JUDGMENT OF THE COURT
5 December 1989 *

In Case C-3/88

Commission of the European Communities, represented by Guido Berardis, a member of its Legal Department, acting as Agent, with an address for service in Luxembourg at the office of Georgios Kremlis, a member of the Commission's Legal Department, Wagner Centre, Kirchberg,

applicant,

v

Italian Republic, represented by Professor Luigi Ferrari Bravo, Head of the Diplomatic Legal Department of the Ministry of Foreign Affairs, acting as Agent, assisted by Ivo Braguglia, avvocato dello Stato, with an address for service in Luxembourg at the Italian Embassy, 5 rue Marie-Adélaïde,

defendant,

APPLICATION for a declaration that the Italian Republic has failed to fulfil its obligations under Articles 52 and 59 of the EEC Treaty and Council Directive 77/62/EEC of 21 December 1976 coordinating procedures for the award of public supply contracts (Official Journal 1977, L 13, p. 1),

THE COURT

composed of: O. Due, President, Sir Gordon Slynn and F. A. Schockweiler (Presidents of Chambers), G. F. Mancini, R. Joliet, J. C. Moitinho de Almeida and G. C. Rodríguez Iglesias, Judges,

* Language of the case: Italian.

Advocate General: J. Mischo
Registrar: D. Louterman, Principal Administrator

having regard to the Report for the Hearing and further to the hearing on 21 June 1989,

after hearing the Opinion of the Advocate General delivered at the sitting on 4 October 1989,

gives the following

Judgment

1 By an application lodged at the Court Registry on 6 January 1988 the Commission of the European Communities brought an action under Article 169 of the EEC Treaty seeking a declaration that, by adopting provisions under which only companies in which all or a majority of the shares are either directly or indirectly in public or State ownership may conclude agreements with the Italian State for the development of data-processing systems for the public authorities, the Italian Republic has failed to fulfil its obligations under Articles 52 and 59 of the EEC Treaty and Council Directive 77/62/EEC of 21 December 1976 coordinating procedures for the award of public supply contracts (Official Journal 1977, L 13, p. 1, hereinafter referred to as 'the directive').

2 It had come to the Commission's notice that the legislation in force in Italy authorized the State to conclude agreements, in a number of sectors of public activity (taxation, health, agriculture and urban property), only with companies in which all or a majority of the shares were directly or indirectly in public or State ownership. The Commission considered that those rules were contrary to the abovementioned provisions of Community law, and on 3 December 1985 it addressed a letter of formal notice to the Italian Government, thus setting in motion the procedure provided for in Article 169 of the Treaty.

3 On 1 July 1986, as no communication had been received from the Italian Government, the Commission delivered the reasoned opinion provided for in the first paragraph of Article 169 of the Treaty.

4 At the request of the Italian Government, two meetings were held with officials of the Commission, one in Rome on 25 to 27 January 1987 and the other in Brussels on 10 March 1987, with a view to clarifying the situation. On 5 May 1987, the Italian Government stated its position on the reasoned opinion. The Commission considered that position unsatisfactory and decided to bring the present action.

5 Reference is made to the Report for the Hearing for a fuller account of the Italian legislation in issue, the course of the procedure and the submissions and arguments of the parties, which are mentioned or discussed hereinafter only in so far as is necessary for the reasoning of the Court.

Failure to comply with Articles 52 and 59 of the EEC Treaty

6 In the Commission's view, by providing that only companies in which all or a majority of the shares are directly or indirectly in public or State ownership may conclude agreements for the development of data-processing systems for the public authorities, the laws and decree-laws in issue, although applicable without distinction to Italian undertakings and to those of other Member States, are discriminatory and constitute a barrier to the freedom of establishment and the freedom to provide services laid down in Articles 52 and 59 of the Treaty.

7 The Italian Government claims first of all that the laws and decree-laws in dispute make no distinction on the basis of the nationality of companies which may conclude the agreements in issue. Consequently, since the Italian State owns all or a majority of the share capital not only in certain Italian companies but also in certain companies of other Member States, both types of company may take part

without any discrimination in the establishment of the data-processing systems in issue.

8 According to the Court's case-law 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 (see, in particular, the judgment of 29 October 1980 in Case 22/80 *Boussac* v *Gerstenmeier* [1980] ECR 3427).

9 Although the laws and decree-laws in issue apply without distinction to all companies, whether of Italian or foreign nationality, they essentially favour Italian companies. As the Commission has pointed out, without being contradicted by the Italian Government, there are at present no data-processing companies from other Member States all or the majority of whose shares are in Italian public ownership.

10 In justification of the public ownership requirement, the Italian Government claims that it is necessary for the public authorities to control the performance of the contracts in order to adapt the work to meet developments which were unforeseeable at the time when the contracts were signed. It also claims that for certain types of activity which the companies have to carry out, particularly in strategic sectors, which involve, as in the present case, confidential data, the State must be able to employ an undertaking in which it can have complete confidence.

11 In that regard it must be stated that the Italian Government had sufficient legal powers at its disposal to be able to adapt the performance of contracts to meet future and unforeseeable circumstances and to ensure compliance with the general interest, and that in order to protect the confidential nature of the data in question the Government could have adopted measures less restrictive of freedom of establishment and freedom to provide services than those in issue, in particular by imposing a duty of secrecy on the staff of the companies concerned, breach of which might give rise to criminal proceedings. There is nothing in the documents

before the Court to suggest that the staff of companies none of whose share capital is in Italian public ownership could not comply just as effectively with such a duty.

12 The Italian Government also maintains that in view of their confidential nature the activities necessary for the operation of the data-processing systems in question are connected with the exercise of official authority within the meaning of Article 55.

13 As the Court has already held (see the judgment of 21 June 1974 in Case 2/74 *Reyners* v *Belgium* [1974] ECR 631), 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 here, however, since the activities in question, which concern the design, programming and operation of data-processing systems, are of a technical nature and thus unrelated to the exercise of official authority.

14 Finally, the Italian Government claims that in view of the purpose of the data-processing systems in question and the confidential nature of the data processed, the activities necessary for their operation concern Italian public policy within the meaning of Article 56(1) of the Treaty.

15 That argument must also be dismissed. It need merely be pointed out that the nature of the aims pursued by the data-processing systems in question is not sufficient to establish that there would be any threat to public policy if companies from other Member States were awarded the contracts for the establishment and operation of those systems. It must also be borne in mind that the confidential nature of the data processed by the systems could be protected, as stated above, by a duty of secrecy, without there being any need to restrict freedom of establishment or freedom to provide services.

16 It follows from the foregoing considerations that the claim based on failure to comply with Articles 52 and 59 of the Treaty must be upheld.

Failure to comply with Directive 77/62/EEC

17 The Commission considers that the laws and decree-laws in issue infringe the provisions of the directive as regards the purchase by the public authorities of the equipment necessary for the establishment of the data-processing systems in question. Since such equipment is to be regarded as 'products' within the meaning of Article 1(1)(a) of the directive and since the value of the relevant public supply contracts exceeds the amount fixed in Article 5, the competent authorities should have followed the award procedures prescribed in the directive and complied with the obligations laid down in Article 9, which requires notices of such contracts to be published in the *Official Journal of the European Communities.*

18 The Italian Government objects, first, that in addition to the purchase of the hardware a data-processing system comprises the creation of software, the planning, installation, maintenance and technical commissioning of the system and sometimes its operation. The interdependence of those activities means that complete responsibility for the establishment of the data-processing systems provided for by the laws and decree-laws in issue must be given to a single company. Therefore, and bearing in mind that the hardware is an ancillary element in the establishment of a data-processing system, the directive is inapplicable. The Italian Government adds that according to Article 1(a) of the directive the concept of public supply contracts covers only contracts the principal object of which is the delivery of products.

19 That argument cannot be accepted. The purchase of the equipment required for the establishment of a data-processing system can be separated from the activities involved in its design and operation. The Italian Government could have approached companies specializing in software development for the design of the data-processing systems in question and, in compliance with the directive, could have purchased hardware meeting the technical specifications laid down by such companies.

20 The Italian Government then claims that Council Decision 79/783/EEC of 11 September 1979 adopting a multiannual programme (1979-83) in the field of data-processing (Official Journal 1979, L 231, p. 23), as amended by Decision 84/559/EEC of 22 November 1984 (Official Journal 1984, L 308, p. 49), should be interpreted as meaning that until such time as the programme is completed the temporary exemption referred to in Article 6(1)(h) of the directive is to remain in force.

21 Under that provision, contracting authorities need not apply the procedures provided for in Article 4(1) and (2) 'for equipment supply contracts in the field of data processing, and subject to any decisions of the Council taken on a proposal from the Commission and defining the categories of material to which the present exception does not apply. There can no longer be recourse to the present exception after 1 January 1981 other than by a decision of the Council taken on a proposal from the Commission to modify this date'.

22 The decisions mentioned by the Italian Government were adopted on the basis of Article 235 of the Treaty and not pursuant to Article 6(1)(h) of the directive. They relate to the implementation of a programme in the field of data processing which does not concern, either directly or indirectly, the rules applicable to contracts for the supply of data-processing equipment.

23 In the Italian Government's submission, the supply contracts in issue also fall within the exceptions provided for in Article 6(1)(g) of the directive, which authorizes contracting authorities not to follow the procedures referred to in Article 4(1) and (2) 'when supplies are declared secret or when their delivery must be accompanied by special security measures in accordance with the provisions laid down by law, regulation or administrative action in force in the Member State concerned, or when the protection of the basic interests of that State's security so requires'. It refers, in that regard, to the secret nature of the data involved, which is essential in the fight against crime, particularly in the areas of taxation, public health and fraud in agricultural matters.

24 That objection concerns the confidential nature of the data entered in the data-processing systems in question. As has already been pointed out, however,

observance of confidentiality by the staff concerned is not dependent on the public ownership of the contracting company.

The Italian Government also claims that the activities to be carried out by the specialized companies chosen for the development of the data-processing systems in question constitute a public service activity. Agreements concluded between the State and the companies chosen to carry out those activities are therefore excluded from the scope of the directive, Article 2(3) of which provides:

'When the State, a regional or local authority or one of the legal persons governed by public law or corresponding bodies specified in Annex I grants to a body other than the contracting authority — regardless of its legal status — special or exclusive rights to engage in a public service activity, the instrument granting this right shall stipulate that the body in question must observe the principle of non-discrimination by nationality when awarding public supply contracts to third parties.'

That argument cannot be accepted. The supply of the equipment required for the establishment of a data-processing system and the design and operation of the system enable the authorities to carry out their duties but do not in themselves constitute a public service.

Finally, the Italian Government claims that the derogation provided for in Article 6(1)(e) of the directive should be applied in the case of the data-processing system at the Finance Ministry. Under that subparagraph, contracting authorities need not apply the procedures referred to in Article 4(1) and (2) 'for additional deliveries by the original supplier which are intended either as part replacement of normal supplies or installations, or as the extension of existing supplies or installations where a change of supplier would compel the contracting authority to purchase equipment having different technical characteristics which would result in incompatibility or disproportionate technical difficulties of operation or maintenance'.

28 In that regard it is sufficient to note that such cases of additional deliveries cannot justify a general rule that only companies in which all or a majority of the share capital is in Italian public ownership may be awarded supply contracts.

29 It follows from the foregoing that the claim based on failure to comply with Directive 77/62/EEC must also be upheld.

30 It must therefore be held that by providing 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, the Italian Republic has failed to fulfil its obligations under Articles 52 and 59 of the EEC Treaty and Council Directive 77/62/EEC of 21 December 1976.

Costs

31 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs. Since the defendant has failed in its submissions, it must be ordered to pay the costs.

On those grounds,

THE COURT

hereby:

(1) **Declares that by providing 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, the Italian Republic has failed to fulfil its obligations under Articles 52 and 59 of the EEC Treaty and Council Directive 77/62/EEC of 21 December 1976;**

(2) Orders the Italian Republic to pay the costs.

Due Slynn Schockweiler

Mancini Joliet Moitinho de Almeida Rodríguez Iglesias

Delivered in open court in Luxembourg on 5 December 1989.

J.-G. Giraud
Registrar

O. Due
President