JUDGMENT OF THE COURT
24 January 1995 *

In Case C-359/93,

Commission of the European Communities, represented by H. van Lier, Legal Adviser, acting as Agent, with an address for service in Luxembourg at the office of G. Kremlis, of the Legal Service, Wagner Centre, Kirchberg,

applicant,

v

Kingdom of the Netherlands, represented by J. W. de Zwaan and T. Heukels, Assistant Legal Advisers at the Ministry of Foreign Affairs, acting as Agents, with an address for service in Luxembourg at the Netherlands Embassy, 5 Rue C. M. Spoo,

defendant,

APPLICATION for a declaration that the Kingdom of the Netherlands has failed to fulfil its obligations under 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 Council Directives 80/767/EEC (OJ 1980 L 215, p. 1) and 88/295/EEC (OJ 1988 L 127, p. 1), and also under Article 30 of the EEC Treaty,

* Language of the case: Dutch.

THE COURT,

composed of: G. C. Rodríguez Iglesias, President, P. J. G. Kapteyn (President of Chamber), G. F. Mancini, C. N. Kakouris, J. L. Murray, D. A. O. Edward (Rapporteur) and G. Hirsch, Judges,

Advocate General: G. Tesauro,
Registrar: R Grass,

having regard to the report of the Judge-Rapporteur,

after hearing the Opinion of the Advocate General at the sitting on 17 November 1994,

gives the following

Judgment

1 By application lodged at the Court Registry on 16 July 1993, the Commission of the European Communities brought an action under Article 169 of the Treaty for a declaration that the Kingdom of the Netherlands had failed to fulfil its obligations under Council Directive 77/62/EEC of 21 December 1976 coordinating procedures for the award of public supply contracts, as amended by Council Directives 80/767/EEC and 88/295/EEC, and also under Article 30 of the EEC Treaty.

2 According to Article 9(5) of Directive 77/62, as amended by Article 9 of Directive 88/295, notices of supply contracts 'shall be drawn up in accordance with the

models given in Annex III'. It is clear from point 7 of part 'A. Open procedures' of this Annex that contract notices must contain the following information:

'(a) the persons authorized to be present at the opening of tenders ...

(b) the date, time and place of this opening ...'.

3 Under Article 7(6) of Directive 77/62, as amended by Article 8 of Directive 88/295, unless the technical specifications referred to in Annex II 'are justified by the subject of the contract, Member States shall prohibit the introduction into the contractual clauses relating to a given contract of technical specifications which mention goods of a specific make or source or of a particular process and which have the effect of favouring or eliminating certain undertakings or products. In particular, the indication of trade marks, patents, types or specific origin or production shall be prohibited; however, such an indication accompanied by the words "or equivalent" shall be authorized where the subject of the contract cannot otherwise be described by specifications which are sufficiently precise and fully intelligible to all concerned.'

4 Article 3 of Council Directive 89/665/EEC 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 provides as follows:

'(1) The Commission may 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 Directives 71/305/EEC and 77/62/EEC.

(2) 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.

(3) Within 21 days of receipt of the notification referred to in paragraph 2, the Member State concerned shall communicate to the Commission:

(a) its confirmation that the infringement has been corrected;

or

(b) a reasoned submission as to why no correction has been made;

or

(c) a notice to the effect that the contract award procedure has been suspended either by the contracting authority on its own initiative or on the basis of the powers specified in Article 2(1)(a).'

5 On 10 December 1991 Nederlands Inkoopcentrum NV, the Netherlands contracting authority, published a tender notice in the *Official Journal of the European Communities* concerning the supply and maintenance of a meteorological station.

6 That tender notice, which was laid out like the model in Annex III to Directive 77/62, contained no reference to the persons authorized to be present at the opening of the tenders or to the date, time and place of opening.

7 Moreover, the contracting authority's general terms and conditions stated that the operating system required was the 'UNIX', which is the name of a software system developed by Bell Laboratories of ITT (USA) for connecting several computers of different makes.

8 Taking the view that those two points in the notice, namely the failure to publish the information provided for in point 7(a) and (b) of Annex III and the reference in the general terms and conditions to a specific product, were not in keeping with the requirements of Articles 9(5) and 7(6) of Directive 77/62, on Thursday 25 June 1992 the Commission sent a letter to the Permanent Representation of the Netherlands, in accordance with Article 3(1) and (2) of Directive 89/665. It drew the attention of the Netherlands Government to the fact that the letter constituted formal notice for the purposes of Article 169 of the Treaty and that the subsequent communication from the Netherlands Government would be treated as the observations provided for in that article.

9 The Commission's letter was received on Friday 26 June by the Permanent Representation in Brussels, which forwarded it to the relevant ministry in the Netherlands where it was received on Monday 29 June. That same day, the Commission sent a copy of the letter by fax to the contracting authority, although the agreement awarding the contract had just been signed.

Admissibility

10 In the light of the foregoing, the Netherlands Government raised two objections of inadmissibility. First, the Commission's conduct did not comply with the requirements of Article 3(1) and (2) of Directive 89/665/EEC, in so far as the Commission was out of time in informing the Member State and the contracting authority of the reasons which led it to conclude that an infringement of Directive 77/62 had been committed, and secondly, since the Commission itself referred to the technical specifications of the UNIX system in a contract notice published after the one at issue in these proceedings, it is not entitled to rely on the alleged infringement, which it has committed as well.

11 With regard to the objection based on the Commission's conduct, Article 3(1) and (2) of Directive 89/665 provides that where, 'prior to a contract being concluded', the Commission considers that a clear and manifest infringement of Community law has been committed during a contract award procedure falling within the scope of Directive 77/62, it is to notify the Member State and the contracting authority concerned of the reasons which have led it to conclude that such an infringement has been committed and request its correction.

2 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 the parties concerned, that the Commission should give notice of its objections to the Member State and the contracting authority as soon as possible before the contract is concluded, thereby giving the Member State and the contracting authority time to answer it, in accordance with Article 3(3) of Directive 89/665, and if necessary to correct the alleged infringement before the contract is awarded.

13 However, that special procedure under Directive 89/665 is a preliminary measure which can neither derogate from nor replace the powers of the Commission 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 that the State concerned has not complied with the Commission's reasoned opinion.

14 Furthermore, a declaration that a State has failed to fulfil its obligations under Article 169 does not depend on the existence of a clear and manifest infringement within the meaning of Directive 89/665. Such a declaration is confined to the finding that a Member State has not fulfilled an obligation under Community law and does not in any way prejudge the nature or seriousness of the infringement.

15 The first plea of inadmissibility raised by the Netherlands Government must therefore be rejected.

16 With regard to the objection that the action is inadmissible because the Commission itself referred to the same technical specification, that is to say the UNIX system, in a contract notice published after the one at issue in these proceedings, it should be noted that, even on the assumption that the Commission is subject to the rules laid down by Directive 77/62 and has infringed them, such an infringement cannot justify any which may have been committed by the Netherlands authorities.

17 Accordingly, the second plea of inadmissibility must also be rejected.

Substance

18 The Commission's first allegation is that the contracting authority failed to indicate in the notice in question the persons authorized to be present at the opening of tenders or the date, time and place of opening, contrary to the requirements of Article 9(5) and point 7 of Annex III to Directive 77/62.

19 The Netherlands Government, which does not dispute the facts, maintains that the information in question is necessary only where the contracting authority intends to restrict the opportunity to attend the opening of tenders, but since opening in this case was public and any interested persons could attend, it was unnecessary to identify them.

20 The first point to note is that the information mentioned in point 7 of Annex III to Directive 77/62 is compulsorily and unconditionally required. As the Advocate General correctly observed at point 8 of his Opinion, that information enables potential suppliers to discover the identity of their competitors and to check whether they meet the criteria laid down for qualitative selection.

21 Furthermore, even when tenders are opened in public, and any interested person may therefore attend, there can be no real opportunity of doing so if the date, time and place are not published.

22 It follows that, by failing to publish the information referred to in point 7 of Annex III to Directive 77/62, the contracting authority has failed to fulfil its obligations under Article 9(5) of the directive.

23 The Commission's second charge is that, by failing to add the words 'or equivalent' after the term UNIX system, the contracting authority has failed to fulfil its obligations under Article 7(6) of Directive 77/62 and Article 30 of the Treaty.

24 The Netherlands Government contends that the UNIX system must, in the field of information technology, be regarded as a technical specification generally recognized by traders and that, accordingly, it is unnecessary to add the words 'or equivalent'.

25 It should be borne in mind that Article 7(6) of Directive 77/62 prohibits the indication of trade marks unless it is accompanied by the words 'or equivalent' since the subject-matter of the contract cannot otherwise be described by specifications which are sufficiently precise and fully intelligible to all concerned.

26 The parties agree, however, that the UNIX system is not standardized and that it is the name of a specific make of product.

27 Hence the fact that the term UNIX was not followed by the words 'or equivalent' may not only deter economic operators using systems similar to UNIX from taking part in the tendering procedure, but may also impede the flow of imports in intra-Community trade, contrary to Article 30 of the Treaty, by reserving the contract exclusively to suppliers intending to use the system specifically indicated.

28 Accordingly, the contracting authority should have added the words 'or equivalent' after the term UNIX, as required by Article 7(6) of Directive 77/62.

29 It follows from the foregoing that, by failing to indicate in the contract notice at issue the persons authorized to be present at the opening of the tenders and the date, time and place of opening, and by introducing into the general terms and conditions a technical specification defined by reference to a product of a specific make, the Kingdom of the Netherlands has failed to fulfil its obligations under Directive 77/62 and under Article 30 of the Treaty.

Costs

30 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs. Since the Kingdom of the Netherlands has been unsuccessful, it must be ordered to pay the costs.

On those grounds,

THE COURT

hereby:

1. Declares that, by failing to indicate in the contract notice at issue the persons authorized to be present at the opening of tenders and the date, time and place of opening, and by introducing into the general terms and conditions a technical specification defined by reference to a product of a specific make, the Kingdom of the Netherlands has failed to fulfil its obligations under Council Directive 77/62/EEC of 21 December 1976 coordinating pro-

cedures for the award of public supply contracts, as amended by Council Directives 80/767/EEC and 88/295/EEC, and also under Article 30 of the Treaty;

2. Orders the Kingdom of the Netherlands to pay the costs.

Rodríguez Iglesias Kapteyn Mancini Kakouris

Murray Edward Hirsch

Delivered in open court in Luxembourg on 24 January 1995.

R. Grass

Registrar

G. C. Rodríguez Iglesias

President