position to construct such a plant is not disputed. In that connection the Municipality of Milan merely contended (see its letter of 11 October 1983) that the advisory technical commission appointed to consider the matter came to the conclusion that the plant proposed by the three Italian undertakings to whom the contract was awarded guaranteed the greatest efficiency ('garanzie di migliore funzionalità'). However, that is hardly sufficient, in connection with the application of Article 9 (b), to show that 'for technical . . . reasons . . . , the works may *only* be carried out by a particular contractor', especially since further and more detailed particulars were not provided.

34. In so far as the Municipality of Milan also relies, in relation to Article 9 (b), on the alleged exclusive rights of the Italian undertakings to whom the contract was awarded, which rights were necessary for a

proper realization of the project, it is sufficient to refer to the Commission's observation that since more detailed information has not been provided at any stage (for example regarding the patent number or entries in the patent register) the necessary supporting evidence is lacking.

35. Consequently, it is not possible to find that the Municipality of Milan was right to rely on Article 9 (b) of the directive, thereby justifying the failure to apply Article 12 thereof.

2. 36. With regard, secondly, to *Article 9 (d)*, the position is the same as it was with Article 9 (b), namely that the provision must in principle be interpreted strictly and that according to its wording there is no doubt that the conditions contained therein must all be satisfied.

37. In the present case, it is not, however, necessary to consider them all. According to the Commission's statements at the hearing, the total extra time needed to comply with the directive (period of notice, allowing time for the receipt of tenders and time for examining the tenders) would be a few months. In fact, merely what is known of the course of the procedure up to November 1979 shows that this was not a case of extreme urgency, for the board of Azienda was aware of the situation since September 1978; only a few months after the establishment of an advisory technical commission, the three Italian undertakings to whom the contract was subsequently awarded were designated; in April 1979 those undertakings were then evaluated by a group of experts and finally they were awarded the contract by a decision taken in July 1979 which the Municipality approved in November 1979. Reference may also be made to the fact that until 1984 it was not known where the plant was to be constructed (because a suitable site had not been found), the fact that it was decided in 1984 to build it at Muggiano, the further fact that it was stated in the application for finance made to the European Investment Bank that the work had been begun in 1984 and would be completed *by 1987* and finally to the fact that it was stated in August 1986 in response to a question asked by the Court that by that date the preliminary work ('interventi preliminari') had been completed (which was in fact emphatically disputed by the Commission at the hearing).

38. In those circumstances, it is difficult to see how it could be said that compliance with the periods laid down by the directive in relation to the publication of notices would be greatly prejudicial. Consequently, the Municipality of Milan cannot rely on Article 9 (d) of the directive either.

C — 39. In view of all the foregoing I can only propose that the Court should allow the Commission's application, which in my view is admissible, and that it should make the declaration sought therein. The defendant should also be ordered to pay the costs.