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Press and Information

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Judgment of the Court of Justice in Case C-337/05

Commission of the European Communities v Italian Republic

ITALY IS DECLARED TO BE IN BREACH OF ITS TREATY OBLIGATIONS BY THE PURCHASE OF AGUSTA AND AGUSTA BELL HELICOPTERS WITHOUT ANY COMPETITIVE TENDERING PROCEDURE

The purchase of equipment, the use of which for military purposes is hardly certain, must necessarily comply with the rules governing the award of public contracts

The Commission of the European Communities brought an action against Italy concerning a long-standing and current practice of directly awarding, to Agusta SpA, contracts for the purchase of Agusta and Agusta Bell helicopters to meet the requirements of several military and civilian corps of the Italian State, without any competitive tendering procedure.

The Commission submitted that those contracts should, under the directive on the award of public supply contracts ¹, have been the subject of an open or a restricted procedure, but not of a negotiated procedure. The Commission maintains that the fleets of the State corps concerned are formed exclusively of helicopters of those makes, none of which was purchased following a competitive tendering procedure at Community level.

In its judgment delivered today, the Court of Justice of the European Communities notes, first of all, that Agusta has, since its formation, been a company governed by private law and, since 1974, a private company with government participation, that is to say a company whose capital is held in part by that State and in part by private shareholders. The Italian State cannot exercise over that company a control similar to that which it exercises over its own departments. **In the absence of an ‘in-house’ relationship**, the Court rules out the possibility that Italy could - on that basis - refrain from applying the procedures for the award of public contracts.

The Court then deals with the arguments concerning the **legitimate requirements of national interest**. Although the Treaty provides - in the case of situations which may involve public safety or national defence - for derogations from Community law, those derogations do not form a general exception and in such cases it is for the State to furnish evidence to establish their justification.

¹ Council Directive 93/36/EEC of 14 June 1993 coordinating procedures for the award of public supply contracts (OJ 1993 L 199, p. 1).

The Court points out, in particular, that only products intended for specifically military purposes may, under Article 296 EC, be eligible for the treatment provided for by the derogation relating to the legitimate requirements of national interest. Such is not the case of items for dual-use, civilian and military. Italy itself admits that the helicopters in question are certainly for civilian use and **possibly for military use**. For the Court, **the purchase of equipment, the use of which for military purposes is hardly certain, must necessarily comply with the rules governing the award of public contracts**. Such is the case of the supply of helicopters to military corps for the purpose of civilian use.

In addition, Italy argued - but did not prove - that the objective of preventing the disclosure of sensitive information relating to the production of the helicopters was unattainable within a competitive tendering procedure. The Court held therefore that **the requirement to impose an obligation of confidentiality in no way prevents the use of a competitive tendering procedure** for the award of a contract.

Finally, the Court rejects Italy's argument that it was necessary to ensure the interoperability of its fleet of helicopters for reasons of economy: Italy did not discharge the burden of proof as regards the reason for which only helicopters produced by Agusta would be endowed with the requisite technical specificities, or in what respect a change of supplier would have constrained it to acquire material manufactured according to a different technique.

Unofficial document for media use, not binding on the Court of Justice.

Languages available: EN FR IT

The full text of the judgment may be found on the Court's internet site

<http://curia.europa.eu/jurisp/cgi-bin/form.pl?lang=EN&Submit=rechercher&numaff=C-337/05>

It can usually be consulted after midday (CET) on the day judgment is delivered.

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