

Case C-3/88

Commission of the European Communities

v

Italian Republic

(Failure of a Member State to fulfil its obligations — Public supply contracts in the data-processing sector — Undertakings partly or wholly in public ownership — National legislation not in compliance with obligations under Community law)

Report for the Hearing	4036
Opinion of Mr Advocate General Mischo delivered on 4 October 1989	4045
Judgment of the Court, 5 December 1989	4056

Summary of the Judgment

- 1. Community law — Principles — Equal treatment — Discrimination by reason of nationality — Prohibition — Covert discrimination — Included*
(EEC Treaty, Arts 52 and 59)
- 2. Freedom of movement — Freedom of establishment — Freedom to provide services — Derogations — Activities connected with the exercise of official authority — Technical activities in the field of data processing carried out for the public authorities — Excluded*
(EEC Treaty, Arts 52, 55, 1st paragraph, 59 and 66)
- 3. Freedom of movement — Freedom of establishment — Freedom to provide services — Procedures for the award of public supply contracts — National legislation giving companies controlled by the national public sector exclusive rights to supply goods in the field of data processing — Not permissible*
(EEC Treaty, Arts 52 and 59; Council Directive 77/62)

1. The principle of equal treatment, of which Articles 52 and 59 of the Treaty embody specific instances, prohibits not only overt discrimination by reason of nationality but also all covert forms of discrimination which, by the application of other criteria of differentiation, lead in fact to the same result.
2. The exception to freedom of establishment and freedom to provide services provided for by the first paragraph of Article 55 and by Article 66 of the EEC Treaty must be restricted to those of the activities referred to in Articles 52 and 59 which in themselves involve a direct and specific connection with the exercise of official authority. That is not the case in respect of activities concerning the design, programming and operation of data-processing systems for the public authorities, since they are of a technical nature and thus unrelated to the exercise of official authority.
3. A Member State which provides that only companies in which all or a majority of the shares are either directly or indirectly in public or State ownership may conclude agreements for the development of data-processing systems for the public authorities thereby fails to fulfil its obligations under Articles 52 and 59 of the Treaty and Directive 77/62 coordinating procedures for the award of public supply contracts.

REPORT FOR THE HEARING delivered in Case C-3/88 *

I — Facts and procedure

A — *Facts*

The Commission considered that certain Italian laws and decree-laws were contrary to Community law inasmuch as they provided that only companies in which all or a majority of the share capital was in public ownership could be awarded certain contracts involving the purchase of

equipment and supplies required for the establishment of data-processing systems, and the design and, in some cases, the technical management of such systems. The Commission communicated its observations to the Italian Government by a telex message of 30 January 1985.

The government's reply, received on 24 April 1985, was deemed unsatisfactory, and the Commission addressed a letter of formal notice to the Italian authorities on 3

* Language of the case: Italian.