

JUDGMENT OF THE COURT

16 June 1987 *

In Case 118/85

Commission of the European Communities, represented by Sergio Fabro, a member of its Legal Department, acting as Agent, with an address for service in Luxembourg at the office of Georges Kremlis, a member of the Commission's Legal Department, Jean Monnet Building, Kirchberg,

applicant,

v

Italian Republic, represented by Luigi Ferrari Bravo, Head of the Litigation Department for Diplomatic Affairs, acting as Agent, assisted by Ivo M. Braguglia, *Avvocato dello Stato*, with an address for service in Luxembourg at the Italian Embassy,

defendant,

APPLICATION for a declaration that the Italian Republic has failed to fulfil its obligations under Article 5 (2) of Commission Directive 80/723 of 25 June 1980 on the transparency of financial relations between Member States and public undertakings (Official Journal, L 195, p. 35),

THE COURT,

composed of: Lord Mackenzie Stuart, President, C. Kakouris, T. F. O'Higgins and F. Schockweiler (Presidents of Chambers), G. Bosco, T. Koopmans, K. Bahlmann, R. Joliet and G. C. Rodríguez Iglesias, Judges,

Advocate General: J. Mischo

Registrar: H. A. Rühl, Principal Administrator

* Language of the Case: Italian.

having regard to the Report for the Hearing and further to the hearing on 30 September 1986,

after hearing the Opinion of the Advocate General delivered at the sitting on 4 November 1986,

gives the following

Judgment

- 1 By an application lodged at the Court Registry on 29 April 1985, the Commission of the European Communities brought an action before the Court under Article 169 of the EEC Treaty for a declaration that by refusing to supply information to it concerning the Amministrazione Autonoma dei Monopoli di Stato, the Italian Republic has failed to fulfil its obligations under Article 5 (2) of Commission Directive 80/723 of 25 June 1980 on the transparency of financial relations between Member States and public undertakings (Official Journal L 195, p. 35).
- 2 Reference is made to the Report for the Hearing for the facts of the case, the course of the procedure and the arguments of the parties, which are mentioned or discussed hereinafter only in so far as is necessary for the reasoning of the Court.
- 3 It is not contested that the Amministrazione Autonoma dei Monopoli di Stato (hereinafter referred to as the 'AAMS') exercises an economic activity inasmuch as it offers goods and services on the market in the manufactured tobacco sector. Furthermore, it is common ground that the AAMS does not have legal personality separate from that of the State.
- 4 The Italian Government defends its refusal to supply the information sought by the Commission on the ground that the AAMS may not be regarded as a 'public undertaking' within the meaning of Article 2 of Directive 80/723, but must be regarded as one of the 'public authorities' within the meaning of the same article. In that regard, it contends that if the AAMS, as a State body, is a public authority, it cannot be at the same time a public undertaking within the meaning of the directive.

5 According to Article 2 of Directive 80/723, 'public authorities' means 'the State and regional or local authorities' and 'public undertaking' means 'any undertaking over which the public authorities may exercise directly or indirectly a dominant influence by virtue of their ownership of it, their financial participation therein, or the rules which govern it'.

6 It should be noted, as the Court stated in its judgment of 6 July 1982 (Joined Cases 188 to 190/80 *French Republic, Italian Republic and United Kingdom of Great Britain and Northern Ireland v Commission* [1982] ECR 2545) that the essential purpose of Directive 80/723 is to promote the effective application to public undertakings of the provisions contained in Articles 92 and 93 of the Treaty concerning State aid. As can be seen from the recitals in the preamble to the directive, the complexity of the relations between national public authorities and public undertakings tends to hinder the performance by the Commission of its supervisory duties with the result that a fair and effective application of the aid rules in the EEC Treaty is possible only if those financial relations are made transparent. In particular, the sixth recital in the preamble states that with regard to public undertakings, such transparency should enable a clear distinction to be made between the role of the State as public authority and its role as proprietor.

7 The distinction provided for in the sixth recital flows from the recognition of the fact that the State may act either by exercising public powers or by carrying on economic activities of an industrial or commercial nature by offering goods and services on the market. In order to make such a distinction, it is therefore necessary, in each case, to consider the activities exercised by the State and to determine the category to which those activities belong.

8 It must be observed that for that purpose, it is of no importance that the State carries out the said economic activities by way of a distinct body over which it may exercise, directly or indirectly, a dominant influence according to the criteria laid down in Article 2 of the directive or that it carries out the activities directly through a body forming part of the State administration. In the latter case, the fact that the body is integrated into the State administration implies automatically the exercise of a dominant influence within the meaning of the said Article 2. In such cases, the financial relations can be even more complex and the transparency

which the directive seeks to achieve therefore becomes even more necessary. In this case, the fact that the AAMS is integrated into the State administration does not therefore prevent its being regarded as a public undertaking within the meaning of Directive 80/723.

- 9 The Italian Government also contends that in order for the public authorities to exercise an influence on a public undertaking, they must be legally distinct from the latter. In its opinion, a public undertaking must therefore necessarily have a legal personality distinct from that of the State.

- 10 That argument cannot be accepted. The purpose of Directive 80/723, as indicated above, would be called into question if its application depended on whether or not State bodies had legal personality distinct from that of the State. The result would be that, according to the legal form chosen by the Member States, the economic activities of an industrial or commercial nature carried on by certain State bodies would be covered by the directive whereas those carried on by other bodies would not. Furthermore, the application of the directive in regard to the same activity would differ from one Member State to another according to the legal form which each Member State gives to the public undertakings carrying on that activity.

- 11 In that regard, it must be pointed out, as the Court has frequently emphasized in its decisions, that having recourse to Member States' domestic law in order to limit the scope of provisions of Community law undermines the unity and effectiveness of that law and cannot, therefore, be accepted. Consequently, the fact that a body has or has not, under national law, legal personality separate from that of the State is irrelevant in deciding whether it may be regarded as a public undertaking within the meaning of the directive.

- 12 The Italian Government also considers that the concept of 'financial relations', the transparency of which the directive seeks to ensure, presupposes relations between distinct legal persons.

- 13 It must be observed in that regard that the fact that a body carrying out economic activities of an industrial or commercial nature is integrated into the State administration and does not have legal personality separate therefrom does not prevent the existence of financial relations between the State and that body. Through the mechanism of budgetary appropriations, the State disposes by definition of the power to influence the economic management of the undertaking, permitting it to grant compensation for operating losses and to make new funds available to the undertaking, and may therefore permit that undertaking to carry out its activities independently of the rules of normal commercial management, which is precisely the situation which the directive seeks to make transparent.
- 14 Finally, the Italian Government contends that it follows from Annex I to Council Directive 80/767 of 22 July 1980 adapting and supplementing in respect of certain contracting authorities Directive 77/62/EEC coordinating procedures for the award of public supply contracts (Official Journal L 215, p. 1) that the AAMS forms part of the Italian Ministry of Finance. A footnote to Annex I concerning the Ministry of Finance excludes the tobacco and salt monopolies from the list of Italian purchasing entities coming within the scope of the directive.
- 15 In that regard, it must be observed that in the context of Directive 80/767, as the Italian Government states, the AAMS is regarded as forming part of the Ministry of Finance. However, as can be seen from the Court's reasoning above, that circumstance is of no consequence in regard to whether or not it is a public undertaking within the meaning of Directive 80/723.
- 16 It follows from the foregoing considerations that the AAMS must be regarded as a public undertaking within the meaning of Article 2 of Directive 80/723.
- 17 It must therefore be declared that by refusing to supply information to the Commission concerning the Amministrazione Autonoma dei Monopoli di Stato, the Italian Republic has failed to fulfil its obligations under Article 5 (2) of Commission Directive 80/723 of 25 June 1980 on the transparency of financial relations between Member States and public undertakings.

Costs

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

On those grounds,

THE COURT

hereby:

- (1) Declares that by refusing to supply information to the Commission concerning the Amministrazione Autonoma dei Monopoli di Stato, the Italian Republic has failed to fulfil its obligations under Article 5 (2) of Commission Directive 80/723 of 25 June 1980 on the transparency of financial relations between Member States and public undertakings;**
- (2) Orders the Italian Republic to pay the costs.**

Mackenzie Stuart

Kakouris

O'Higgins

Schockweiler

Bosco

Koopmans

Bahlmann

Joliet

Rodríguez Iglesias

Delivered in open court in Luxembourg on 16 June 1987.

P. Heim

A. J. Mackenzie Stuart

Registrar

President