OPINION OF ADVOCATE GENERAL TESAURO

delivered on 17 November 1992 *

Mr President,
Members of the Court,

1. In the present case the Commission seeks a declaration from the Court that, in the procedure for inviting tenders for the construction of a bridge across the western channel of the Storebælt (Great Belt), the Kingdom of Denmark has failed to fulfil its obligations under Articles 30, 48 and 59 of the EEC Treaty and under Council Directive 71/305/EEC of 26 July 1971 concerning the coordination of procedures for the award of public works contracts. [1] The Commission challenges two aspects of the procedure for awarding the contract: a) the inclusion in the general tender conditions of a clause which invited tenders on condition that the greatest possible use was made of Danish materials and consumer goods and of Danish labour and equipment (hereinafter the 'Danish content clause'); b) the fact that the negotiations with the selected consortium were conducted on the basis of a tender which did not comply with the general tender conditions.

2. The facts and the pre-litigation procedure are described in detail in the Report for the Hearing, to which reference is made. Here I shall therefore merely recapitulate, so far as is necessary to make the subsequent observations easier to follow, the essential aspects of the matter.

The contract for the construction of a bridge over the western channel of the Storebælt was awarded to the European Storebælt Group (hereinafter 'ESG'), one of the five international consortia which were invited to submit tenders under a restricted invitation to tender put out by Aktieselskabet Storebæltsforbindelsen (hereinafter 'Storebælt'), a company wholly controlled by the Danish State and the contracting authority for the work in question. Storebælt, which had drawn up three different projects as a basis for tenders, opened talks with the preselected consortia and then pursued negotiations with ESG, which had exercised the option provided for in Condition 3, Clause 3, of the general tender conditions, of submitting an alternative tender; those negotiations ended in the signature of the contract on 26 June 1989.

3. On 18 May 1989, the Commission had contacted the Danish authorities to express its doubts about the compatibility with Community law of both the Danish content clause and the fact that the negotiations with ESG had been conducted on the basis of a tender which did not comply with Condition 3, Clause 3, of the general tender conditions. Not satisfied with the explanations offered by the Danish Government, the Commission sent a letter of formal notice on 21 June 1989 requesting *inter alia* postponement of the signature of the contract. In reply to that letter the Danish authorities informed the Commission that they did not consider it appropriate to postpone the signing of the contract, but that, by letter of 21 June, they had requested Storebælt to remove the Danish content clause, so that it no longer appeared in the final contract.

* Original language: Italian.

1 — OJ, English Special Edition 1971 (II), p. 682.

Considering that an infringement had been committed and that removal of the clause in question after the contract had been awarded did not expunge the failure to fulfil obligations, the Commission, by telex message of 14 July 1989, delivered a reasoned opinion addressed to Denmark in which *inter alia* it stated that, since the contract had already been signed, the only way for the situation to be remedied was to ask Storebælt to cancel the contract with ESG and to reopen the tendering procedure.

When the Kingdom of Denmark failed to comply with the reasoned opinion, the Commission brought proceedings under Article 169 and also applied for interim measures pursuant to Article 186 of the Treaty, but only in respect of its objection to the Danish content clause.

4. At the hearing of the application for interim measures on 22 September 1989, the Danish Government stated that it recognized that the Danish content clause constituted a breach of the fundamental principle of non-discrimination enshrined in the EEC Treaty and undertook (a) to avoid any discriminatory clause or practice in relation to future contracts for public works or supplies, (b) to ensure that compensation would be paid for the damage incurred by the tenderers provided that they were able to demonstrate that their claims for damages were well founded in Danish law, and (c) in any event to ensure that bidding costs were recovered through arbitration, without the undertakings concerned having to establish that their failure to be awarded the contract was caused by the discriminatory effect of the Danish content clause.

Following that statement, the Commission withdrew its application for interim measures but continued proceedings under Article 169, retaining as one of its grounds of complaint that on which the application for interim measures had been based. Subsequently, however, the Commission, which in its application initiating proceedings had reserved the right at a later date to supplement and develop the grounds of its application, requested — and for the most part obtained — from the Danish Government various documents relating to the tendering procedure and to the final version of the contract, on the basis of which it then adduced, in the form of a reply, new reasons in support of its application. That step prompted the Danish Government to raise, in its rejoinder, a series of preliminary objections of inadmissibility directed at both the ground of application concerning the Danish content clause and that concerning the negotiations which took place between Storebælt and ESG. Those objections of the Danish Government will now be considered together with the two grounds of application relied on by the Commission.

(a) *The Danish content clause*

5. The Danish Government objects that the Commission is widening the dispute to include clauses in the general tender conditions other than those referred to in the letter of formal notice or the reasoned opinion since, in substance, new pleas in law are thereby introduced, which are contained and developed only in the reply.

Indeed, in the course of the pre-litigation procedure, the Commission referred to only the Danish content clause as laid down in Condition 6, Clause 2, of the general tender conditions; in its application, however, and

especially in its reply, it objected to various other clauses, which were either contained in the same tender conditions or introduced for the first time in the final version of the contract with the result that the Danish content condition still features in the contract, particularly in the form of requirements concerning materials.

The Commission seeks to justify that step by claiming that in the pre-litigation procedure its purpose was to challenge the Danish content clause in general and that, therefore, the submissions contained in the reply should be understood as simply amplifying this more general ground of application and do not constitute new separate pleas in law. Indeed, it cannot be denied that the clauses referred to by the Commission both in the originating application and in the reply are in essence no more than particular instances of the Danish content condition as expressed in Condition 6, Clause 2, of the general tender conditions.

6. That said, it should be pointed out that, according to settled case-law, [2] the scope of an application under Article 169 of the Treaty is delimited by the pre-litigation procedure provided for in that article as well as by the forms of order sought, and both the reasoned opinion and the application must be based on the same grounds and pleas in law. Although the Court allows new matters of fact to be raised in the course of an action if they are 'of the same kind as those to which the reasoned opinion referred and constituted the same conduct', [3] those facts must nevertheless, according to Article 42(2) of the Rules of Procedure, have occurred after delivery of the reasoned opinion or, in any event, the applicant must have been unaware of them at the time of lodging the application.

In so far, then, as the objections raised for the first time by the Commission in the application and the reply concern clauses in the general tender conditions, and therefore clauses which already existed when the letter of formal notice was sent, the inescapable conclusion according to settled case-law is that the Commission should have, or at least could have, known of them.

It follows that those 'discriminatory' clauses may not be taken into consideration in these proceedings: the preliminary objection of inadmissibility raised by the Danish Government must therefore be upheld.

Nevertheless, I must add that, put in those terms, the question is a purely formal one. By that I mean that, if the Danish content clause is incompatible with Community law — a fact not in dispute — it seems to me that the defaulting State has a duty in any case to accept the obvious consequences, that is to say, to remove all those provisions which embody the Danish content condition. That the Danish Government was well aware of this is evident both from its reply to the reasoned opinion, in which it gave assurances that the final version of the contract contained no clause analogous to the Danish content condition, and from its statement to the effect that, since it had to remove the

2 — See, most recently, the judgment in Case C-52/90 *Commission* v *Denmark* [1992] ECR I-2187, paragraph 23.

3 — See the judgment in Case 42/82 *Commission* v *France* [1983] ECR 1013 and in Case 113/86 *Commission* v *Italy* [1988] ECR 607.

Danish content condition before the contract was signed, and therefore had little time in which to act, some specific instructions regarding the use of Danish materials had escaped its notice, simply because it was acting in haste. [4]

7. Next, with regard to those clauses which were included for the first time in the final version of the contract and which, according to the Commission, also formed Danish content specifications, it should first of all be observed that the form of order sought by the Commission in respect of the plea in law in question concerns only the unlawfulness of the procedure for awarding the contract. Therefore, unlike the 'discriminatory' clauses in the general and specific tender conditions, those which were added to the final version of the contract cannot have had any influence on the conduct of that procedure. [5] Strictly speaking, therefore, those clauses could serve as the basis for a separate action because, if they are unlawful, they would clearly constitute an infringement of Community law in the course of being committed, since the construction of the bridge is still in progress.

Of course, it could also be argued that to take into consideration, for the purposes of these proceedings, requirements in those clauses which are possibly unlawful, is unlikely to lead to any significant change in the subject-matter of the action, since the grounds of objection are of the same nature as those raised in the reasoned opinion and relate to the same conduct. Besides, if the final version of the contract was in fact drawn up before the reasoned opinion was delivered, it follows that the applicant institution — which, moreover, cannot be accused of either delay or negligence given the extreme rapidity with which it brought the present proceedings (less than one month elapsed between the commencement of the pre-litigation procedure and the lodging of the application) — only gained actual knowledge of it after the action had been brought.

However, in view of the Court's restrictive approach to the question of the widening of the subject-matter of the action to include facts of which the applicant was unaware at the time of the delivery of the reasoned opinion, I propose, having regard to the principles of procedure which govern actions under Article 169, that the preliminary objection of inadmissibility raised by the Danish Government should be allowed on this point, too.

8. Now that it has been established that the subject-matter of the plea under examination is confined to the Danish content clause, as expressed in Condition 6, Clause 2, of the general tender conditions, and bearing in mind that the incompatibility of that clause with Articles 30, 48 and 59 of the Treaty is not in dispute, the first point to be examined is whether or not the Danish Government, in removing the clause in question, complied with the reasoned opinion. Indeed, as will be recalled, that clause was removed before the contract was signed (26 June) and thus before the Commission delivered its reasoned opinion to the Danish Government (14 July). And it is precisely in view of this circumstance that the Danish Government submits that the application should be declared inadmissible or at the very least dismissed, by analogy with the Court's decision

4 — See page 44 of the rejoinder. In fact, the Danish Government expressly recognized that some provisions of the contract, described as being of secondary importance, still contain Danish content specifications.

5 — Of course, the observations which I have just made hold true in this case, too: it would at the very least be illogical if the Danish Government, having recognized the incompatibility of the Danish content clause with Community law and therefore requested its removal, were then to allow unlawful requirements of the same kind to be included in the final version of the contract.

in Case C-362/90 *Commission* v *Italy*. [6] In that connection I must point out immediately that in my opinion the case under examination is not comparable with the case just mentioned.

In Case C-362/90 the infringement complained of had already produced all its effects by the time the reasoned opinion was delivered. Furthermore, the Court specifically criticized the Commission for its failure to 'act in good time in order to prevent, by means of procedures available to it, the infringement complained of from producing effects and did not even invoke the existence of circumstances preventing it from concluding the pre-litigation procedure laid down in Article 169 of the Treaty before the infringement ceased to exist'. [7]

9. The situation in the case now before us is quite different. As I have already mentioned, in its letter of formal notice the Commission not only requested the explanations sought within seven days but also postponement, during that interval, of the signature of the contract. By meeting the Commission's requests, the Danish Government could therefore have avoided 'consummating' its failure to fulfil obligations; instead of doing that, it announced, in the course of the Treaty infringement proceedings, in its reply to the letter of formal notice, that Storebælt had already signed the contract. The taking of that step precluded the reopening of the procedure for awarding the contract, which is why, in its reasoned opinion, the applicant requested, as the only way to secure compliance with Community law, that the contract be rescinded and the tendering procedure be reopened. Consequently, in so far as the contract was concluded on the basis of an irregular tendering procedure, it seems to me that — given the undisputed unlawfulness of the Danish content condition — the existence of an infringement cannot be denied.

It is obvious that the infringement could have been eliminated only by means of a fresh tendering procedure, since the procedure followed was conducted in flagrant breach of Community law. In other words, it unquestionably follows from the fact that the Danish content clause had influenced the submission of the tenders that its subsequent removal, even before signature of the contract, could not in any circumstances have made good such a serious defect in the tendering procedure.

What is more, I think it unlikely that the Danish Government can rely on the Commission's statement to the effect that it is no longer possible at this stage to secure full compliance with Community law in contending that the form of order sought by the Commission regarding its objection to the Danish content clause is no longer relevant. Indeed, it would be at the very least unusual if a Member State, which had been in a position to prevent the infringement from producing definitive effects, could later rely on the fact that the breach of obligations had already been consummated in order to avoid a declaration, pursuant to Article 171, that it had taken place. The purpose of a ruling by the Court to that effect is not to declare that Storebælt should have reopened the tendering procedure but, more simply, to declare that the procedure in question was conducted in breach of the applicable provisions of Community law.

6 — See the judgment in *Commission* v *Italy* [1992] ECR I-2353.

7 — See the judgment in Case C-362/90, cited above, at paragraph 12.

In conclusion, to accept the defendant's contention that the Danish content clause had already been removed before the reasoned opinion was issued and that, consequently, the formal objection to that clause is no longer relevant following the signature of the contract, would be tantamount to rewarding the fact that, even though infringement proceedings were already in progress, the breach of obligations had been 'consummated'.

One final observation on this point. In my view, it is all too clear that, if the Court were to accept the argument of the Danish Government, the whole raison d'être of the infringement proceedings would be rendered nugatory where there is a quite specific failure to fulfil obligations, that is to say where there is a risk that the failure will be already 'consummated' during the pre-litigation procedure and possibly before delivery of the reasoned opinion. Moreover, that is obviously a risk which arises almost as a matter of course in a sector such as public works contracts. Consequently, unless the procedure under Article 169 regarding breaches of obligations of the kind in question is to be deprived of meaning and devalued, there is little point in relying on the Court's finding that 'a matter may be brought before the Court of Justice only if the State concerned has not complied with the reasoned opinion', [8] nor can one contend, as in Case C-362/90 to which I referred earlier, that 'at the date of expiry of the period laid down in the Commission's reasoned opinion ..., the infringement complained of no longer existed' as it had produced all its effects. In the present case, the Commission initiated infringement proceedings in good time to prevent the infringement complained of from producing effects inasmuch as, since the final contract had not yet been signed, the State concerned was in a position to reopen the tendering procedure.

10. That said, it must now be established whether, and if so, to what extent, the Danish Government's statement of 22 September 1989 made in the proceedings for interim measures has any bearing on these proceedings. In that connection, the Danish Government contends that by that statement it not only recognized the existence of the infringement but also acknowledged its own financial liability towards the tenderers, so that the statement was equivalent in effect to a Court ruling definitively finding that an infringement had been committed.

Although the Danish Government recognized the infringement and gave assurances that compensation would be provided for the damage suffered by the tenderers, the fact is that this does not remove the interest in pursuing proceedings. The fact that the statement caused the applicant institution to withdraw its application for interim measures is merely the result of an agreement between the parties concerning only the proceedings for interim measures so as to settle those proceedings specifically. However, it does not seem to me correct to deduce from that conduct of the Commission that the action is inadmissible or unfounded. Otherwise, the principle would be established that the Commission *must* abandon an action whenever, in the course of proceedings, the breach of obligations is no longer contested and at the same time it is acknowledged that compensation should be paid for any damage suffered by individuals on account of the breach.

11. Moreover, it appears from the settled case-law on this point, in which the Court

8 — See the judgment in Case 121/84 *Commission* v *Italy* [1986] ECR 107, paragraph 10.

has from time to time expressly pointed out that the interest in pursuing an action may reside in establishing the basis of liability which a Member State may incur as a result of its default, [9] that there must in any case be a presumption that the Commission has an interest in pursuing an action which it has initiated under Article 169, even where the breach of obligations is not contested. [10]

In short, as the Court has recognized, [11] the Commission does not have to demonstrate an interest in taking action in order to pursue an action which it has initiated. As 'guardian' of the Treaties, the Commission has in any case an interest in obtaining a declaration from the Court that a Member State has failed to fulfil its obligations: for that purpose, the only relevant factor is that the State in question did not bring the infringement complained of to an end within the period laid down in the reasoned opinion. On the other hand, the fact that the infringement in question was acknowledged before delivery of the reasoned opinion is, contrary to the Danish Government's contention, totally irrelevant.

In the light of the foregoing I am therefore of the opinion that, since Storebælt awarded a public works contract on the basis of a clause which invited tenders subject to the condition that the greatest possible use was made of Danish materials and labour, the Kingdom of Denmark has failed to fulfil its obligations under Articles 30, 48 and 59 of the Treaty.

(b) *The negotiations conducted on the basis of a tender which did not comply with the general tender conditions*

12. In relation to this ground of application, the Danish Government has again raised a number of objections of inadmissibility, concerning both the additional matters of fact which the Commission added in its reply in support of the ground in question and — above all — an alleged change to the form of order sought, widening its scope.

With regard to the facts mentioned by the Commission for the first time in its reply, that is to say, the 'presumed' negotiations between Storebælt and ESG, which supposedly resulted in a final contract which contained provisions incompatible with the tender conditions, [12] the same considerations apply as have already been made in relation to the ground concerning the Danish content condition. It clearly follows from the settled case-law, already referred to, that the Commission may not base the ground in question on facts which were not challenged in the course of the pre-litigation procedure.

However, the matter of the re-wording of the form of order sought is more delicate. Originally, the Commission took objection to the fact that Storebælt had held negotiations with ESG on the basis of a tender which did not comply with Condition 3, Clause 3, of the general tender conditions. In its reply the Commission then re-worded the form of order sought, claiming that, on the basis of a tender which did not comply with

9 — See, most recently, the judgment in Case C-29/90 *Commission* v *Greece* [1992] ECR I-1971, paragraph 12.

10 — On that point, it is sufficient to note that the Court has never questioned the Commission's interest in obtaining a declaration that a Member State has failed to fulfil its obligations, even when the default in question was fully acknowledged by the Member State and where there was obviously no problem regarding compensation for damage.

11 — See judgment in Case 167/73 *Commission* v *France* [1974] ECR 359, paragraph 15.

12 — In its reply the Commission no longer referred exclusively to the negotiations concerning the reservation made by ESG with respect to Condition 3, Clause 3, of the general tender conditions, but also referred to negotiations allegedly conducted on the unit price of embankment sand, penalties and making up of delays, the contribution of support for the employment market, the price-adjustment formula and so on.

the general tender conditions, Storebælt had held negotiations with ESG with the result that the final contract contained amendments to the conditions of the invitation to tender favouring exclusively that individual tenderer and relating in particular to price factors. Furthermore, the Commission added an express reference to the principle of equal treatment as the basis of Directive 71/305, whereas the form of order sought in the original application refers, in particular, to Title IV of that directive.

The Danish Government contends that, by re-wording the form of order sought in that respect, its scope has been widened; it cites settled case-law to the effect that a party may not change the subject-matter of a dispute in the course of proceedings and contends that, consequently, the merits of the action must be assessed with regard only to the form of order sought in the application originating proceedings. [13] The defendant further contends that the form of order sought, as now re-worded, has a new legal basis, namely, the principle of equal treatment which underlies the directive. Such a step is unacceptable in so far as it amounts to a breach of the rights of the defence, since the defendant has had no opportunity to submit its observations on those points in good time and in the prescribed manner.

13. I cannot accept that argument. In the first place, as the Danish Government itself has acknowledged, a reframing of the form of order sought is permissible if it delimits, in the sense of 'restricts', the formal claim. In my opinion, that is precisely the position in the present case, in so far as the Commission — by no longer relying in general on the fact that the negotiations were conducted on the basis of a tender which did not comply with the general tender conditions, but rather on the fact that the subject-matter of those negotiations was a clause in the general tender conditions which was not open to derogation and that they led to results manifestly contrary to the principle underlying Directive 71/305, which is, namely, the equal treatment of tenderers — in the end essentially delimited and restricted the scope of its charge as expressed in the reasoned opinion.

With regard to the argument that the principle of equal treatment constitutes a new legal basis, I would first of all observe that, although such a principle was actually included in the form of order sought for the first time in the reply, the Commission had already taken issue with the Danish Government during the pre-litigation procedure for breach of that principle. In particular, I would remind the Court that the Commission expressly stated in its reasoned opinion that the fact of having held negotiations on the basis of a tender which did not comply with the general tender conditions 'infringed the principle of equal treatment of all contractors which lies at the heart just as much of national laws in the field of procurement as of Council Directive 71/305'. It follows, therefore — as is clear moreover from both the reply to the reasoned opinion and from the defence — that the Danish Government had an opportunity to submit its observations in that regard.

13 — See, for instance, the judgment in Case 278/85 *Commission* v *Denmark* [1987] ECR 4069.

14. That said, let me move on to consider the substance of the ground of application. It is appropriate first of all to examine Condition 3, Clause 3, of the general tender conditions, that is to say, the wording of the clause with which ESG failed to comply when submitting its tender.

According to that provision, the price for an alternative tender must include the costs of the detailed design of the project submitted by the tenderer for acceptance by the contracting authority; in addition, the tenderer must itself assume full liability for the project and for its execution, including the risk of variations in the quantities on which the alternative tender is based. Condition 3, Clause 3, also provides that the tenderer must quote a reduced price for the project in the event that the contracting authority decides itself to undertake the detailed design directly. In that case, liability for the planning of the project and the risk of variations in quantities, in so far as they result from the detailed design of the project, is to be borne by the contracting authority.

The alternative tender submitted by ESG for a bridge in reinforced concrete provided, at paragraph 6.1 (actual tender), that the contracting authority was to undertake the detailed design of the project and to assume full liability for its execution, and for the risk of variations in the quantities. At paragraph 6.2 of the tender, ESG proposed a further option whereby it would undertake the design of the project itself for an additional cost of DKR 42 million; even under that arrangement, however, the tenderer considered that it should be for the contracting authority to assume liability for execution of the project and for the risk of variations in the quantities, a risk involving an estimated DKR 5 million.

15. In my opinion, it clearly follows from the wording of paragraph 6.2 that a tender framed in those terms does not comply with Condition 3, Clause 3, of the general tender conditions. The argument put forward by the Danish Government — according to which the contracting authority is only to assume liability for execution of the project and for the risks of variations in the quantities in the event that it undertakes the design of the project — is moreover contradicted by Storebælt itself, as is clear from the note of 21 June 1989 annexed to the Danish Government's reply to the Commission's request for clarification. [14]

The Commission originally claimed that, since the tender did not comply with the general tender conditions, the very fact that Storebælt had given it consideration, and entered into negotiations on that basis, constituted a breach of the principle of equal treatment to which Title IV of Directive 71/305 gives expression.

In particular, although the Commission acknowledges that tenderers may make reservations in their tenders, it believes that the availability of that option had its limit in the fundamental requirements contained in the general tender conditions, of which Condition 3, Clause 3, is certainly an example. It follows that Storebælt failed to undertake an objective comparison of the tenders submitted under identical conditions, which in turn means that the last stage of the tendering procedure was not conducted in a proper

14 — In order to show that the tender submitted by ESG, in the form described at paragraph 6.2, in no way influenced the result of the negotiations, Storebælt states in that note that it had not accepted the proposal put forward by ESG in terms of which the contracting authority would have borne 'le risque lié à la conception du projet et aux quantités, même si l'entrepreneur effectuait cette conception' ('the risks linked to the design of the project and the quantities involved, even if the tendering company undertook the design').

manner so far as the other tenderers were concerned. As I have already mentioned, the Commission then amplified this complaint in its reply, stating that the negotiations between ESG and Storebælt were incompatible with Community law in so far as they had an effect on prices.

16. Indeed, as I have just explained, ESG had undertaken to take on the detailed design of the project for a fixed sum of DKR 42 million, but did not undertake to assume liability for the project or for the risks involved. Those conditions must, therefore, have been the subject of negotiation, as must the risk relating to quantity variations.

Given the Danish Government's refusal to provide the Commission with the documents concerning the negotiations in question, [15] it is not possible to say in what way Storebælt took into account the reservations in question and fixed the corresponding prices. The fact remains, however, that some of the conditions contained in the general tender conditions were amended in the course of the negotiations, with the result that — given the nature of those conditions — the contract price, as quoted in the tender, was changed.

Furthermore, it appears from the documents submitted by the Commission that the contract concluded with ESG provides that its liability is to be limited to DKR 300 million and to last no longer than six years, which is clearly contrary not only to Condition 3, Clause 3, of the general tender conditions, under which the contractor must assume full liability in respect of the project and its execution, but also, and above all, to the principle of equal treatment: it is in fact clear that the other tenderers, in establishing a price for the contract, took into account the fact that they would have to assume full liability for the work. As regards the risk of variations in the quantities, the contract provides for a fixed sum of DKR 5 million, which corresponds to the estimate made by ESG in the variation on its tender: it is thus clear that the negotiations in question did indeed affect prices.

Given all those facts, it is impossible to avoid the conclusion that the tender conditions, as laid down in the contract documents (and as far as here relevant, in Condition 3, Clause 3) were amended in order to favour a particular tenderer. It follows that the conditions of competition between the tenderers were thereby distorted and that, consequently, the principle of equal treatment between tenderers was breached.

17. The Danish Government contends nevertheless that the increase in the price was quite proportional to the total cost of the work in question and that, in any case, the facts complained of by the Commission are not governed by Community law; in particular, the possibility of accepting offers which contain reservations and the contracting authority's right to hold negotiations with tenderers are both matters governed by national law. The Danish Government therefore maintains that Directive 71/305 does not govern the limits within which negotiations

15 — The grounds for the refusal being (a) the documents concerned were confidential, and (b) Storebælt was under no obligation, in any case, to determine the price of the reservations in question.

may take place and that the relevant national law was applied without discrimination of any kind between the different tenderers.

On that point, I would say straightaway that I do not think that the Danish Government's statement that 'on ne peut inférer de la directive 71/305 une règle imposant aux Etats membres des obligations supérieures aux exigences du droit danois en matière de marchés publics en ce qui concerne le fait de ne pas prendre en considération une offre comportant une réserve ou de s'abstenir absolument de toute négociation' ('one cannot deduce from Directive 71/305 the existence of a rule subjecting Member States to obligations which override the requirements of Danish law on public works contracts on the question of not taking into consideration a tender containing a reservation or wholly avoiding negotiation') merits any particular comment. [16] It is self-evident that in so far as Danish rules are shown to be incompatible with Community law, the latter prevails.

Secondly, I do not see the point of the Danish Government's complaint that the Commission interpreted the directive as having been based on the principle of equal treatment. It would be strange, to say the least, to take the view that, since the principle in question is not expressly codified in any of the provisions of the directive in question, it is extraneous to the directive, when the directive's very purpose is first and foremost to secure equality for all those who take part in a tendering procedure.

18. It is true that Directive 71/305 does not contain any specific rule regarding reservations; nor does it expressly codify the principle of equal treatment. That does not mean, however, that all matters related to public contracts may be governed by national law without taking into account such a fundamental principle. And quite frankly, I find it astonishing that the parties have expended so much energy in demonstrating, or denying, that the principle of equal treatment lies at the heart of Directive 71/305. On that point, it is hardly necessary to point out that, where a public contract falls to be awarded, it is precisely because the procedure is a competition that it must be ensured that all those who take part have an equal chance: otherwise, it would no longer be a public tendering procedure but private bargaining. In sum, equal treatment underlies any set of rules governing procedures for the award of public contracts since it is the very essence of such procedures.

Furthermore, both the preamble to Directive 71/305 and its provisions, taken as a whole, are more than indicative in this respect. Suffice it to say that it is expressly stated that the fixing of objective criteria for participation constitutes one of the fundamental principles, observation of which must be ensured throughout procedures for the award of public works contracts (third recital); that tenders must be submitted in accordance with the conditions contained in the contract notice, in order to ensure 'development of effective competition', and all the more so in the context of restricted procedures (penultimate recital).

19. As regards the joint statement of July 1989, [17] attached to Council Directive 89/440/EEC [18] — which in open or restricted procedures rules out all negotiation with tenderers on fundamental aspects

16 — See page 54 of the Danish Government's rejoinder.

17 — OJ 1989 L 210, p. 22.

18 — Directive of 18 July 1989 amending Directive 71/305/EEC concerning coordination of procedures for the award of public works contracts (OJ 1989 L 210, p. 1).

of contracts, variations in which are likely to distort competition, and in particular on prices — it does not seem to me possible to accept the Danish Government's view that the statement in question has no legal consequences and that, in any case, since it postdates the events in issue, it is of no significance in these proceedings.

Nor do I believe, given the observations set out above, that the Danish Government may rely on the Court's statement in the judgment in *Antonissen*, [19] according to which the relevance of a declaration depends on its content and on whether reference is made to it in the wording of the provision in question. In my opinion, it is indisputable that the statement referred to is purely declaratory, since the principle of equal treatment of tenderers — whose purpose in this particular context is, in particular, to ensure that competition between those taking part in the tendering procedure is not distorted — lies at the very heart of the rules under consideration in this case.

One last point. The defendant Government's contention that the national law governing the award of public contracts was applied without any discrimination to all those taking part in the tendering procedure raises the question whether, that being the case, it may be concluded that the prohibition of discrimination laid down in Directive 71/305 was infringed. I have no hesitation in replying that if, as in this case, the Danish rules governing the award of public contracts are such that — even if applied without discrimination — they conflict with the principle of equal treatment as apparent in Directive 71/305 and as restated in the common statement of July 1989, then that national law must be considered incompatible with Community law.

20. In the light of the foregoing I therefore propose that the Court uphold the application and order the defendant State to pay the costs.

19 — Judgment in Case C-292/89 *Antonissen* [1991] ECR I-745.