JUDGMENT OF THE COURT
22 SEPTEMBER 1976 [1]

Commission of the European Communities v Italian Republic

'Public works contracts'

Case 10/76

Summary

Directives — Mandatory nature — Time-limits — Compliance therewith (EEC Treaty, Article 189)

The mandatory nature of directives entails the obligation for all Member States to comply with the time-limits contained therein in order that their implementation shall be achieved uniformly within the whole Community.

In Case 10/76

COMMISSION OF THE EUROPEAN COMMUNITIES, represented by its Legal Adviser, Antonino Abate, acting as Agent, with an address for service in Luxembourg at the office of Mario Cervino, Legal Adviser of the Commission, Bâtiment CFL, place de la Gare,

applicant,

v

ITALIAN REPUBLIC, represented by its Ambassador Adolfo Maresca, acting as Agent, assisted by Ivo Maria Braguglia, Viceavvocato dello Stato, with an address for service in Luxembourg at the Italian Embassy,

defendant,

Application for a declaration that the Government of the Italian Republic has failed to fulfil its obligations under Council Directive No 71/305/EEC of 26 July 1971 concerning the coordination of procedures for the award of public works contracts (OJ, English Special Edition 1971 (II), p. 682,

1 — Language of the Case: Italian.

THE COURT

composed of: R. Lecourt, President, H. Kutscher and A. O'Keeffe, Presidents of Chambers, A. M. Donner, J. Mertens de Wilmars, P. Pescatore, M. Sørensen, A. J. Mackenzie Stuart and F. Capotorti, Judges,

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

gives the following

JUDGMENT

Facts

The facts and the arguments put forward by the parties in the course of the written procedure may be summarized as follows:

I — Facts and procedure

1. On 26 July 1971 the Council of the European Communities adopted two Directives for attaining freedom of establishment and freedom to provide services in the matter of public works contracts. The first, No 71/304/EEC (OJ, English Special Edition 1971 (II), p. 678), implements, with regard to public works contracts, the principle of the prohibition of discrimination based on nationality in the matter of freedom to provide services. The second, No 71/305/EEC (OJ, English Special Edition 1971 (II), p. 682), provides for the coordination of national procedures for the award of public works contracts based on the following basic principles:

- Prohibition of national technical specifications having a discriminatory effect (Articles 10 and 11);
- Advertising of notices of contracts on the Community level by publication in the Official Journal of the European Communities (Article 12);
- Introduction of objective criteria for the selection of undertakings and the award of contracts by national administrations (Article 23 *et seq.);*
- Introduction of a procedure designed to ensure that these principles are observed, particularly through the intervention of the Advisory Committee set up by Council Decision No 71/306/EEC of 26 July 1971 (OJ, English Special Edition 1971 (II), p. 693).

The directive was devised to bring into line the law of the Member States on this matter and required the Member States to adopt the measures necessary to comply with it within twelve months of its notification; this period expired on 29 July 1972.

2. By a Law of 2 February 1973, the Italian legislature prescribed the 'Rules relating to the procedures for the award

of public contracts by restricted invitation to tender' (Norme sui procedimenti di gara negli appalte di opere pubbliche mediante licitazione privata, Gazzetta Ufficiale of 24 February 1973, No 51). The Commission took the view that this Law did not fulfil the objectives of Directive No 71/305/EEC and by a letter of 10 June 1974, pursuant to Article 169 of the EEC Treaty, invited the Italian Government to submit its observations within 30 days of receipt of the said letter.

By a letter of 5 July 1974 from its Permanent Representation, the Italian Government conveyed to the Commission a draft bill intended to implement the Community rules 'fully', which, according to the Commission, satisfied to a large extent the conditions laid down by the directive in question. As this bill had not yet been passed in March 1975, the Commission, by a reasoned opinion of 1 April 1975, invited the Italian Republic to adopt the necessary measures within a month.

By a letter of 29 April 1975 from the Permanent Representation, the Italian Government conveyed to the Commission the bill presented to the Chamber of Deputies on 1 August 1974, entitled: 'Rules of adapting procedures for the award of public works contracts to the directives of the European Community' (Norme di adequamento delle procedure di aggiudicazione degli appalti di lavori pubblici alle direttive della Comunità Europea) a text corresponding to the draft bill sent to the Commission on 5 July 1974. At the same time an assurance was given that the Office of the President of the Council of Ministers, the Ministry of Construction and the Ministry for Foreign Affairs would make every effort to set in motion the procedure for the passing of the bill by Parliament.

The application dated 30 January 1976 was lodged at the Court Registry on 5 February 1976.

The written procedure followed the normal course. Upon 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 Commission claims that the Court should:

(a) declare that the Italian Republic has failed to fulfil its obligations under Council Directive No 71/305/EEC of 26 July 1971, concerning the coordination of procedures for the award of public works contracts;

(b) order the Italian Republic to pay the costs.

In its defence, the Italian Government sets out its point of view, but does not however submit any conclusion on the issues of the action.

III — Submissions and arguments of the parties

In the submission of the Commission, first of all the Italian Republic failed to fulfil its obligation to enact before 29 July 1972 the measures necessary to give effect to the directive and, furthermore, Law No 14 of 2 February 1973 only fulfilled its obligations under that directive very incompletely.

Indeed:

(a) whereas the directive applies to all procedures for the award of contracts, both 'open' and 'restricted' (Article 5), the Italian Law applies only to the procedure for award by restricted invitation to tender, termed 'licitazione privata';

(b) Article 29 (3) of Directive No 71/305/EEC provides for the progressive abolition of the Italian 'anonymous envelope' procedure, but the Italian Law makes no mention of this subject;

(c) The second paragraph of Article 12 of the directive provides for the publication of notices of contracts in the Official Journal of the European Communities: the Italian Law limits itself (Article 7) to providing for the publication of notices in the Official Journal of the Italian Republic;

(d) In Articles 16 (d) and 17 (a) the directive lays down the obligation to indicate the time-limit for the completion of the works. The Italian Law makes no provision in this connexion;

(e) The criteria for qualitative selection, specified as essential in Articles 20, 24, 25 and 26 of the directive (vocational aptitude, financial and economic standing and technical knowledge or ability), which must be observed by the authority awarding contracts, are not mentioned in the Italian Law, which thus maintains the wide discretionary powers conferred on authorities awarding contracts by the previous provisions;

(f) Under the last paragraph of Article 15 of the directive, requests for participation and invitations to tender may be made by telegram, telex message or telephone. As the Italian Law makes no mention of this subject, the Commission is of the opinion that the prohibition on tendering by telegram is still in force in Italy;

(g) The time-limit fixed by authorities for receipt of requests to participate must not, according to the directive (first paragraph of Article 14) be less than twenty-one days from the date of sending the notice of contract; the Italian Law limits itself to providing a minimum time-limit of 10 days from the publication of the notice;

(h) The Italian Law does not lay down any obligation formulated in Article 29 (5) of Directive No 71/305/EEC to justify to the Advisory Committee the rejection of tenders considered to be too low.

The Italian authorities moreover implicitly accepted the findings of the Commission and realized the need to adjust the Italian legal system to the Community provisions, as is shown by the existence of the bill submitted to the Chamber of Deputies on 13 August 1974 and not yet passed.

As appears from the judgment of the Court of Justice of 21 June 1973 (Case 79/72, *Commission* v *Italian Republic* [1973] ECR 667 at p. 672) the failure to observe the time-limit laid down first by the Directive (29 July 1972) and subsequently by the reasoned opinion (1 May 1975) constitutes a serious failure by a Member State to fulfil its obligations.

In its *defence* the Italian Government points out that the bill presented to the Chamber of Deputies on 13 August 1974 is designed to amend existing law to the extent necessary to put the directive into effect.

It was for reasons of legal certainty that the provisions of the directive were reiterated in a Law, a procedure which offers greater guarantees but takes longer. The Italian Government hopes that the bill will be passed as soon as possible, so that the subject-matter of the action may be considered as having ceased to exist.

In its *reply* the Commission points out that the defendant does not challenge the validity of the submissions and conclusions formulated in the application. It stresses, as has already been done in the reasoned opinion of 1 April 1975, that Bill No 3219 submitted to the Chamber of Deputies on 13 August 1974 would in large measure satisfy, both as to substance and as to form, the conditions set by Council Directive No 71/305. The Commission acknowledges that the nature of the Italian legal system is such that it is impossible to carry out the necessary amendments and adjustments in national law by any instrument other than a Law:

no possibility exists of adopting lesser measures, such as administrative measures.

It observes however that the choice of form and methods for giving effect to Community directives left to national authorities by Article 189 of the EEC Treaty is subject to limitations. One limitation of an external kind is constituted by the subject-matter of the directive If for example the directive is aimed at circumscribing the extent of the discretionary power of public authorities, the national measures for giving effect to it inevitably have the nature of legislative acts, that is to say, acts which are mandatory and binding on the administration and capable of creating rights for individuals which are enforceable in a court of law. One limitation which might be described as 'internal' is constituted by the state of national substantive law governing the subject-matter of the directive. The choice of the methods used to adjust the internal legal system will be conditioned by the form of the instruments already in existence; the choice will have to obey the principle of the hierarchy of the sources of law in force in each national legal system.

It follows from these considerations that an instrument having force of law appears to constitute the only method capable of allowing proper application of Directive No 71/305.

If it is true, as the Italian Government states in its defence, that other Member States have not considered it appropriate to give effect to the directive by way of legislation, it should however be observed that, on the practical level and as to its substance, the directive is nevertheless applied in those Member States.

Whilst joining with the Italian Government in hoping for the immediate passing of Bill No 3219 by both Houses, the Commission feels that it must emphasize the seriousness of the infringement committed by the Italian Republic. Directive No 71/305 introduces machinery appropriate to stimulate effective competition between undertakings in the Community, by coordinating procedures for the award of public contracts. Failure to put it into effect hinders and delays the process of interpenetration in the sphere of public works contracts.

The Italian Government did not lodge a rejoinder.

In the oral procedure, on 6 July 1976, the parties enlarged upon the arguments put forward in the written procedure. At the request of the Court, the Commission produced a list of the measures taken in the Member States to give effect to Directive No 71/305/EEC.

The Advocate-General delivered his opinion at the hearing on 13 July 1976.

Law

1 By an application which was received at the Registry on 5 February 1976 the Commission has brought before the Court under Article 169 of the EEC Treaty an action seeking a declaration that the Italian Republic has failed to fulfil its obligations under Directive No 71/305/EEC of the Council of 26 July 1971 (OJ, English Special Edition, 1971 (II), p. 682).

2 In conjunction with Directive No 71/304/EEC of the same date concerning the abolition of restrictions on freedom to provide services in respect of public works contracts, Directive No 71/305/EEC seeks to coordinate the national procedures for the award of these contracts. Under Article 32 Member States were to adopt the measures necessary to comply with the directive within twelve months of its notification to them, which period expired on 29 July 1972.

3 Subsequent to this directive the Italian Republic adopted the Law of 2 February 1973 relating to the procedures for the award of public contracts by restricted invitation to tender (licitazione privata) the text of which was conveyed to the Commission on 16 August 1973.

In application of Article 169 of the EEC Treaty the Commission, however, informed the Italian Republic by letter of 10 June 1974 that it considered that the obligations arising from the abovementioned directive had not been satisfied by the adoption of the Law.

4 In the first place it was claimed that the defendant had excluded from the scope of the Law procedures for the award of public works contracts other than by restricted invitation to tender.

5 Secondly, it was alleged that the defendant had not complied with Article 29 of the directive whereby the Italian 'anonymous envelope' procedure had to be abolished by 29 July 1975 or 29 July 1979 according to the estimated value of the contract as the Italian Law of 2 February 1973 made no provision in this respect.

6 In addition, under Article 12 of the directive, authorities awarding contracts who wish to award a public works contract by open or restricted procedure must make their intention known by means of a notice published in the Official Journal of the Communities whereas the Italian Law limits itself to providing for the publication of a notice in the Official Journal of the Italian Republic.

7 The Italian Law does not contain the provisions referred to in Articles 14, 15, 16 and 17 of the directive concerning the time-limit for the receipt of requests to participate, the form required for tenders and the compulsory indication of the time-limit for the completion of the works put out to tender.

8 Finally, Articles 20, 24, 25 and 26 of the directive lay down the criteria for qualitative selection which allow certain undertakings to be excluded from participation in the contracts, while the Italian Law contains no provision to this effect and retains the wide discretion conferred on authorities awarding contracts by Article 89 of the Royal Decree of 23 May 1924.

9 The defendant did not contest the alleged failures and, on 5 July 1974, conveyed to the Commission a preliminary draft of a bill 'containing the Community rules in full.'

10 The draft, which according to the Commission satisfies the essential requirements of the directive, was conveyed to the Italian Parliament on 13 August 1974 but has still not been adopted with the result that the measures intended to ensure the implementation of the directive are not yet in force at the date of this judgment.

11 Article 189 of the Treaty provides that a directive shall be 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.

12 The mandatory nature of directives entails the obligation for all Member States to comply with the time-limits contained therein in order that the implementation shall be achieved uniformly within the whole Community.

13 It follows that as the Italian Republic has failed to adopt, within the prescribed period, the measures necessary to comply with Directive No 71/305/EEC of the Council concerning the coordination of procedures for the award of public works contracts, it has failed to fulfil an obligation under the Treaty.

Costs

14 Under Article 69 (2) of the Rules of Procedure of the Court of Justice, the unsuccessful party shall be ordered to pay the costs.

The defendant has failed in its submissions.

It must therefore be ordered to pay the costs.

On those grounds,

THE COURT

hereby rules:

1. **As the Italian Republic has failed to adopt, within the prescribed period, the measures necessary to comply with Directive No 71/305/EEC of the Council concerning the coordination of procedures for the award of public works contracts, it has failed to fulfil an obligation under the Treaty.**

2. **The defendant shall pay the costs.**

Lecourt Kutscher O'Keeffe Donner Mertens de Wilmars

Pescatore Sørensen Mackenzie Stuart Capotorti

Delivered in open court in Luxembourg on 22 September 1976.

A. Van Houtte
Registrar

R. Lecourt
President

OPINION OF MR ADVOCATE-GENERAL REISCHL DELIVERED ON 13 JULY 1976 [1]

Mr President,
Members of the Court,

Several Community measures were adopted in 1971 to further the implementation of the important principle of the right of establishment and of freedom to provide services in respect of public works contracts. I may mention on the one hand Council Directive No 71/304 of 26 July 1971 (OJ, English Special Edition, 1971 (II), p. 678), which relates to the abolition of restrictions on freedom to provide services in respect of public works contracts. Next Council Directive No 71/305 of 26 July 1971 (OJ, English Special Edition, 1971 (II), p. 682), issued

1 – Translated from the German.