

## Case C-243/89

Commission of the European Communities

v

Kingdom of Denmark

(Award of a works contract — Bridge over the ‘Storebælt’)

Report for the Hearing .....	I - 3354
Opinion of Advocate General Tesauro delivered on 17 November 1992 .....	I - 3373
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### Summary of the Judgment

- 1. Actions against Member States for failure to fulfil obligations — Subject-matter of the proceedings — Determination during the pre-litigation procedure — Subject-matter subsequently widened — Not permissible*  
(EEC Treaty, Art. 169)
- 2. Actions against Member States for failure to fulfil obligations — Examination by the Court as to whether an action is well founded — Acknowledgement by the Member State concerned of its failure to fulfil its obligations and of its liability with regard to individuals — Not material*  
(EEC Treaty, Art. 169)
- 3. Approximation of laws — Procedures for the award of public works contracts — Directive 71/305 — Award of contracts — Condition requiring the use to the greatest possible extent of national products and labour — Negotiations with a tenderer on the basis of a tender not complying with the tender conditions — Free movement of goods — Freedom of movement for persons — Freedom to provide services — Not permissible*  
(EEC Treaty, Arts 30, 48 and 59; Council Directive 71/305)

1. In actions brought under Article 169, the pre-litigation stage defines the subject-matter of the proceedings and this cannot subsequently be widened. The possibility for the Member State concerned to submit its observations constitutes an indispensable guarantee required by the Treaty and observance of that guarantee is an essential formal requirement of the procedure for establishing that a Member State has failed to fulfil its obligations.
2. In an action for failure to fulfil obligations, brought by the Commission under Article 169 of the Treaty, whose expediency only the Commission decides, it is for the Court to determine whether or not the alleged breach of obligations exists, even if the State concerned no longer denies the breach and recognizes that any individuals who have suffered damage because of it have a right to compensation. Otherwise, by admitting their breach of obligations and accepting any ensuing liability, Member States would be at liberty at any time during Article 169 proceedings before the Court to have them brought to an end without any judicial determination of the breach of obligations and of the basis of their liability.
3. By letting tenders be invited, in a procedure for the award of public works contracts, on the basis of a condition requiring the use to the greatest possible extent of national materials, consumer goods, labour and equipment and by letting negotiations be conducted with the selected tenderer on the basis of a tender not complying with the tender conditions, a Member State fails to fulfil its obligations under Articles 30, 48 and 59 of the Treaty and under Directive 71/305.

## REPORT FOR THE HEARING In Case C-243/89 \*

### I — Legislative background

1. On 26 July 1971 the Council adopted Directive 71/305/EEC of 26 July 1971 concerning the coordination of procedures for the award of public works contracts (OJ, English Special Edition 1971 (II), p. 682, hereinafter 'the directive'). Its purpose is to

coordinate procedures for the award of public works contracts awarded in the Member States on behalf of the State, or regional or local authorities or other legal persons governed by public law, on the basis of the following principles: prohibition of technical specifications that have a discriminatory effect, adequate advertising of contracts and the fixing of objective criteria for participation. According to Article 2, in awarding public works contracts the authorities awarding contracts are to apply their

\* Language of the case: French.