Reports of Cases

OPINION OF ADVOCATE GENERAL
KOKOTT
delivered on 19 January 2012 [1]

Case C-615/10

Insinööritoimisto InsTiimi Oy

(Reference for a preliminary ruling from the Korkein hallinto-oikeus (Finland))

(Public supply contracts — Article 10 of Directive 2004/18/EC — Article 296 EC — Protection of a Member State's essential security interests — Trade in arms — Products which are procured by the contracting authorities specifically for military purposes, but for which there exists a largely identical civilian application — Turntable equipment for electromagnetic measurements)

I – Introduction

1. The conditions under which the Member States may derogate from European Union legislation in connection with their defence and their armed forces repeatedly give rise to legal disputes. [2]

2. In the present case, the Court is called upon to clarify under what conditions a Member State's armed forces may circumvent the rules of European procurement law in awarding public supply contracts for the procurement of products which are intended for military use.

3. In 2008, the Finnish Defence Forces awarded a contract for the supply of turntable equipment [3] for electromagnetic measurements, which was to be used for simulating and practising military situations in 'electronic warfare'. The procurement procedures prescribed in Directive 2004/18/EC [4] were not fully complied with.

4. A Finnish Court now raises the question of how the exception for public contracts in the field of defence, laid down in Article 10 of Directive 2004/18 in conjunction with Article 296 EC (now Article 346 TFEU), is to be construed. On the basis of its judgment in *Agusta*, [5] in answering this question referred for a preliminary ruling, the Court will be required, in particular, to clarify whether products may be regarded as 'intended for specifically military purposes' where, in addition to their military use, there is also a largely similar civilian application.

1 — Original language: German.

2 — See, for example, the case-law on access for women to posts in the Member States' armed forces (Case C-273/97 *Sirdar* [1999] ECR I-7403, and Case C-285/98 *Kreil* [2000] ECR I-69), on compulsory military service for men (Case C-186/01 *Dory* [2003] ECR I-2479), on VAT liability for armaments (Case C-414/97 *Commission* v *Spain* [1999] ECR I-5585), and on customs handling of military equipment (Case C-284/05 *Commission* v *Finland* [2009] ECR I-11705; Case C-294/05 *Commission* v *Sweden* [2009] ECR I-11777; Case C-372/05 *Commission* v *Germany* [2009] ECR I-11801; Case C-387/05 *Commission* v *Italy* [2009] ECR I-11831; Case C-409/05 *Commission* v *Greece* [2009] ECR I-11859; Case C-461/05 *Commission* v *Denmark* [2009] ECR I-11887; Case C-239/06 *Commission* v *Italy* [2009] ECR I-11913; and Case C-38/06 *Commission* v *Portugal* [2010] ECR I-1569).

3 — Specifically: 'tiltable turntable'.

4 — Directive 2004/10/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).

5 — Case C-337/05 *Commission* v *Italy* ('Agusta') [2008] ECR I-2173, paragraph 47.

5. Unlike the helicopters in *Agusta*, the turntable equipment at issue here was purchased by the contracting authority for purely military purposes, with the result that it is not a 'dual-use item' in the stricter sense of the expression. However, according to the findings in the order for reference, it is perfectly conceivable that private organisations and undertakings could use such turntable equipment.

II – Legislative framework

6. The Union-law framework of this case is formed by Article 10 of Directive 2004/18 in conjunction with Article 296 EC.

7. Under the heading 'Defence procurement', Article 10 of Directive 2004/18 contained, in its original version,[6] this clarification of the scope of the rules governing public contracts:

'This Directive shall apply to public contracts awarded by contracting authorities in the field of defence, subject to Article 296 of the Treaty.'

8. Until it was replaced by Article 346 TFEU following the entry into force of the Treaty of Lisbon,[7] Article 296 EC (formerly Article 223 of the EEC Treaty) was worded as follows:

'1. The provisions of this Treaty shall not preclude the application of the following rules:

…

(b) any Member State may take such measures as it considers necessary for the protection of the essential interests of its security which are connected with the production of or trade in arms, munitions and war material; such measures shall not adversely affect the conditions of competition in the common market regarding products which are not intended for specifically military purposes.

2. The Council may, acting unanimously on a proposal from the Commission, make changes to the list, which it drew up on 15 April 1958, of the products to which the provisions of paragraph 1(b) apply.'

9. Council Decision 255/58 of 15 April 1958, which defined the list mentioned in Article 296(2) EC (also: 'the 1958 list'), includes the following provisions:[8]

'The list of the arms, munition and war materiel, including nuclear arms, to which the provisions of Article 223 paragraph 1(b) of the Treaty are applicable is given below:

…

5. Military fire control equipment:

(a) firing computers and guidance systems in infra-red and other night guidance devices;

6 — The wording of Article 10 of Directive 2004/18 has been amended by Directive 2009/81/EC of the European Parliament and of the Council of 13 July 2009 on the coordination of procedures for the award of certain works contracts, supply contracts and service contracts by contracting authorities or authorities in the fields of defence and security, and amending Directives 2004/17/EC and 2004/18/EC (OJ 2009 L 216, p. 76). However, this revised version only entered into force on 21 August 2009 and had to be transposed by the Member States by 21 August 2011 (cf. Article 72(1) and Article 74 of Directive 2009/81), with the result that it was not yet applicable to the present case.

7 — The Treaty of Lisbon entered into force on 1 December 2009.

8 — This decision was not published in the *Official Journal of the European Communities*, although an extract is reproduced in Document No 14538/4/08 of the Council of the European Union of 26 November 2008 < http://register.consilium.europa.eu/ > (last visited on 12 December 2011). The content of the list is also reproduced in a Commission answer to a parliamentary question (Answer of 27 September 2001 to Written question E-1324/01 by Bart Staes MEP, OJ 2001 C 364 E, p. 85).

(b) telemeters, position indicators, altimeters;

(c) electronic tracking components, gyroscopic, optical and acoustic;

(d) bomb sights and gun sights, periscopes for the equipment specified in this list.

…

11. Military electronic equipment.

…

14. Specialised parts and items of material included in this list insofar as they are of a military nature.

15. Machines, equipment and items exclusively designed for the study, manufacture, testing and control of arms, munitions and apparatus of an exclusively military nature included in this list.'

10. Reference should also be made to recital 10 in the preamble to Directive 2009/81: 'For the purposes of this Directive, military equipment should be understood in particular as the product types included in the list of arms, munitions and war material adopted by the Council in its Decision 255/58 of 15 April 1958, and Member States may limit themselves to this list only when transposing this Directive. This list includes only equipment which is designed, developed and produced for specifically military purposes. However, the list is generic and is to be interpreted in a broad way in the light of the evolving character of technology, procurement policies and military requirements which lead to the development of new types of equipment, for instance on the basis of the Common Military List of the Union. For the purposes of this Directive, military equipment should also cover products which, although initially designed for civilian use, are later adapted to military purposes to be used as arms, munitions or war material.'

A – *National law*

11. In Finland Directive 2004/18 was implemented by Law No 348/2007 on public procurement [9] ('Law on public procurement'), the scope of which is subject to the following limitation under paragraph 7(1):

'This law shall not apply to contracts

(1) where they are to be kept confidential, where their performance must be accompanied by special security measures laid down by law, or where the essential security interests of the State so requires;

(2) where their object is suited primarily to military purposes.'

12. Furthermore, according to an administrative instruction issued by the Finnish Ministry of Defence on 28 May 2008, until further notice, defence procurement contracts must comply with, inter alia, Order No 76 issued by the Ministry of Defence on 17 March 1995.

13. Paragraph 1 of Order No 76 defines products or services intended primarily for military purposes, to which the Law on public procurement is not applicable. This applies in particular to 'specialised equipment for military activities, training or military situation simulation drills, and components, additional apparatus and equipment specially designed for these', according to paragraph 1 in conjunction with point M of the Annex to that order.

9 — Julkisista hankinnoista annettu laki.

III – Facts and main proceedings

14. In 2008, the Finnish Defence Forces Technical Research Centre [10] conducted a tender procedure for the procurement of turntable equipment for electromagnetic measurements, to a value of EUR 1 650 000. To that end, on 5 February 2008 it invited four undertakings to submit tenders, including the engineering firm Insinööritoimisto InsTiimi Oy (InsTiimi).

15. The contract was awarded in a 'negotiated procedure' which, according to the information provided in the order for reference, differs from the procurement procedures prescribed in Directive 2004/18. InsTiimi takes the view that the procurement procedure should have complied with the rules of Directive 2004/18 and has therefore brought the main proceedings before the Finnish courts. The Finnish Defence Forces, represented by the General Staff of the Finnish Defence Forces, [11] is also a party to those proceedings.

16. Before the Markkinaoikeus, [12] the court of first instance, the appeal lodged by InsTiimi was unsuccessful. The Markkinaoikeus regarded it as settled that the turntable equipment was suited primarily to military purposes and that the contracting authority intended it solely for military purposes. The Markkinaoikeus thus concluded that the contested contract came under the exception provided for in paragraph 7(1)(2) of the Law on public procurement.

17. Following an appeal lodged by InsTiimi, the case is now at second instance before the Korkein hallinto-oikeus, [13] the referring court.

18. Before that court, InsTiimi submitted that the turntable was a technical innovation from the civilian sector and is not designed to be war material. It is an item of general-purpose auxiliary equipment for examination and a base which does not in itself provide any new information on the object of examination. It also submits that the technical implementation of the contested contract is based entirely on combining freely available materials, components and assemblies, and that the design involved is solely a matter of the appropriate selection and attachment of these structural components in order to fulfil the requirements of the invitation to tender.

19. The Defence Forces contended before the Korkein hallinto-oikeus that the turntable had been purchased for specifically military purposes and was also intended especially for purposes of simulation of military situations. The turntable would be used to simulate and practise military countermeasures against reconnaissance and target acquisition which takes place from overhead threat angles. A threat-emulating sensor can only be brought to the angle corresponding to the threat by tilting the target, for example a tank which is placed on the turntable, to the correct angle by means of the turntable.

20. According to the Defence Forces, the turntable is an essential part of the open space measurement track, intended for electronic warfare measurements, simulations and drills, which is being built for it, and it is therefore designed for the study of weapons intended for military use. The turntable is a product within the meaning of point M of the Annex to Order No 76 of the Ministry of Defence.

IV – Reference for a preliminary ruling and procedure before the Court

21. By interlocutory order of 13 December 2010, the Korkein hallinto-oikeus stayed its proceedings and referred the following question to the Court for a preliminary ruling:

Is Directive 2004/18/EC applicable, having regard to Article 10 of that directive and to Article 346(1)(b) of the Treaty on the Functioning of the European Union and to the list of arms, munitions and war material adopted by decision of the Council on 15 April 1958, to a procurement which otherwise falls within the scope of the directive, when according to the contracting entity the intended purpose of the object of procurement is specifically military, but there also exist largely identical technical applications of the object of procurement in the civilian market?

10 — Suomen Puolustusvoimien Teknillinen Tutkimuslaitos.

11 — Pääesikunta.

12 — Market Court.

13 — Supreme Administrative Court.

22. In the proceedings before the Court, in addition to the two parties to the main proceedings — InsTiimi and the Defence Forces — the Finnish, Czech and Portuguese Governments and the European Commission submitted written observations. With the exception of the Czech and Portuguese Governments, the same parties also took part in the hearing on 12 December 2011.

V – Assessment

23. The answer to the present reference for a preliminary ruling hinges on the interpretation of Article 296 EC (now Article 346 TFEU), to which reference is made in Article 10 of Directive 2004/18.

24. The first half of Article 296(1)(b) EC permits any Member State unilaterally[14] to take such measures as it considers necessary for the protection of the essential interests of its security which are connected with the production of or trade in arms, munitions and war material. Directive 2004/18 refers to that provision in Article 10 for the purpose of defining its own scope.

25. As the Commission rightly states and the Finnish Government also acknowledges, the first half of Article 296(1)(b) EC makes the adoption of unilateral national measures dependent on two cumulative conditions being satisfied:

— First, the measures must be connected with the production of or trade in arms, munitions and war material.

— Second, the measures to be taken must appear necessary for the protection of the essential security interests of the Member State concerned.

26. With its reference for a preliminary ruling, the referring court has the first of these two conditions specifically in view: it addresses only the notion of 'products intended for specifically military purposes'. However, the second condition cannot be disregarded completely either in the assessment of the admissibility of the reference for a preliminary ruling (see immediately below under section A) or in the substantive appraisal of the question referred (see further below under section B). I will therefore also consider this second condition below, in so far as is necessary, as several of the parties have done, not least at the hearing.

A – *Admissibility of the reference for a preliminary ruling*

27. The fact that in its order for reference the referring court addresses only the first criterion under Article 296(1)(b) EC — the notion of 'products intended for specifically military purposes' — cannot, in itself, call into question the admissibility of its reference for a preliminary ruling.

28. The question referred to the Court for a preliminary ruling would have to be regarded as hypothetical if it were established that in the present case the second cumulative criterion under Article 296(1)(b) EC was not satisfied in any event, i.e. if the derogation from the procurement rules laid down in Directive 2004/18 could not be justified by Finland's essential security interests. However, there is not sufficient evidence to that effect in the case before the Court.

29. The order for reference does not state definitively whether or not the contracting authority in the present case has relied on the protection of Finland's essential security interests in accordance with the second criterion. The referring court merely states that the Defence Forces had failed to specify, as recommended by the European Commission,[15] which essential security interest is connected with the procurement of the turntable equipment and why the non-application of Directive 2004/18 was necessary in this specific case. The Finnish Government and the General Staff of the Defence Forces nevertheless claim that such security interests were invoked in the national proceedings.

14 — The Court established very early, in Case 6/64 *Costa* v *ENEL* [1964] ECR 585, that the measures are unilateral.

15 — The referring court mentions the Commission's Interpretative communication of 7 December 2006 on the application of Article 296 of the Treaty in the field of defence procurement (COM(2006) 779 final), 'the Commission Communication').

30. The referring court also states that the application made by InsTiimi would have to be dismissed as inadmissible if the public contract does not fall within the scope of Directive 2004/18 and of Law No 348/2007. In order to be able to assess this, it is also necessary to clarify the first criterion, the notion of 'products intended for specifically military purposes'.

31. Under these circumstances, it cannot be assumed that it would be *obvious* that the question referred has no relevance to the decision. [16] According to settled case-law, that question continues to enjoy a presumption of relevance. [17]

32. Consequently, there are no reservations to answering the question referred for a preliminary ruling.

B – *Substantive appraisal of the question*

33. By its question, the referring court is essentially seeking to ascertain whether the award of a public contract in the field of defence may disregard the rules laid down in Directive 2004/18 where the intended purpose of the object of procurement is specifically military, but there also exist largely similar civilian applications.

34. The background to this question is that turntable equipment like that procured in the present case is not, according to claims made by InsTiimi which have not been refuted, intended primarily for military purposes, but has predominantly civilian applications.

35. The parties disagree sharply. Whilst InsTiimi and the Commission take the view that the rules of Directive 2004/18 should have been complied with in the present case, the Defence Forces and all the Governments participating in the proceedings consider that a derogation from that directive was justified under Article 296(1)(b) EC.

36. In principle, the European Union legislation governing the award of public contracts also applies in the field of defence. This followed, at the time of the award of the contested contract, from Article 10 of Directive 2004/18. For the period after 21 August 2011, it is also confirmed in Directive 2009/81. [18] The application of the European Union legislation governing the award of public contracts will strengthen freedom of movement of goods, freedom of establishment and freedom to provide services within the Union and contribute to the realisation of the internal market. [19]

37. At the same time, however, European Union law recognises the legitimate interest of the Member States in the protection of their essential security interests, as expressed in particular in Article 296 EC. Article 10 of Directive 2004/18, which expressly refers to that Treaty provision, demonstrates the tension which can arise in public procurement between the principle of the internal market and national security interests.

38. Under Article 10 of Directive 2004/18 in conjunction with Article 296(1)(b) EC, a Member State may derogate from the European Union legislation on the award of public contracts where the measures are connected with trade in arms, munitions and war material (first criterion) and where a derogation from the European Union legislation governing the award of public contracts appears necessary for the protection of the essential security interests of that Member State (second criterion).

16 — With regard to the plea of inadmissibility that it is *obvious* that there is no relevance to the decision, see inter alia Case C-308/06 *Intertanko and Others* [2008] ECR I-4057, paragraphs 31 and 32; Case C-45/09 *Rosenbladt* [2010] ECR I-9391, paragraphs 32 and 33; and Joined Cases C-509/09 and C-161/10 *eDate Advertising* [2011] ECR I-10269, paragraphs 32 and 33.

17 — Case C-355/97 *Beck and Bergdorf* [1999] ECR I-4977, paragraph 22; Case C-45/09 *Rosenbladt*, cited in footnote 16, paragraph 33; and Case C-119/09 *Société fiduciaire nationale d'expertise comptable* [2011] ECR I-2551, paragraph 21.

18 — See, in particular, Article 10 of Directive 2004/18 as amended by Directive 2009/81, Article 2 of Directive 2009/81, and the first sentence of recital 10 in the preamble to Directive 2009/81.

19 — Recital 2 in the preamble to Directive 2004/18; also the Court's settled case-law on the various directives coordinating public procurement law, see for example Case C-380/98 *University of Cambridge* [2000] ECR I-8035, paragraph 16; Case C-507/03 *Commission* v *Ireland* [2007] ECR I-9777, paragraph 27; and Case C-337/06 *Bayerischer Rundfunk and Others* [2007] ECR I-11173, paragraph 38.

39. In view of the key importance of the fundamental freedoms and the principle of the internal market in the system of the Treaties,[20] these criteria must be given a strict interpretation in accordance with the case-law on Article 296 EC.[21]

1. First criterion: military products

40. The first half of Article 296(1)(b) EC is applicable to arms, munitions and war material, i.e. *military products*. The Council defined the specific categories of items covered in the 1958 list.

41. I share the view taken by the General Court of the European Union (then the Court of First Instance)[22] that the substantive scope of Article 296(1)(b) EC is regulated exhaustively by the 1958 list, to which express reference is made in Article 296(2) EC.[23] The General Court rightly pointed out that the exception contained in Article 296(1)(b) EC is not intended to apply to activities relating to products other than the military products identified on the 1958 list.[24]

42. A derogation from the procurement procedures prescribed in Directive 2004/18 on the basis of Article 296(1)(b) EC therefore requires, first of all, that a product like the contested turntable equipment can actually be classified in one of the categories of items included in the 1958 list. This will have to be examined and evaluated in detail by the referring court, which has exclusive jurisdiction to establish and evaluate the facts.

43. Because, according to the Finnish Defence Forces, the abovementioned turntable equipment allows electromagnetic measurements to be taken and is used for the simulation of military situations where target acquisition is practised, it could be a component of equipment for testing and control of arms (point 15 in conjunction with points 11 and 14 of the 1958 list). Theoretically, the turntable equipment could also be regarded as a part of a position indicator or a tracking component (point 5(b) and (c) in conjunction with point 14 of the 1958 list).[25]

44. However, the mere fact that the turntable equipment can possibly be classified in one of the categories of items in the 1958 list does not, as such, justify a derogation from the European Union legislation governing the award of public contracts. The mention of a certain item in the 1958 list is a necessary, but insufficient condition for reliance on Article 10 of Directive 2004/18 in conjunction with the first half of Article 296(1)(b) EC.

20 — See, thus far, Article 2 EU and Article 3(1)(c) EC (now the first sentence of Article 3(3) TEU).

21 — Case C-414/97 *Commission* v *Spain*, paragraph 21; Case C-284/05 *Commission* v *Finland*, paragraph 46; Case C-294/05 *Commission* v *Sweden*, paragraph 44; Case C-372/05 *Commission* v *Germany*, paragraph 69; Case C-387/05 *Commission* v *Italy*, paragraph 46; Case C-409/05 *Commission* v *Greece*, paragraph 51; Case C-461/05 *Commission* v *Denmark*, paragraph 52; Case C-239/06 *Commission* v *Italy*, paragraph 47; and Case C-38/06 *Commission* v *Portugal*, paragraph 63, each cited in footnote 2.

22 — See Case T-26/01 *Fiocchi munizioni* v *Commission* [2003] ECR II-3951.

23 — Admittedly, this does not mean that the list cannot be given a contemporary interpretation and application in order to take account of current developments. According to recital 10 in the preamble to Directive 2009/81, 'the list is generic and is to be interpreted in a broad way in the light of the evolving character of technology, procurement policies and military requirements which lead to the development of new types of equipment … '(see also the Commission Communication, cited in footnote 15, section 3). The list is thus applicable not only to the military products known in 1958, but also to those used today in the Member States' armed forces, provided they can be classified under the categories described in the list.

24 — Case T-26/01 *Fiocchi munizioni* v *Commission*, cited in footnote 22, paragraph 61.

25 — Classification in point 5 of the 1958 list requires the item to be 'military fire control equipment'. A link to 'fire control' could, in principle, exist because the contested turntable equipment is used to simulate and practise 'target acquisition' in 'electronic warfare' and is ultimately intended to prepare 'countermeasures against overhead reconnaissance'. However, no such connection with fire control was taken to exist by the parties at the hearing before the Court.

45. The application of the first half of Article 296(1)(b) EC also requires that the item in question be *intended for specifically military purposes.*[26] This follows *a contrario* from the second half of that provision, which mentions 'products which are not intended for specifically military purposes'. The 1958 list likewise contains numerous wordings which suggest that a product within the meaning of Article 296(1)(b) EC must not only be classified generically in a certain category of items, but must also be intended for specifically military purposes.[27] This has also been recently confirmed by the Union legislature.[28]

46. It is not possible to infer whether a product is intended for specifically military purposes solely from the fact that a Member State's armed forces are the purchaser or another public authority purchases the product for the armed forces. Otherwise, any pencil could become a military product merely because it is purchased for the military. This would run counter to the requirement of a strict interpretation of Article 296(1)(b) EC and impair the principle of the internal market excessively.

47. Nor is it sufficient that a product is merely *suited* to military use and thus will *possibly* be used for military purposes. The Court ruled in *Agusta* that the helicopters which had been purchased by the Italian State for a long time, without any competitive tendering procedure, did not come under Article 296(1)(b) EC because they were certainly for civilian use and only possibly for military use.[29]

48. The application of Article 296(1)(b) EC requires that a product, more than being merely suited to possible military use, has a *specifically military purpose*, both subjectively and objectively. Thus, the item in question must be intended for specifically military purposes not only according to its specific use defined by the contracting authority[30] (*subjectively*), but also according to its design and its characteristics[31] (*objectively*).

49. Such a specifically military purpose may be obvious in the case of many products. One need only think of the anti-tank guns, bombs and warships included in the 1958 list.[32] They are designed as purely military equipment (objective purpose) and purchased by the contracting authorities solely for military purposes (subjective purpose).

50. On the other hand, in the case of other products such as the vehicles, aircraft, explosives, ammunition and telemeters also included in the 1958 list, the specifically military purpose must be positively demonstrated[33] because a civilian use is also conceivable.

51. That is precisely the situation in the present case.

52. It is certainly clear that *subjectively* the contested turntable equipment had a specifically military use: according to the intentions of the contracting authority, it was to be used by the Finnish Defence Forces in the simulation of military situations and in practising target acquisition. In this respect the present case therefore differs from the *Agusta* case, in which no specifically military purpose could be established for the purchased products.[34]

26 — Case C-337/05 *Commission* v *Italy* ('Agusta'), cited in footnote 5, paragraph 47, and Case C-157/06 *Commission* v *Italy* [2008] ECR I-7313, paragraph 26.

27 — See, for example, points 5 and 11 ('military') and point 14 of the 1958 list ('insofar as they are of a military nature').

28 — '[The 1958 list] includes only equipment which is designed, developed and produced for specifically military purposes' (second sentence of recital 10 in the preamble to Directive 2009/81).

29 — Case C-337/05 *Commission* v *Italy* ('Agusta'), cited in footnote 5, in particular paragraphs 48 and 49; see also Case C-157/06 *Commission* v *Italy*, cited in footnote 26, paragraph 27.

30 — See Case C-337/05 *Commission* v *Italy* ('Agusta'), cited in footnote 5, in particular paragraphs 48 and 49, where reference is made to the purpose defined by the contracting authority.

31 — See also recital 10 in the preamble to Directive 2009/81, according to which the 1958 list 'includes only equipment which is *designed, developed and produced* for specifically military purposes' (emphasis added); see also the Commission Communication (cited in footnote 15, section 3), which mentions 'equipment which is of *purely military nature and purpose*' (emphasis also in the original).

32 — Points 2(a), 4 and 9(a) of the 1958 list.

33 — Points 3, 5(a), 6, 8(b) and 10 of the 1958 list.

34 — Case C-337/05 *Commission* v *Italy* ('Agusta'), cited in footnote 5, in particular paragraphs 48 and 49.

53. However, there are serious doubts *objectively* as to the status of that turntable equipment as a product with a specifically military purpose. At the hearing the parties were not in agreement as to whether turntable equipment like that at issue here would find a buyer on the civilian market in the event of its subsequent sale by the Defence Forces. However, according to the information provided by the referring court, which alone is relevant in preliminary ruling proceedings,[35] there also exist largely similar technical applications for such turntable equipment on the civilian market. Similarly, InsTiimi makes the — unrefuted — argument that turntables could also be used in the civilian sector; indeed they were even initially designed for civilian use and only later were actually made useable for military purposes.

54. Such items which, although initially designed for civilian use, are later adapted to military purposes, are not intended in principle, according to the will of the Union legislature,[36] to fall outside the scope of the procedures for the award of public contracts under European Union law.[37]

55. It certainly cannot be ruled out that the turntable purchased in the present case was modified with a view to its military use in such essential respects that it became an entirely different product from the common product in the civilian sector. Such adaptation could have been made, for example, in connection with the installation of the turntable in a specially designed 'open space measurement track' intended for 'electronic warfare' measurements, simulations and drills.

56. Should there have there been such a fundamental modification — which the referring court will have to examine — the turntable in question would have acquired a specifically military purpose not only subjectively, but also objectively. Then (and only then) would the contracting authority have rightly classified it as a military product for the purposes of the first half of Article 296(1)(b) EC.

57. If, on the other hand, in the main proceedings the referring court's current assumption were confirmed that, on the basis of its design and its characteristics — even as part of a specialist military installation for taking electromagnetic measurements and simulating operations — the contested turntable equipment is essentially no different from the turntables commonly used in the civilian sector, it would objectively have no specifically military purpose, even though the contracting authority may have envisaged and purchased the turntable equipment for a specifically military use.

58. In the latter case, the procurement procedures prescribed by European Union law should have been applied in the procurement of the turntable in question.

59. In summary:

An item which, according to the contracting authority, is to be used for specifically military purposes, but which, viewed objectively, is essentially no different from similar items used in the civilian sector cannot, through reliance on Article 296(1)(b) EC in conjunction with Article 10 of Directive 2004/18, be excluded from the procurement procedures prescribed in that directive.

2. Second criterion: protection of essential security interests

60. Even if the contested turntable were to be classified as a military product (first criterion for the application of Article 296(1)(b) EC), the referring court would still have to examine whether in the present case a derogation from the procurement procedures prescribed by European Union law appeared necessary for the protection of Finland's essential security interests (second criterion for the application of Article 296(1)(b) EC).

35 — Case C-475/99 *Ambulanz Glöckner* [2001] ECR I-8089, paragraph 10; Joined Cases C-482/01 and C-493/01 *Orfanopoulos and Oliveri* [2004] ECR I-5257, paragraph 42; and Case C-382/08 *Neukirchinger* [2011] ECR I-139, paragraph 41.

36 — Last sentence of recital 10 in the preamble to Directive 2009/81. Although this statement came from a legislative act which is not applicable to the present case *ratione temporis*, there is no obvious reason not to take account of the underlying evaluations in interpreting Directive 2004/18 in the relevant version for the main proceedings. In any case, recital 10 essentially makes clarifications regarding the meaning of the 1958 list, as it was to be understood until now.

37 — Similarly, the Court has held that a Member State may not rely on Article 296 EC in order to exempt from customs duties imports of dual-use material for both civilian and military use, 'whether or not such material was imported exclusively for military purposes' (see Case C-294/05 *Commission* v *Sweden*, paragraph 53, and Case C-387/05 *Commission* v *Italy*, paragraph 55, cited in footnote 2).

61. In this regard, the Court has held that no more than reliance by a Member State on its security interests does not justify a derogation from European Union law. [38]

62. Certainly the relevant Member State is to be granted a wide discretion in the definition of its essential security interests; [39] this is shown by the use of the words 'as it considers necessary' in Article 296(1)(b) EC. Nevertheless, the national authorities bear the burden of proof to demonstrate that the conditions laid down by that provision are satisfied. [40]

63. As the Commission has rightly argued, the contracting authority should demonstrate in the present case that the derogation from the procurement procedures prescribed in Directive 2004/18 appeared necessary for the protection of Finland's essential security interests [41] and was proportionate. [42]

64. It should be noted that any confidentiality requirement in relation to certain military information does not, in itself, prevent the use of a competitive tendering procedure for the award of a contract. [43] It is also possible in a procurement procedure as laid down in European Union law to take the necessary precautions for the protection of sensitive information. [44]

65. In the present case, according to the unrefuted claims made by InsTiimi, the contracting authority is said to have reported in detail on the item purchased and the operation of the turntable equipment in a Finnish daily newspaper. Under these circumstances, it would seem unlikely that there could have been a legitimate confidentiality interest on the part of the Finnish State in the procurement procedure.

66. Certain derogations from the procurement procedures prescribed by European Union law may nevertheless be justified by the fact that a Member State does not wish simply to disclose security-related information to foreign undertakings or undertakings controlled by foreign nationals, in particular undertakings or persons from non-member countries. A Member State can also legitimately ensure that it does not become dependent on non-member countries or on undertakings from non-member countries for its arms supplies. Both points were rightly highlighted by the Czech Government.

67. However, in the present case there is likewise — as far as can be seen — absolutely no evidence of such security concerns on the part of the contracting authority. But all this will ultimately have to be assessed by the referring court in a full evaluation of all the circumstances of the individual case.

38 — Case C-284/05 *Commission* v *Finland*, paragraph 47; Case C-294/05 *Commission* v *Sweden*, paragraph 45; Case C-372/05 *Commission* v *Germany*, paragraph 70; Case C-387/05 *Commission* v *Italy*, paragraph 47; Case C-409/05 *Commission* v *Greece*, paragraph 52; Case C-461/05 *Commission* v *Denmark*, paragraph 53; Case C-239/06 *Commission* v *Italy*, paragraph 48; and Case C-38/06 *Commission* v *Portugal*, paragraph 64, each cited in footnote 2.

39 — Case T-26/01 *Fiocchi munizioni* v *Commission*, cited in footnote 22, paragraph 58; see also the Commission Communication (cited in footnote 15), according to which Article 296 EC 'has been acknowledged to grant to Member States a broad degree of discretion' in deciding how to protect their essential security interests (section 4 of the Communication) and 'it is the Member States' prerogative to define their essential security interests' (section 5 of the Communication).

40 — Case C-414/97 *Commission* v *Spain*, paragraphs 22 and 24; Case C-294/05 *Commission* v *Sweden*, paragraph 47; Case C-284/05 *Commission* v *Finland*, paragraph 49; Case C-372/05 *Commission* v *Germany*, paragraph 72; Case C-387/05 *Commission* v *Italy*, paragraph 49; Case C-409/05 *Commission* v *Greece*, paragraph 54; Case C-461/05 *Commission* v *Denmark*, paragraph 55; Case C-239/06 *Commission* v *Italy*, paragraph 50; and Case C-38/06 *Commission* v *Portugal*, paragraph 66, each cited in footnote 2.

41 — See also the Commission Communication (cited in footnote 15, section 3).

42 — Case C-337/05 *Commission* v *Italy* ('Agusta'), cited in footnote 5, in particular paragraph 53, and Case C-157/06 *Commission* v *Italy*, cited in footnote 26, paragraph 31; also the Commission Communication (cited in footnote 15, section 5), according to which it must be demonstrated why the non-application of the Public Procurement Directive in this specific case is *necessary* for the protection of an essential security interest.

43 — Case C-337/05 *Commission* v *Italy* ('Agusta'), cited in footnote 5, in particular paragraph 52, and Case C-157/06 *Commission* v *Italy*, cited in footnote 26, paragraph 30.

44 — With regard to the confidentiality of classified information of the contracting authority, see in particular Articles 7, 20 and 22 of Directive 2009/81; with regard to the confidentiality of information forwarded by tenderers, see for example Article 6 of Directive 2004/18 and Article 6 of Directive 2009/81 and Case C-450/06 *Varec* [2008] ECR I-581.

VI – Conclusion

68. In the light of the above arguments, I propose that the Court give the following answer to the question asked by the Korkein hallinto-oikeus:

An item which, according to the contracting authority, is to be used for specifically military purposes, but which, viewed objectively, is essentially no different from similar items used in the civilian sector cannot, through reliance on Article 296(1)(b) EC in conjunction with Article 10 of Directive 2004/18, be excluded from the procurement procedures prescribed in that directive.