

ORDER OF THE PRESIDENT OF THE COURT
12 June 1992 *

In Case C-272/91 R,

Commission of the European Communities, represented by Antonio Aresu and R. Pellicer, members of its Legal Service, acting as Agents, with an address for service in Luxembourg at the office of Roberto Hayder, a representative of its Legal Service, Wagner Centre, Kirchberg,

applicant,

v

Italian Republic, represented by Professor Luigi Ferrari Bravo, head of the Department for Legal Affairs at the Ministry of Foreign Affairs, acting as Agent, assisted by Ivo M. Braguglia, Avvocato dello Stato, with an address for service in Luxembourg at the Italian Embassy, 5 Rue Marie-Adelaïde,

defendant,

APPLICATION for the adoption of interim measures requiring the Italian Republic to take the measures necessary to suspend the award of the concession for the lottery computerization system,

* Language of the case: Italian.

THE PRESIDENT OF THE COURT

makes the following

Order

1 By letter of 23 March 1992, the Italian Government requested the President of the Court in accordance with Article 87 of the Rules of Procedure to reconsider the order of 31 January 1992 requiring the Italian Republic to take the measures necessary to suspend the legal effect of the decree of the Minister for Finance of 14 June 1991 awarding the concession for the lottery computerization system and performance of the contract concluded for that purpose with the consortium Lotomatica.

2 That order was made pursuant to an application for interim measures by the Commission of the European Communities in the context of an action brought on 18 October 1991 under Article 169 of the EEC Treaty for a declaration that, by failing to make known, for the purposes of publication in the *Official Journal of the European Communities*, first, at the beginning of 1990, an indicative notice setting out the total procurement which the Italian Ministry of Finance was envisaging awarding during that year and secondly, in November 1990, a notice concerning the invitation to tender for the concession of the lottery computerization system, and by restricting participation in that tender exclusively to bodies, companies, consortia and groupings a majority of whose capital, considered individually or in aggregate, was publicly owned, the Italian Republic had failed to fulfil its obligations under Articles 30, 52 and 59 of the EEC Treaty and Articles 9 and 17 to 25 of 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 Directive 88/295/EEC of 22 March 1988 (OJ 1988 L 127, p. 1).

- 3 In his order of 31 January 1992, the President of the Court found in accordance with Article 83(2) of the Rules of Procedure that pleas of fact and law had been made establishing a prima facie case for the interim measure sought by the Commission and that there were circumstances establishing that that measure was urgently required. He held that taking account of the judgment in Case C-3/88 *Commission v Italy* [1989] ECR 4035 the Commission's application did not appear at that stage in the proceedings to be without substance and that if the Commission were to succeed in the main proceedings the judgment would have no practical effect in the absence of an interim measure.

- 4 Reference is made to the order of 31 January 1992 for a fuller account of the facts, the observations of the parties and the grounds for the decision of the President of the Court.

- 5 In support of its request that the abovementioned order be reconsidered, the Italian Government pleads as new circumstances Decree-Law No 47 of 1 February 1992, Article 7a of which empowers the Ministry of Finance to transfer its powers concerning the computerized lottery to companies a majority of whose capital is publicly owned and provides that the first application of that provision shall be to transfer the abovementioned powers to Lottomatica, the company already chosen as concessionaire following the invitation to tender which gave rise to the action under Article 169.

- 6 It should be noted that under Article 87 of the Rules of Procedure an order granting an interim measure may at any time on application by a party be varied or cancelled on account of a change in circumstances.

- 7 In this case, the amendment of the Italian legislation cannot be considered to be a change in circumstances such as to justify varying or cancelling the interim measure. The new rules relied on, although providing for the exercise of the

public authority's powers to be transferred to the concessionaire, cannot retrospectively cure the prima facie incompatibility with Community law of the invitation to tender and therefore of the award of the concession to the Lottomatica consortium and of the contract concluded with that consortium.

- 8 In order to ensure that the forthcoming judgment can be effective, therefore, the interim measure requiring the Italian Republic to suspend the legal effect of the decree of the Minister for Finance of 14 June 1991 awarding the concession for the lottery computerization system and performance of the contract concluded for that purpose with the consortium Lottomatica should be continued.

On those grounds,

THE PRESIDENT OF THE COURT

hereby orders:

1. The application by the Italian Government is dismissed.
2. The costs are reserved.

Luxembourg, 12 June 1992.

J.-G. Giraud

Registrar

O. Due

President

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