JUDGMENT OF THE COURT
OF 17 FEBRUARY 1981 [1]

Commission of the European Communities v Italian Republic

"Non-implementation of a directive — Public supply contracts"

Case 133/80

Member States — Obligations — Implementation of directives — Failure to fulfil — Justification — Not permissible
(EEC Treaty, Art. 169)

A Member State may not plead provisions, practices or circumstances existing in its internal legal system in order to justify a failure to comply with obligations and time-limits resulting from Community directives.

In Case 133/80

COMMISSION OF THE EUROPEAN COMMUNITIES, represented by Alberto Prozillo, a member of the Commission's Legal Department, acting as Agent, with an address for service in Luxembourg at the office of Mario Cervino, Legal Adviser to the Commission, Jean Monnet Building, Kirchberg,

applicant,

v

ITALIAN REPUBLIC, represented by Arnaldo Squillante, Head of the Department for Diplomatic Disputes, Treaties and Legislative Matters, acting as Agent, assisted by Pier Giorgio Ferri, Avvocato dello Stato, with an address for service in Luxembourg at the Italian Embassy,

defendant,

1 — Language of the Case: Italian.

APPLICATION for a declaration that the Italian Republic has failed to fulfil its obligations under the EEC Treaty by not adopting within the prescribed periods the provisions needed to comply with Council Directive 77/62/EEC coordinating procedures for the award of public supply contracts (Official Journal 1977, L 13, p. 1),

THE COURT

composed of: J. Mertens de Wilmars, President, P. Pescatore and T. Koopmans (Presidents of Chambers), A. O'Keeffe, G. Bosco, A. Touffait, O. Due, U. Everling and A. Chloros, Judges,

Advocate General: G. Reischl
Registrar: A. Van Houtte

gives the following

JUDGMENT

Facts and Issues

The facts of the case, the course of the procedure, the conclusions and the submissions and arguments of the parties may be summarized as follows:

I — Facts and written procedure

Council Directive 77/62/EEC of 21 December 1976 coordinating procedures for the award of public supply contracts (Official Journal 1977, L 13, p. 1) is intended to supplement the prohibition on restrictions on the free movement of goods laid down by Article 30 et seq. of the EEC Treaty by introducing equal conditions of competition for public supply contracts in order to ensure a degree of transparency allowing the observance of the prohibition in question to be better supervised (first and second

recitals in the preamble). To achieve this the directive contains *inter alia* common rules on technical specifications which have a discriminatory effect (Articles 7 and 8), on the advertising of contracts (Articles 9 to 16) and on participation in the contracts in question (Articles 17 to 24); it also lays down criteria for the award of contracts (Article 25).

The following public supply contracts are excluded from the ambit of the directive: contracts for less than 200 000 European units of account (Article 5 (i) (a)), contracts awarded by bodies which administer transport services (Article 2 (2) (a)), those awarded by bodies which administer production, distribution and transmission or transport services for water or energy (Article 2 (2) (b)) and by bodies administering telecommunications services (Article 2 (2) (b)), and public contracts governed by different procedural rules and awarded pursuant to certain international agreements (Article 3).

The directive in question was notified to Italy on 23 December 1976. By the terms of Article 30 thereof it should have been implemented within 18 months of its notification, that is to say by 23 June 1978. On 27 October 1978 the Commission sent the Italian Government a letter reminding it of the expiry of the date laid down for the incorporation of the directive into national law. By a telex message of 21 November 1978 the Italian Government replied that the law in question had been passed and was about to be published in the Gazzetta Ufficiale. However, by a letter of 21 December 1978 it stated that the draft Law had been approved by the Chamber of Deputies only and that it was under scrutiny by the Senate.

The Commission came to the view that it had not been given any guarantee as to the implementation of the directive in the immediate future and by a letter of 13 March 1979 started the procedure laid down under Article 169 of the EEC Treaty. On 9 April 1979 the Italian Government replied that the draft Law in question, which had been submitted to the Chamber for a second reading, had lapsed owing to the dissolution of the legislature. On 7 December 1979 the Commission sent the Italian Government a reasoned opinion within the meaning of Article 169 of the Treaty; that opinion was adopted on 6 December 1979 and declared that "by not adopting the measures of internal law needed to comply with Council Directive 77/62/EEC of 21 December 1976 coordinating procedures for the award of public supply contracts, the Italian Republic has failed to fulfil its obligations under the EEC Treaty". It laid down a period of two months for the Italian Republic to adopt the necessary measures.

On 8 February 1980 the Italian Government informed the Commission that a draft Law had been submitted to the Senate (Senate document No 651).

The Commission commenced this action by an application lodged at the Court Registry on 2 June 1980.

On hearing the report of the Judge-Rapporteur and the views of the Advocate General the Court decided to open the oral procedure without any preparatory inquiry.

II — Conclusions of the parties

The *applicant* claims that the Court should:

— Declare that by not adopting within the prescribed period the provisions needed to comply with Council Directive 77/62/EEC the Italian Republic has failed to fulfil one of its obligations under the EEC Treaty;

— Order the Italian Republic to pay the costs.

The *defendant* did not submit any conclusions.

III — Submissions and arguments of the parties

1. Application

The Commission points out that under Article 189 of the Treaty establishing the European Economic Community a directive is binding, as to the result to be achieved, upon each Member State to which it is addressed, but leaves to the national authorities the choice of form and methods. The binding nature of directives implies that Member States are bound to comply with the periods laid down by them, as is shown in particular by the judgment of 26 February 1976 in Case 52/75 *Commission* v *Italian Republic* ([1976] ECR 277) and by the judgment of 22 September 1976 in Case 10/76 *Commission* v *Italian Republic* ([1976] ECR 1359). It is also apparent from the case-law of the Court, in particular from the judgment of 11 April 1978 in Case 100/77 *Commission* v *Italian Republic* ([1978] ECR 879) and the judgment of 22 February 1979 in Case 163/78 *Commission* v *Italian Republic* ([1979] ECR 771), that a Member State "may not plead provisions, practices or circumstances existing in its internal legal system in order to justify a failure to comply with obligations and time-limits imposed by Community directives".

2. Defence

The Italian Government first recalls the facts and circumstances which prevented the enactment of the Law required to incorporate the directive in question into national law. It then contends that the obstacle which prevented that aim from being achieved was due to an extraordinary constitutional event which, owing to the fundamental requirements of the democratic system, temporarily paralysed the legislative functions conferred on Parliament.

It points out that a bill is at present before the Senate Committee for Finance and Treasury Matters and states that it wishes to comply with the Community directive in the matters in question.

3. Reply

The Commission decided not to submit a reply.

IV — Oral procedure

The Commission of the European Communities, represented by Alberto Prozillo, a member of its Legal Department, and the Government of the Italian Republic, represented by Ivo M. Braguglia, Avvocato dello Stato, presented oral argument at the sitting on 13 January 1981.

The Advocate General delivered his opinion at the sitting on 28 January 1981.

Decision

1 By application lodged at the Court Registry on 2 June 1980 the Commission of the European Communities brought an action under Article 169 of the EEC Treaty for a declaration that by failing to adopt within the prescribed period the provisions needed to comply with Council Directive 77/62/EEC of 21 December 1976 coordinating procedures for the award of public supply contracts (Official Journal 1977, L 13, p. 1) the Italian Republic has failed to fulfil its obligations under the EEC Treaty.

2 Council Directive 77/62/EEC contains a number of provisions intended to ensure that the prohibition of restrictions on the free movement of goods laid down by Articles 30 to 37 of the EEC Treaty is observed in the field of public supply contracts. The object of the provisions of the directive is to coordinate national procedures concerning public supply contracts, in particular by introducing equal conditions of competition for such contracts in all the Member States, and to ensure a degree of transparency allowing the observance of the prohibition contained in Articles 30 to 37 mentioned above to be better supervised.

3 Under Article 30 of the directive Member States were obliged to adopt the measures necessary to comply with it within 18 months of its notification and to inform the Commission thereof forthwith. Under Article 31 they were, and still are, further obliged to communicate to the Commission the texts of the basic provisions of domestic law, whether laws, regulations or administrative provisions, which they adopt in the field in question.

4 The period laid down by Article 30 expired on 23 June 1978 without the Italian Republic's having adopted the necessary measures and the Commission gave it a first reminder of its obligation by a letter of 27 October 1978. It took up the matter again at the meeting on 9 and 10 November 1978 of the Advisory Committee for Public Contracts.

5 Seeing that its reminders had not led to the adoption of the necessary measures, on 13 March 1979 the Commission invited the Government of the Italian Republic in accordance with the procedure laid down by Article 169 of the EEC Treaty to submit its observations within a period of 20 days. The Government did so by a telex message of 9 April 1979. In that message it was explained that the draft Law to incorporate the directive into the Italian legal system had been passed once by the Chamber of Deputies on 27 September 1978 and then by the Senate on 13 December 1978, but that certain amendments had made it necessary for the draft to be remitted to the Chamber of Deputies. Owing to the dissolution of the legislature Parliament could not complete its scrutiny of the draft Law. The situation remained unchanged throughout 1979 and on 6 December of that year the Commission issued a reasoned opinion declaring that there had been a failure on the part of the Italian Republic to fulfil its obligations under the Treaty and inviting it to comply with that opinion within a period of two months.

6 That invitation was not acted upon and on 2 June 1980 the Commission lodged an application for a declaration establishing the non-compliance. The Italian Republic pointed out in its defence that the delay was due to the dissolution of the legislature, causing all draft Laws under discussion to lapse and thereby rendering necessary a new draft, which had been presented to the Senate on 9 December 1979; but it did not claim that the application should be dismissed.

7 The circumstances which have been described cannot expunge the non-compliance complained of. According to well-established case-law a Member State may not plead provisions, practices or circumstances existing in its internal legal system in order to justify a failure to comply with the obligations imposed by Community directives.

8 It is therefore necessary to declare that by not adopting within the prescribed period the provisions needed to comply with Council Directive 77/62/EEC of 21 December 1976 the Italian Republic has failed to fulfil one of its obligations under the Treaty.

Costs

9 Under Article 69 (2) of the Rules of Procedure the unsuccessful party is to be ordered to pay the costs if they have been asked for in the successful party's pleadings. Since the defendant has been unsuccessful it must be ordered to pay the costs.

On those grounds,

THE COURT,

hereby:

1. **Declares that, by not adopting within the prescribed period the provisions needed to comply with Council Directive 77/62/EEC of 21 December 1976 coordinating procedures for the award of public supply contracts (Official Journal 1977, L 13, p. 1), the Italian Republic has failed to fulfil its obligations under the EEC Treaty;**

2. **Orders the defendant to pay the costs.**

Mertens de Wilmars Pescatore Koopmans O'Keeffe

Bosco Touffait Due Everling Chloros

Delivered in open court in Luxembourg on 17 February 1981.

A. Van Houtte
Registrar

J. Mertens de Wilmars
President