OPINION OF ADVOCATE GENERAL MENGOZZI
delivered on 29 June 2010 [1]

1. In the context of this action for failure to fulfil an obligation, the Court is asked to clarify the extent to which European Union law is applicable to a public works contract in respect of which the relevant directives require that only certain minimum provisions be applied. At issue in this case is a contract for the provision of translation services, in regard to which Directive 2004/18/EC [2] requires only that the technical specifications of the service be set out and a notice of the results of the award procedure be published. The Commission, however, takes the view that, in the light of the Court's case-law, the Irish [contracting] authority ought to have complied with a number of other obligations, and it is the failure to fulfil those obligations that has given rise to the current application.

I — Legislative background

2. The European Union law that constitutes the basic reference framework in this case comprises both the Treaties and the abovementioned Directive 2004/18 ('the directive').

3. It is common ground between the parties that the services at issue in this case are among those listed in Annex II B of the directive. Translation services constitute '[o]ther services' included in category 27 of that annex.

4. Article 21 of the directive, entitled '[s]ervice contracts listed in Annex II B' stipulates that:

'Contracts which have as their object services listed in Annex II B shall be subject solely to Article 23 and Article 35(4).'

5. Article 23 of the directive, entitled '[t]echnical specifications', is not the subject of dispute, and it is therefore unnecessary to cite the full text of that article here. It is a very lengthy and detailed provision which requires bodies awarding public works contracts to furnish a clear and exact definition of the requirements of the service put out to tender, in order to prevent any difference in

1 — Original language: Italian.

2 — Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (OJ 2004 L 134, p. 114).

the treatment of persons interested in entering into the contract with the authority.

6. Article 35(4) of the directive requires contracting authorities which have awarded a public contract to send a notice of the results of the award procedure. The Commission does not allege that Ireland infringed that provision either.

II — Facts and pre-litigation procedure

7. On 16 May 2006, the Irish Government published a notice [3] in the Supplement to the *Official Journal of the European Union* concerning a contract for the provision of interpretation and translation services for the office responsible for matters relating to refugees.

8. The contract notice specified the category of services called for and set a closing date (9 June 2006) for the submission of requests to participate in the tendering procedure. As regards the procedure for the award of the contract, it was stated that the most economically advantageous tender would be selected on the basis of the following criteria:

(1) completeness of tender documentation;

(2) stated ability to meet requirements;

(3) range of lots, [4] services and languages;

(4) qualifications, relevant experience;

(5) cost;

(6) suitability of proposed arrangements; and

(7) reference sites.

9. The contract notice further stated that the award criteria should not be construed as being listed in descending order of importance.

3 — OJ 2006 S 92. The reference number of the contract notice is S 92-098663.

4 — The contract notice provided for the contract to be subdivided into several lots.

10. Twelve companies submitted requests to participate in the procedure, and three of them were established outside Ireland.

11. Immediately after the closing date for submitting tenders, the members of the evaluation team were given an evaluation matrix indicating the relative weightings to be attributed to the award criteria. The weightings ranged from 0% (for criterion No 1 concerning the completeness of the documentation) to 30% (for criterion No 4). As regards the remaining criteria, the matrix attributed a weighting of 7% to criterion No 2, of 25% to criterion No 3, of 20% to criterion No 5, of 10% to criterion No 6 and of 8% to criterion No 7.

12. In the days that followed, the members of the evaluation team individually undertook an initial review of the various bids submitted.

13. On 22 June 2006, the evaluation team met for the first time. Before reviewing the various bids, it decided to alter the weightings attributed to the criteria, reducing to 25% the weighting for criterion No 4 (originally 30%) and increasing to 15% the weighting for criterion No 6 (originally 10%). The weighting attributed to the other criteria remained unchanged. The evaluation team then moved on to evaluate the bids and award the contract, applying the new, recently approved weightings.

14. The Commission received a complaint from an unsuccessful tenderer. Following an exchange of information with Ireland, it issued a letter of formal notice on 23 October 2007 and, after receiving, from the Irish Government, a reply which it considered to be insufficient, the Commission issued a reasoned opinion on 23 September 2008.

III — Procedure before the Court and forms of order sought

15. The Commission was not satisfied with the Irish authorities' response to the reasoned opinion and, as a result, brought the present action for failure to fulfil an obligation on 19 June 2009.

16. The Commission asks the Court:

— to declare that, by attributing weightings to the award criteria following the closing date for the submission of the bids and by modifying them after an initial review of the submitted bids, Ireland has failed to

fulfil its obligations under the principles of equal treatment and transparency as interpreted by the Court of Justice; and

— to order Ireland to pay the costs.

17. Ireland asks the Court:

— to dismiss the application; and

— to order the Commission to pay the costs.

IV — The failure to fulfil an obligation

A — *The legal nature of the contract at issue*

18. Before considering the alleged failure to fulfil an obligation, it is necessary, as a preliminary issue, to clarify the nature of the invitation to tender published by the Irish authorities, in order to determine the legal regime applicable to it.

19. As I mentioned earlier, it is common ground between the parties that the services awarded by the Irish Government in the context of this dispute fall within Annex II B of the directive. Consequently, the only obligations explicitly imposed by the directive related to the technical specifications (Article 23 of the directive) and the notice of the results of the award procedure (Article 35(4)), the Commission has not, however, made any complaint against Ireland in either regard.

20. It is, however, well known that the European Union law applicable to public procurement consists of more than the specific provisions laid down in the relevant directives. In particular, in its case-law, the Court has always emphasised the need to take account, in that context, of the importance of primary law.

21. It must be pointed out that the Court has consistently held that the purpose of coordinating, at Community level, the procedures for the award of public contracts is to eliminate barriers to the freedom to provide services and goods and therefore protect the interests of traders established in a Member State who wish to offer goods or services to contracting authorities established in another Member State. [5]

5 — See, for example, Case C-92/00 *HI* [2002] ECR I-5553, paragraph 43, and Case C-507/03 *Commission* v *Ireland* [2007] ECR I-9777, paragraph 27.

22. Consequently, if a public contract involves a cross-border interest, even if merely a potential cross-border interest, the rules that arise from the Treaty must apply. [6] Clearly, those rules apply in addition to any formal requirements laid down by the applicable legislation: in this case, for example, the obligations concerning the technical specifications and the notice of the results of the award procedure.

23. There are, in essence, two obligations that derive, in this regard, from primary law and from the principles of freedom of establishment and the freedom to provide services more particularly. First, the authorities must respect the principles of non-discrimination on grounds of nationality and of equal treatment. Second, they must observe a duty of transparency in order to make it possible to verify compliance with those principles. [7]

24. The parties do not appear actually to disagree about the existence of the obligations set out in the preceding paragraphs or, indeed, about the fact that the contract at issue involved a cross-border interest, as demonstrated both by the decision to advertise it in the Supplement to the *Official Journal of the European Union*, and the fact that some of the tenderers were undertakings established outside Ireland. [8] What is a matter of dispute is whether, in the particular circumstances of the case, the conduct of the Irish authority met the standards set out above.

B — *Arguments of the parties*

25. In its brief application, the Commission contends that the Irish authority was in breach of the obligations laid down by European Union law in two separate respects, in both instances breaching the principles of

6 — The requirement of a cross-border interest is not always clearly stated in the Court's case-law which sometimes contains statements that seem to imply that the principles that arise from the Treaty apply unconditionally: see, for example, Case C-324/98 *Telaustria and Telefonadress* [2000] ECR I-10745, paragraph 60, and Case C-59/00 *Vestergaard* [2001] ECR I-9505, paragraph 20. In other judgments, however, that requirement is explicitly set out: see, for example, in regard to concessions, Case C-231/03 *Coname* [2005] ECR I-7287, paragraph 20, and Case C-91/08 *Wall* [2010] ECR I-2815, paragraph 34. As regards services that are not of priority interest (in other words, services coming within the ambit of Annex II B of Directive 2004/18), see *Commission* v *Ireland*, cited in footnote 5 (paragraph 29)). The Commission itself acknowledged the need for there to be a cross-border interest in its Interpretative Communication on the Community law applicable to contract awards not or not fully subject to the provisions of the Public Procurement Directives (OJ 2006, C 179, p. 2, paragraph 1.3).

7 — The case-law in this regard is consistent: see, for example, Case C-458/03 *Parking Brixen* [2005] ECR I-8585, paragraphs 47-49.

8 — The Commission has set out more extensive arguments seeking to demonstrate the existence of a cross-border interest in relation to the contract at issue, and has clearly done so in order to respect the principle that, in this regard, it bears the burden of proof. See *Commission* v *Ireland*, cited in footnote 5 (paragraph 32).

equal treatment and transparency imposed by the Court's case-law.

26. In the first place, according to the Commission, the Irish authorities acted unlawfully by failing to weight the criteria for the award of the contract until after the closing date for the submission of bids.

27. Secondly, again according to the Commission, the fact that the weighting was modified after an initial review of the submitted bids is also unlawful.

28. The Commission further points out that the invitation to tender sent to the undertakings after the notice had been published in the Official Journal no longer stated that the award criteria were not listed in descending order of importance, with the result that undertakings taking part in the tender could reasonably have expected that this was the order in which the criteria were ranked. However, since the weighting did not attribute to the criteria the importance that their position in the list implied, the Irish authorities had misled tenderers. In its reply, however, the Commission explained that the question of the specific order in which the criteria were listed was not the basis of its application which is, therefore, founded solely on the two elements described: the fact that the relative weighting to be attributed to the criteria was not decided until after the closing date for the submission of bids and the fact that the weighting was modified after an initial review of the bids by the individual members of the evaluation team.

29. Ireland, for its part, essentially accepts the facts as set out by the Commission, [9] but denies that they constitute a breach of European Union law.

30. More specifically, the Irish Government points out that the modification made to the criteria on 22 June was insignificant (a reduction of 5 % in the weighting attributed to criterion No 4 and a corresponding increase of 5 % in the weighting attributed to criterion No 6), and entirely incapable of advantaging or disadvantaging any given tenderer compared with another. Indeed, a retrospective analysis would demonstrate that the successful tenderer would also have won the contract on the basis of the criteria as originally weighted.

31. Since, according to the Irish Government there has, consequently, been no breach of the principle of equal treatment of tenderers, it is also unnecessary to evaluate compliance with

9 — The Irish Government's particular insistence on the fact that the weighting attributed to the criteria was modified *before* the evaluation team began its review of the bids does not, however, cast doubt on the fact that the individual members of that team had, in the meantime, already made an initial review of those bids *on an individual basis*. That is in fact clearly shown in the documents annexed by the Commission to its application.

the principle of transparency, as the Court's case-law treats the latter principle as merely ancillary to the principle of equal treatment.

C — *Analysis*

32. For reasons of logic and clarity of argument, I shall begin my analysis of the legal aspects of this case with some observations concerning the principle of transparency in relation to public procurement. I shall then move on to analyse the Commission's two complaints and, finally, briefly discuss an aspect which, it seems to me, the parties have mistakenly overlooked.

1. The principle of transparency

33. Ireland, as we have seen, maintains that the principle of transparency in relation to public procurement is subsidiary to the principles of equal treatment and non-discrimination; consequently, in Ireland's view, once it has been established that there has been no infringement of the latter two principles, an assessment of compliance with the principle of transparency becomes superfluous.

34. Ireland's argument cannot be upheld.

35. It is true that, in terms of the rationale underlying the settled case-law in this field, the principle of transparency has an ancillary role compared with the principles of equal treatment and non-discrimination. However, the fact that it is ancillary does not make it subordinate, as envisaged by the Irish Government. Quite the reverse, the duty of transparency is ancillary in the sense that *its observance makes it possible to ascertain whether the other two* '*main*' *obligations have been complied with*. If the authority fails to act transparently, it becomes difficult, if not impossible, to ascertain whether or not it may have failed to fulfil the requirements of equal treatment and non-discrimination.

36. Moreover, observance of the duty of transparency is a vital precondition for guaranteeing that all potential tenderers are properly informed of the tendering procedure, thereby ensuring equality of treatment. [10]

37. Consequently, if the conditions laid down in case-law for the application to a public contract of the principles derived from

10 — See *Coname*, cited in footnote 6 (paragraph 17).

primary European Union law are met, it will always be necessary to confirm that the principle of transparency has been respected. In fact, logic would suggest that an assessment of compliance with the principle of transparency must *precede* any assessment of respect for the principles of equal treatment and non-discrimination.

2. The Commission's first complaint

38. By its first complaint, the Commission criticises Ireland, as we have seen, for having determined the weighting to be attributed to the various award criteria only after the closing date for the submission of bids. According to the Commission, that late determination of the weightings breached the principles of equal treatment and transparency.

39. It seems to me that it is not possible to uphold this first complaint, for the following reasons.

40. Firstly, it is indisputable that the directive did not require that the importance attaching to the award criteria should be set out in advance. As the Commission itself in fact acknowledges in its application, Article 40 of the directive, which provides for an obligation of this nature in Article 40(5)(e), was not applicable to the contract at issue. Indeed, to be precise, in this case, the directive did not even require that the award criteria be stated in advance, although the Irish authorities did indicate them.

41. Secondly, an obligation of that nature cannot be derived from case-law either. In particular, we may cite, by analogy, a judgment in which, in a case which fell completely within the ambit of the public procurement directives, the Court recognised the legitimacy of the conduct of an authority that had weighted the subheadings of an award criterion *after* bids had been submitted but *before* the envelopes containing the bids had been opened. [11]

42. It is, of course, necessary to consider whether the obligation to set out in the notice itself the weighting attributed to the various award criteria may be regarded as a natural consequence of the duty to observe the principles of equal treatment, non-discrimination and transparency. However, in the light of the Court's case-law in particular, I do not consider that this can be the case.

43. The case-law concerning tenders caught by all of the provisions of the various public

11 — Case C-331/04 *ATI EAC and Others* [2005] ECR I-10109, paragraph 32.

procurement directives in fact regards the obligation to inform tenderers of the award criteria in advance as an expression of the principles of equal treatment and transparency (that obligation, it is worth pointing out, is specifically provided for by the rules in such cases). [12] Again, according to that case-law, the abovementioned principles give rise to the obligation to interpret the award criteria in the same way throughout the entire procedure [13] and to the prohibition on amending them during the tender procedure. [14]

44. It is clear that, in Directive 2004/18, the obligation to set out in advance the weighting attributed to the award criteria for contracts coming entirely within the ambit of the directive itself also reflects the need to guarantee respect for the principles of equal treatment and transparency. In my view, however, it is necessary to steer clear of the automatic assumption that the principles in question have the same scope in relation to both contracts subject to the directive and contracts not subject to the directive (or, as in this instance, subject to the directive in part only). If, in fact, the transparency required in relation to contracts excluded from the scope of the directive were regarded as necessarily the same as that required in relation to contracts coming within the ambit of the directive, this would open the way for the directive to be covertly applied to a whole range of circumstances to which the legislature *explicitly* considered that it should not apply. To some degree, in fact, the purpose of the whole directive is to put into effect the fundamental principles of the Treaty: [15] if the procedure under the directive were the only way of achieving those principles in relation to public contracts, it would have to be applied to all cases with a cross-border interest.

45. Generally speaking, the practical methods of guaranteeing observance of the principles of the Treaty where the directive does not apply, or applies in part only, cannot be laid down once and for all, and must be assessed on a case-by-case basis. [16]

46. In the case in point, the Irish authority published a notice that set out the award criteria, but without indicating the relative weightings attributed to those criteria. I consider that, in the light of the considerations

12 — Case C-87/94 *Commission* v *Belgium* [1996] ECR I-2043, paragraph 88, and Case C-470/99 *Universale-Bau and Others* [2002] ECR I-11617, paragraph 98. It is also interesting to note that in the directives applicable in the judgments that I have just cited, the authorities are merely asked to set out in advance the weighting attributed to the award criteria only 'where possible', listing them in the order of importance attributed to them (see Article 30(2) of Directive 93/37/EEC and Article 27(2) of Directive 90/531/EEC).

13 — Case C-19/00 *SIAC Construction* [2001] ECR I-7725, paragraph 43.

14 — Case C-448/01 *EVN and Wienstrom* [2003] ECR I-14527, paragraph 93.

15 — See, by analogy, Case C-243/89 *Commission* v *Denmark* [1993] ECR I-3353, paragraph 33.

16 — See, for example, *Telaustria and Telefonadress*, cited in footnote 6 (paragraph 63), and *Parking Brixen*, cited in footnote 7 (paragraph 50).

set out in the preceding points, there has been no breach of the principle of non-discrimination, the principle of equal treatment or the principle of transparency. The contracting authority provided more information than the directive required, and did not discriminate between potential tenderers.

47. As the case-law has made clear, the purpose of the transparency requirement is, in principle, to ensure for any potential tenderer a degree of advertising sufficient to enable the market to be opened up to competition and the impartiality of procurement procedures to be reviewed. [17] In this case, the decision to use the Supplement to the *Official Journal of the European Union* must clearly be regarded as appropriate sufficiently to advertise the competitive procedure for the award of the contract.

48. Moving on to the principles of non-discrimination and equal treatment, the fact that weightings were not attributed to the criteria until after the bids had been submitted did not, of itself, create any difference in treatment between tenderers, who were placed on an equal footing.

49. It must be pointed out that the Commission's first complaint would have had to be assessed differently, had the contracting authority set out the award criteria in the contract notice, listing them in descending order of importance. Had it done so, then the authority would have modified the importance attributed to the criteria during the course of the procedure, since, as we saw earlier, in this case, the importance attributed to the criteria has no bearing on the order in which they are listed in the notice, with the most important criteria for the award of the contract being listed in third and fourth position.

50. However, even though the Commission suggested, in its application, that the list of criteria contained in the notice and subsequent invitation to tender implied a listing in descending order of importance, various factors contradict that claim.

51. Firstly, the notice published in the Official Journal expressly stated that the order in which the criteria were listed did not reflect their relative weighting.

52. Secondly, the first criterion listed related to the completeness of the documentation supplied. Not even the least astute of tenderers could have regarded this as the main award criterion; in point of fact, it seems more in the

17 — See, for example, *Telaustria and Telefonadress*, cited in footnote 6 (paragraph 62); see also, by analogy, in relation to the concession of services, Case C-324/07 *Coditel Brabant* [2008] ECR I-8457, paragraph 25, and Case C-203/08 *Sporting Exchange* [2010] ECR I-4695, paragraph 41 and the case-law cited therein.

nature of a condition of admission to the tender than an award criterion, and it is no coincidence that it was subsequently attributed a 0 % weighting. [18]

53. Thirdly, in its reply, the Commission itself appears, if not to have abandoned, then certainly to have revised, its position on the descending order of importance of the award criteria. That decision by the Commission seems to me to be entirely proper but, at the same time, it deprives the first complaint of the only sustainable ground on which it could be based.

54. I therefore consider that the Commission's first complaint must be rejected.

3. The Commission's second complaint

55. As we have seen, by its second complaint, the Commission claims that, by modifying the weighting attributed to the award criteria after an initial brief review of the bids submitted, Ireland was in breach of the principles of equal treatment and transparency.

56. As I stated above, the facts are clear and undisputed. The weighting of the criteria was in fact modified a few days after it had initially been determined. At the time it was modified, the evaluation team had yet to begin its work, but the members of the team had, individually, been able to view the tenders submitted.

57. The second complaint, unlike the first, must be upheld.

58. I pointed out earlier that Community law, as interpreted by the Court, considers any modification of the award criteria that takes place during the procedure to be incompatible with the principles of equal treatment and non-discrimination. [19] That is exactly what happened in this case.

59. That finding is unaffected by the fact that the evaluation team did not start work collectively until after the award criteria had been finally modified. The principle according to

18 — See, also in that connection, point 64 et seq below.

19 — See point 43 above.

which the criteria must not be modified during the procedure would be deprived of all effectiveness, if a stage at which the members of the evaluation team had sight of the bids submitted by tenderers before the team itself met were not, to all intents and purposes, regarded as a part of the procedure.

60. Even though the original weighting of the criteria was not an official act but simply a kind of 'preliminary proposal', that does not make the conduct of the authority any less unlawful. In my view, in order to guarantee that tenders are treated equally, it is crucial that the weighting attributed to the award criteria should be determined *before the bids are reviewed*, even if only by the members of the evaluation team acting individually. There has to be a clear separation between the process of weighting the criteria and the process of evaluating the bids. To be legitimate, 'joint consideration' by the members of the evaluation team of the weighting of the various criteria should have taken place before there was any review of the bids.

61. It is also necessary to reject the arguments of the Irish Government according to which the same tenderer would have been successful even if the weighting as originally determined had been attributed to the various criteria, instead of the weighting consequent on the subsequent modification.

62. In that regard, it must be pointed out that, according to settled case-law, in the context of actions for failure to fulfil an obligation, there is no condition regarding the interest in bringing an action. [20] The purpose of the procedure is to establish whether there has been a breach of the law of the Union, and not to consider the consequences that flow from that breach. It follows that the fact that the outcome of the procedure would have been the same if the award criteria had been attributed the importance originally attached to them is immaterial for the purposes of determining whether or not there has been a failure to fulfil an obligation.

63. In conclusion, the second of the Commission's complaints is well founded and must be upheld.

4. The possible illegality of attributing zero weighting to a criterion

64. A final point worth considering, although the parties have not paid particular attention to it, relates to the possibility of regarding as incompatible with European Union law the fact that, when weighting the various award criteria, the Irish authority accorded one of

20 — See, for example, Case C-394/02 *Commission* v *Greece* [2005] ECR I-4713, paragraphs 14 to 16 and the case-law cited therein.

them zero weighting (0 %). I am, obviously, referring to the criterion of the 'completeness of tender documentation'.

65. In my view, to list an award criterion in the contract notice and then attribute to it, after the closing date for the submission of bids, a weighting equivalent to 0 % is, to all intents and purposes, tantamount to modifying the criteria. The practical outcome is, in fact, the same as it would be if the criterion were deleted from the list: a criterion that was set out in the notice is not subsequently applied for the award of the contract. In other words, the Irish authorities probably infringed European Union law by attributing zero weighting to the criterion of the completeness of tender documentation.

66. In this case, the Court cannot, however, give a ruling condemning that infringement.

67. Firstly, the question arises, as I pointed out earlier, of whether the 'award criterion' relating to the completeness of tender documentation ought not, in reality, to be regarded simply as a condition for participation in the tender. By definition, either the documentation is complete, that is to say meets the requirements set out in the contract notice, or it is not. It is hard to envisage any middle way. But the fact remains that, even if the completeness of tender documentation was not to be regarded as an award criterion, it was presented as such in the contract notice, and could therefore raise doubts concerning compatibility with the principles of the Treaty.

68. Secondly, however, the fact remains that the Commission does not cite this failure. It is not explicitly stated, nor can it be considered to be in any way implied, in the application, which, as we have seen, merely criticises the fact that the weighting of the criteria was not determined until after the closing date for submitting bids and that the weightings were modified after the members of the evaluation team individually had reviewed the bids. The Irish Government thus did not have the opportunity to state a view on this issue.

V — Conclusions

69. On the basis of my analysis, I therefore propose that the Court uphold the second of the Commission's two complaints. As regards the costs, since Ireland has been unsuccessful in part only, I propose that it be ordered, pursuant to Article 69(3) of the Court's Rules of Procedure, to pay half of the Commission's costs.

70. On the basis of the foregoing considerations, I propose that the Court should rule as follows:

— by modifying the weightings attributed to the award criteria for a contract after an initial review of the submitted bids, Ireland has failed to fulfil its obligations under the principles of equal treatment, non-discrimination and transparency;

— the application is dismissed as to the remainder;

— Ireland is order to pay half of the costs;

— the Commission is ordered to bear half of its own costs.