

OPINION OF ADVOCATE GENERAL

MAZÁK

delivered on 10 July 2007<sup>1</sup>

1. In the present action, brought pursuant to Article 226 EC, the Commission seeks a declaration from the Court that, by adopting a procedure, in existence over a long period and still followed now, of directly awarding to the firm Agusta contracts for the purchase of helicopters to meet the requirements of several ministries and departments without any tendering procedure, Italy has failed to fulfil its obligations under the directives on coordinating procedures for the award of public supply contracts, namely Council Directive 93/36/EEC<sup>2</sup> and, earlier, Council Directive 77/62/EEC,<sup>3</sup> Council Directive 80/767/EEC<sup>4</sup> and Council Directive 88/295/EEC.<sup>5</sup>

2. Italy contests the alleged infringement and in its defence relies, inter alia, on Article 296(1)(b) EC.

1 — Original language: English.

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

3 — Directive 77/62/EEC of 21 December 1976 coordinating procedures for the award of public supply contracts, OJ 1977 L 13, p. 1.

4 — Directive 80/767/EEC 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, OJ 1980 L 215, p. 1.

5 — Directive 88/295/EEC of 22 March 1988 amending Directive 77/62/EEC relating to the coordination of procedures on the award of public supply contracts and repealing certain provisions of Directive 80/767/EEC, OJ 1988 L 127, p. 1.

**I — Legal framework**

*A — Community law*

3. Directive 93/36 ('Directive 93/36' or 'the Directive') coordinates procedures for the award of public supply contracts and lays down requirements for the award of such contracts.

4. Article 1 of Directive 93/36 provides:

'(a) "public supply contracts" are contracts for pecuniary interest concluded in writing involving the purchase, lease rental or hire purchase, with or without

option to buy, of products between a supplier (a natural or legal person) and one of the contracting authorities defined in (b) below. The delivery of such products may in addition include siting and installation operations;

declared secret or the execution of which must be accompanied by special security measures in accordance with the laws, regulations or administrative provisions in force in the Member States concerned or when the protection of the basic interests of the Member State's security so requires'.

...

- (d) "open procedures" are those national procedures whereby all interested suppliers may submit tenders;
- (e) "restricted procedures" are those national procedures whereby only those suppliers invited by the contracting authorities may submit tenders;
- (f) "negotiated procedures" are those national procedures whereby contracting authorities consult suppliers of their choice and negotiate the terms of the contract with one or more of them.'
6. Article 3 of the Directive provides that: '[w]ithout prejudice to Articles 2, 4 and 5(1), this Directive shall apply to all products to which Article 1(a) relates, including those covered by contracts awarded by contracting authorities in the field of defence, except for the products to which [Article 296(1)(b) EC] applies.'
7. According to Article 6 of the Directive:

5. Under Article 2(1)(b), the Directive is not to apply to: 'supply contracts which are

'1. In awarding public supply contracts the contracting authorities shall apply the procedures defined in Article 1(d), (e) and (f), in the cases set out below. ...

3. The contracting authorities may award their supply contracts by negotiated procedure without prior publication of a tender notice, in the following cases:

...

(c) when, for technical or artistic reasons, or for reasons connected with protection of exclusive rights, the products supplied may be manufactured or delivered only by a particular supplier;

...

(e) for additional [deliveries] by the original supplier which are intended either as a partial replacement of normal supplies or installations or as the extension of existing supplies or installations where a change of supplier would oblige the contracting authority to acquire material having different technical characteristics which would result in incompatibility or disproportionate technical difficulties in operation and maintenance. The length of such contracts as well as that of recurrent contracts may, as a general rule, not exceed three years.

4. In all other cases, the contracting authorities shall award their supply contracts by

the open procedure or by the restricted procedure.'

8. As regards other specific provisions, they will be referred to when I analyse the grounds of the alleged failure to fulfil obligations.

## II — Facts, pre-litigation procedure and forms of order sought

### A — *Facts*

9. Following receipt of a complaint, the Commission opened an infringement procedure (No 2002/4194) in relation to Ordinance No 3231 of the President of the Council of Ministers of the Italian Republic of 24 July 2002 concerning aerial forest fire-fighting, which authorised recourse to negotiated procedures by way of derogation from the directives on public supply and service contracts. On the basis of this ordinance, the Corpo Forestale dello Stato (State Forestry Corps) purchased on 28 October 2002 two Agusta Bell AB 412 EP helicopters for approximately EUR 18 millions, 'by private negotiated contract, by derogation from the statutory provisions listed in Article 4 [of that

ordinance]’, that is to say in particular from the national legislation transposing Community directives on coordinating procedures for the award of public supply contracts. The Commission brought an action before the Court pursuant to Article 226 EC which resulted in a judgment in Case C-525/03 of 27 October 2005.<sup>6</sup>

approximately EUR 33.6 million; and (iii) on 19 March 2003, a contract for a lease-purchase of four A 109 Power helicopters for approximately EUR 12.8 million. The Commission noted that the *Corpo Nazionale dei Vigili del Fuoco*’s helicopter fleet is essentially composed of Agusta or Agusta Bell helicopters.

10. On the basis of the information received within the framework of the above procedure, the Commission noted that the specific infringement, forming the subject-matter of that procedure was not an isolated incident but was symptomatic of a general practice of directly awarding contracts for the purchase of helicopters manufactured by Agusta and Agusta Bell to meet the requirements of various corps of the Italian State, without any tendering procedure. The Commission therefore opened another infringement procedure (No 2003/2158).

12. With regard to the *Corpo Carabinieri* (Ministry of Defence), the information communicated to the Commission indicates that, in the period 2000 to 2002, the *Corpo Carabinieri* awarded two contracts to Agusta to purchase four helicopters, without any tendering procedure. The Commission noted that the *Corpo Carabinieri*’s helicopter fleet is also essentially composed of Agusta or Agusta Bell helicopters.

11. As regards the *Corpo Nazionale dei Vigili del Fuoco* (the fire brigade, Ministry of the Interior), the Commission noted in particular that the latter directly awarded the following contracts to the company Agusta, without any tendering procedure: (i) on 10 June 2002, a contract to purchase four Agusta Bell AB 412 helicopters for approximately EUR 30.5 million; (ii) on 23 December 2002, a contract to purchase four Agusta A 109 Power helicopters for

13. As to the *Corpo Forestale dello Stato* (Ministry of Agricultural and Forestry Policy), apart from the purchases which formed the subject-matter of Case C-525/03, that body is said to have purchased one other Agusta helicopter. Likewise, the Commission noted that the *Corpo Forestale*’s helicopter fleet is essentially composed of Agusta or Agusta Bell helicopters.

6 — *Commission v Italy* [2005] ECR I-9405.

14. Concerning the Department of Civil Protection, the Commission was informed that it concluded a contract to lease-purchase 'Agusta' helicopters.

15. As regards the other state corps, the Commission considered — in spite of the fact that it did not have any information as to the specific contracts — that the air fleets of the Guardia Costiera (Coastguard), an emanation of the Corpo delle Capitanerie di Porto (Ministry of Infrastructure and Transport), of the Guardia di Finanza (Revenue Guard Corps, Ministry of Economy and Finance) and of the Polizia di Stato (State Police, Ministry of the Interior) were also composed exclusively or predominantly of Agusta or Agusta Bell helicopters.

#### B — *Pre-litigation procedure*

16. The Commission — not having found any information pertaining to the organisation of a tender at Community level for the purchase of helicopters to meet the requirements of the abovementioned Italian ministries and departments — considered that the above helicopters manufactured by Agusta were directly purchased in breach of the procedures laid down in Directive 93/36 and, earlier, in Directive 77/62, Directive 80/767 and Directive 88/295. On 17 October 2003, the Commission sent the Italian Government

a letter of formal notice, inviting it to present its observations.

17. The Italian authorities replied by way of a fax from its Permanent Representation to the European Union of 9 December 2003. Considering the Italian authorities' reply unsatisfactory, the Commission sent the Italian Republic a reasoned opinion on 5 February 2004, inviting it to comply with that reasoned opinion within two months of notification thereof.

18. The Italian authorities responded to the reasoned opinion in three letters from the Italian Permanent Representation to the European Union.<sup>7</sup>

19. The Commission considered that the Italian authorities did not provide sufficient arguments to refute the observations formulated in the reasoned opinion and noted that the Italian Republic did not take any measures intended to bring the incriminated practice to an end, and accordingly brought

<sup>7</sup> — (i) The first dated 5 April 2004 communicating a note from the head of the legislative service of the Ministry for Community policy of 2 April 2004; (ii) the second dated 13 May 2004 transmitting a note from the President of the Council of Ministers (department of Community policy) of 11 May 2004; and (iii) the third dated 27 May 2004 forwarding a note from the Presidency of the Council of Ministers (department of civil protection) of 12 May 2004.

the present action before the Court on 15 September 2005.<sup>8</sup>

2. order the Italian Republic to pay the costs.'

20. The Commission claims that the Court should:

21. The Italian Republic contends that the action should be dismissed as inadmissible and, in any event, dismissed as unfounded.

1. declare that, since the Italian Government and, in particular, the Ministries of Home Affairs, Defence, Economics and Finance, for Agricultural and Forestry Policy, and for Infrastructure and Transport, and the Department of Civil Protection of the Presidency of the Council of Ministers, have adopted a procedure, which has been in existence for a long time and is still followed, of directly awarding to the firm Agusta contracts for the purchase of helicopters manufactured by Agusta and Agusta Bell to meet the requirements of the military corps of the fire brigade, the Carabinieri, the State Forestry Corps, the Coast-guard, the Revenue Guard Corps, the State Police and the Department of Civil Protection, without any tendering procedure, in particular without complying with the procedures provided for by Directive 93/36 and, earlier, by Directive 77/62, Directive 80/767 and Directive 88/295, the Italian Republic has failed to fulfil its obligations under the abovementioned directives;

22. Both parties submitted oral argument at the hearing which took place on 17 April 2007.

### III — Assessment

#### A — *Preliminary remarks*

23. It is important to note that the Italian Government does not contest having used the negotiated procedure for the purchase of helicopters for its corps and having directly awarded contracts to Agusta without prior publication of a tender notice at Community level. The discussion in this case therefore

<sup>8</sup> — The Commission also points out that, according to its information, the Italian Government by way of a negotiated procedure directly purchased in December 2003 further Agusta helicopters to meet the requirements of Guardia di Finanza, Polizia di Stato, Carabinieri and Corpo Forestale and, as follows from the date of their registration at the Italian Court of Auditors, Italy did not annul these contracts after it had received the reasoned opinion.

focuses on whether Italy could lawfully depart from the Community provisions on public supply contracts.<sup>9</sup> The form of order sought by the Commission refers not only to Directive 93/36 but also to earlier directives, namely Directives 77/62, 80/767 and 88/295. None the less, in view of the similarity of the relevant provisions in these directives, as suggested by the Commission, I consider that for reasons of clarity and simplicity it is sufficient for me to refer henceforth in my analysis solely to Directive 93/36.

did not refer to military supplies, the only supplies mentioned during that procedure being civil supplies. Moreover, in the framework of the pre-litigation procedure the Commission merely cited a number of contracts concluded in recent years, that is to say in 2002 and 2003, by Corpo dei Vigili del Fuoco, Corpo Forestale and the Carabinieri with Agusta. Therefore, the complaint raised during the pre-litigation procedure does not correspond to the form of order sought in the present application to the Court. In addition, in its rejoinder, Italy contends that having regard to the vague and imprecise character of the facts alleged by the Commission, the action does not satisfy the requirements laid down by the case-law. The Italian Republic submits that this has gravely affected its rights of defence.

## B — Admissibility

24. In its defence, the Italian Government disputes the admissibility of the present action.

26. Finally, the Italian Government contends that the part of the present action relating to the supplies for the Corpo Forestale dello Stato is inadmissible, since these supplies were based on Ordinance No 3231. The principle *ne bis in idem* would be breached, as that ordinance was already considered by the Court in Case C-525/03.<sup>10</sup>

### 1. Main arguments of the parties

25. Italy submits that during the course of the pre-litigation procedure the Commission

27. The Commission disputes the views of the Italian Republic. It considers that the pre-litigation procedure never concerned military

<sup>9</sup> — Namely Directive 93/36 and, previously, Directive 77/62, Directive 80/767 and Directive 88/295.

<sup>10</sup> — Cited in footnote 6.

supplies. Rather, it related to civil supplies intended to meet inter alia the needs of certain military corps of the Italian Republic. With regard to the alleged imprecision, the Commission contends that it had always been clear since the letter of formal notice that the subject-matter of the procedure was the practice of directly awarding contracts to Agusta over a long period of time, which was never suspended. The purpose of the procedure was clear to Italy, which could and has defended itself, by producing inter alia a number of annexed documents. In addition, the Commission submits that the procedure which gave rise to Case C-525/03 had a different subject-matter from that of the present case.

## 2. Appraisal

28. According to the Court's settled case-law, the Commission must indicate, in any application made under Article 226 EC, the specific complaints on which the Court is asked to rule and, at the very least in summary form, the legal and factual particulars on which those complaints are based.<sup>11</sup>

11 — See, inter alia, Case C-375/95 *Commission v Greece* [1997] ECR I-5981, paragraph 35 and the case-law cited therein.

29. In this regard, although it is true that the subject-matter of proceedings brought under Article 226 EC is circumscribed by the pre-litigation procedure provided for in that provision and that, consequently, the Commission's reasoned opinion and the application must be based on the same objections, that requirement cannot go so far as to mean that in every case exactly the same wording must be used in both, where the subject-matter of the proceedings has not been extended or altered but simply narrowed. Accordingly, in its application the Commission may clarify its initial grounds of objection provided, however, that it does not alter the subject-matter of the dispute.<sup>12</sup>

30. First of all, I find persuasive the Commission's explanation that the adjective 'military' refers quite unambiguously to certain 'corps' of the State, rather than to 'supplies', as contended by the Italian Government.<sup>13</sup> It is clear from the file before the Court that the Commission's case is only about civil supplies purchased in order to meet the requirements of certain corps of the Italian State, some of which are of a military character and some of a civil character. In fact, a comparison of the reasoned opinion and the application, which are framed in almost identical terms, reveals

12 — See, most recently, Case C-195/04 *Commission v Finland* [2007] ECR I-3351, paragraph 18 and the case-law cited therein. See also Case C-29/04 *Commission v Austria* [2005] ECR I-9705, paragraphs 25 to 27 and the case-law cited therein.

13 — The Commission is right to point out in its reply that Italy itself states in its defence that the Carabinieri, Guardia di Finanza and Guardia Costiera are State corps of a military character. The other corps are, however, civil.



that they are based on the same objections. In those circumstances, Italy's plea that the complaint raised during the pre-litigation procedure does not correspond to the form of order sought in the present action cannot be upheld.

Indeed that action was held inadmissible on account of the ordinance's temporary validity. A re-examination of the legality of Ordinance No 3231 has not been sought in the present proceedings. Rather the subject-matter of the present case is the alleged practice of directly awarding contracts for the purchase of helicopters to Agusta without any tendering procedure at Community level.

31. Secondly, as regards the Italian Government's contention that the facts alleged by the Commission were vague and imprecise, in my opinion in the pre-litigation procedure in the present case it was set out clearly why the Commission considered that the Italian Republic had failed to comply with the directives on public supplies. Indeed, in point 14 of the reasoned opinion and point 25 of the letter of formal notice, the Commission stated in unambiguous terms that it had been unable to obtain any information that would confirm that the Italian Government had followed public procurement procedures at Community level in its purchases of helicopters, in conformity with Directive 93/36 but also, previously, Directives 77/62, 80/767 and 88/295. The allegations were thus sufficiently clear for the Italian Government to defend itself.

33. It follows from the foregoing that the Italian Government's objection of inadmissibility must be dismissed.

## C — Substance

### 1. The in-house relations with Agusta

32. Finally, I consider that the principle *ne bis in idem* has not been breached in the present proceedings. In my view the subject-matter of Case C-525/03 concerned a specific national order (namely Ordinance No 3231) which authorised recourse to negotiated procedures by way of derogation from directives on public supply and service contracts.

34. In order to establish whether Italy actually breached the directives on public supply contracts, I shall first deal with the Italian Government's contention that until the end of the 1990s its relations with Agusta qualified as 'in-house' relations.

## (a) Main arguments of the parties

35. Italy submits that the relations with Agusta were ‘in-house’ relations and in its defence it traces the development of public participation in Agusta. Although Italy acknowledges that the direct award of contracts by the State to companies in whose capital it participated at the time was difficult to reconcile with the case-law on ‘in-house’ transactions, it contends that Agusta’s relations with the Italian State had rather the character of what it refers to as ‘auto-production of goods and services’ — used by the State and which constituted a fundamental part of the production portfolio of companies with a State participation.

36. The Commission submits that the Italian authorities did not prove that the criteria established by the Court in *Teckal* were fulfilled in the present case,<sup>14</sup> as Italy confined itself to submitting only vague and imprecise information.

## (b) Appraisal

37. As the Commission rightly argues, it is important to recall that, according to the Court’s settled case-law, a call for tenders, under the directives relating to public procurement, is not compulsory, even if the contracting party is an entity legally distinct from the contracting authority, where two cumulative conditions are met. First, the public authority which is a contracting authority must exercise over the distinct entity in question a control which is similar to that which it exercises over its own departments and, second, that entity must carry out the essential part of its activities with the local authority or authorities which control it.<sup>15</sup>

38. It was Italy’s duty not only to claim the existence of such a relationship between the contracting authorities and Agusta, but also to furnish such evidence as would enable the Court to conclude unequivocally that the above two conditions were met. However, it is apparent from the file before the Court that Italy’s claims in this respect are rather inconclusive and are not supported by any relevant documents. Therefore, in the present case, the Italian Government has failed to demonstrate that the two conditions have been met.

14 — See Case C-107/98 [1999] ECR I-8121.

15 — See *Teckal*, cited in footnote 14, paragraph 50, and, most recently, Case C-295/05 *Asemfo* [2007] ECR I-2999, paragraph 55 and the case-law cited therein.

39. Moreover, the Court recently clarified that the participation, even as a minority, of a private undertaking in the capital of a company in which the contracting authority in question is also a participant excludes in any event the possibility of that contracting authority exercising over that company a control similar to that which it exercises over its own departments.<sup>16</sup>

40. Therefore, in view of the fact pointed out by the Commission that between the 1970s and the 1990s Agusta was never wholly owned by the Italian State, that in itself suffices to exclude the existence of an in-house relationship with Agusta.<sup>17</sup> Moreover, as regards the period since 2000, when a joint-venture 'Agusta Westland' was created with the British company Westland, the in-house relationship with the Italian State has to be excluded as well.

41. Hence, I shall now consider whether the directives on public supply contracts were indeed breached.

<sup>16</sup> — See Case C-26/03 *Stadt Halle* [2005] ECR I-1, paragraphs 49 and 50.

<sup>17</sup> — Italy's argument that *Stadt Halle* is not applicable as it postdates the facts of the present case is to my mind not pertinent, as the latter judgment merely interpreted the law as it should have been interpreted *ab initio*.

2. The existence of the practice

(a) Main arguments of the parties

42. In view of the fact that the public supplies at issue fulfil the conditions laid down by Directive 93/36, in that due to helicopters' high prices the contracts have always largely exceeded the threshold of 130 000 Special Drawing Rights (SDRs),<sup>18</sup> the Commission maintains they should have been subject to an open procedure or to a restricted one, in conformity with Article 6 of the Directive, but not to a negotiated procedure. Therefore, the Commission submits that the infringement of Community law is demonstrated. Since the Italian authorities have explicitly admitted purchasing Agusta helicopters without any tendering procedure on the Community level before 2000, the Commission submits that the practice of directly awarding contracts to Agusta has been pursued after 2000, which is confirmed by the contracts annexed to its application.

43. In essence, as regards the *pre-2000* purchases, Italy argues that they qualified as 'in-house', while with regard to the

<sup>18</sup> — As provided in Article 5(1)(a)(ii) of Directive 93/36. That amount in SDRs is equal to approximately EUR 162 000 for 2002 and 2003.

*recent* purchases, Italy submits that the direct awarding of contracts is a result of the international security climate following 11 September 2001. Civil helicopters, therefore, must be assimilated to military ones. The purchases were thus exempted from Community law under Article 296 EC.

46. The 12th recital in the preamble to Directive 93/36 clearly notes that the negotiated procedure should be considered as exceptional and therefore applicable only in limited cases. To that end, Article 6(2) and (3) of the Directive exhaustively and expressly lists the cases in which the negotiated procedure may be used without prior publication of a tender notice.<sup>19</sup>

(b) Appraisal

44. The Commission claims that the practice in question was 'general' and 'systematic' and alleges infringement of Directive 93/36 and of Directive 77/62 and of the other directives applicable in the meantime. It follows that the practice of systematically awarding contracts directly to Agusta for the purchase of helicopters may well have lasted for some 30 years.

47. It should also be borne in mind that derogations from the rules intended to ensure the effectiveness of the rights conferred by the Treaty in connection with public supply contracts must be interpreted strictly.<sup>20</sup> In order not to deprive Directive 93/36 of its effectiveness, Member States cannot, therefore, provide for the use of the negotiated procedure in cases not provided for in that directive, or add new conditions to the cases expressly provided for by that directive which make that procedure easier to use.<sup>21</sup> In addition, the burden of proving the actual

45. The Italian Government does not dispute the above practice. Moreover, in the annexes to its defence Italy actually confirms the Commission's contention in this respect. It follows that Italy has indeed used the negotiated procedure without proceeding to any tendering procedure at Community level. Therefore, it is necessary to analyse whether or not Italy could lawfully derogate from the directive.

19 — See *Teckal*, cited in footnote 14, paragraph 43, which states that: 'the only permitted exceptions to the application of Directive 93/36 are those which are exhaustively and expressly mentioned therein (see, with reference to Directive 77/62, Case C-71/92 *Commission v Spain* [1993] ECR I-5923, paragraph 10).' With reference to *inter alia* Council Directive 93/37/EEC of 14 June 1993 (OJ 1993 L 199, p. 54), see Case C-323/96 *Commission v Belgium* [1998] ECR I-5063, paragraph 34.

20 — See Case 199/85 *Commission v Italy* [1987] ECR 1039, paragraph 14.

21 — See Case C-84/03 *Commission v Spain* [2005] ECR I-139, paragraphs 48, 58 and the operative part, and the case-law cited therein.

existence of exceptional circumstances justifying derogation lies on the person seeking to rely on those circumstances.<sup>22</sup>

48. It is therefore necessary to examine whether or not Italy meets the requirements expressly covered by the derogations provided for in the Treaty and/or in the directive on which it relies.

### 3. The legitimate requirements of national interest

#### (a) Main arguments of the parties

49. Italy contends that the purchases of helicopters at issue meet the legitimate requirements of national interest foreseen by Article 296 EC as well as Article 2(1)(b) of the

Directive. Italy submits that these provisions are applicable, because the helicopters in question are ‘dual-use goods’, that is to say, goods capable of being used for both civil and military purposes.

50. First, the Italian Government takes the view that Article 296 EC covers all the supplies to the military corps of the Italian State. As regards the other corps, it emphasises that since 2001 the supplies for those corps have been progressively included in a specific domain pertaining to State security (or ‘homeland security’) and subject to a regime which tends to assimilate them to military supplies.<sup>23</sup> Italy considers that in *Leifer*,<sup>24</sup> which concerned a derogation from Article 28 EC in relation to dual-use goods, the Court expressly recognised that the Member States have a discretionary power when adopting measures deemed necessary to guarantee their public security, both internal and external.

51. In that regard, Italy refers to the judgment of the Court of First Instance in *Fiocchi munizioni v Commission*,<sup>25</sup> which states that the regime established by Article 296(1)(b) EC is intended to preserve the freedom of action of the Member States in certain matters affecting national defence and

22 — Case 199/85 *Commission v Italy*, cited in footnote 20, paragraph 14. Most recently, with reference to Council Directive 93/38/EEC of 14 June 1993 (OJ 1993 L 199, p. 84), see Case C-394/02 *Commission v Greece* [2005] ECR I-4713, paragraph 33.

23 — Italy maintains that the fact that the military or paramilitary use of the helicopters in question is only an eventuality does not call in question their ‘non-civil’ character, since the need to ensure that the helicopters are suitable for military purposes imposes requirements from the order and procurement stage, especially as regards principles of secrecy.

24 — Case C-83/94 [1995] ECR I-3231, paragraph 35.

25 — Case T-26/01 [2003] ECR II-3951, paragraph 58.

security. Article 296(1)(b) EC confers on the Member States a particularly wide discretion in assessing the needs receiving such protection.

52. Second, Italy maintains that in view of the fact that the helicopters in question can be involved in the fight against terrorism as well as missions protecting public order the derogation under Article 2(1)(b) of the Directive is applicable. It also invokes confidentiality requirements with regard to the purchases of the helicopters.

53. The Commission submits that Italy has not proven in the present case that requirements existed which justified the application of Article 30 EC and the 'dual-use goods' argument. In addition, with regard to Article 2(1)(b) of the Directive and the argument that the divulgence of elements concerning the purchases at issue would be contrary to Italy's essential interests, the Commission contends that Italy has not specified which 'elements' they may be. With regard to Article 296 EC, what is in question here is not 'trade in arms, munitions and war material' but rather purchases of helicopters intended for essentially civil use. Italy has not demonstrated that the situation

in the present case constituted a measure necessary to protect its essential interests, such as security, which is an indispensable condition laid down by Article 296 EC. The Commission submits that the helicopters' only certain use is for civil purposes and that their military use remains only potential and uncertain. Therefore Article 296 EC is not applicable. Even on the hypothesis that the supplies in question were of a military character, Article 296 EC would not allow an automatic derogation such as that applied by Italy in the circumstances of the present case. To remove an entire industrial sector from competition procedures in order to protect national security appears neither proportionate nor necessary.

#### (b) Appraisal

54. The Court has held that the only articles in which the Treaty provides for derogations applicable in situations which may affect public security are Articles 30 EC, 39 EC, 46 EC, 58 EC, 64 EC, 296 EC, and 297 EC, which deal with exceptional and clearly defined cases. It cannot be inferred from those articles that the Treaty contains an inherent general exception excluding all measures taken for reasons of public security from the scope of Community law. To recognise the existence of such an exception, regardless of the specific requirements laid down by the Treaty, might impair the binding nature of Community law and its

uniform application.<sup>26</sup> Thus, public security may be relied on only if there is a genuine and sufficiently serious threat to a fundamental interest of society. Moreover, those derogations must not be misapplied so as, in fact, to serve purely economic ends.<sup>27</sup>

of the Member States, so that the latter are permitted to derogate from Community law, but only under the strict conditions prescribed.

55. The Court has also held that it is for the Member State which seeks to rely on those exceptions to furnish evidence that the exemptions in question do not go beyond the limits of such cases and that they are necessary for the protection of the essential interests of its security.<sup>28</sup>

57. As a derogation, this article must be interpreted strictly.

56. In its defence, Italy relies in particular on Article 296 EC. The purpose of Article 296 EC is to coordinate as well as balance relations and tensions between the protection of competition in the common market and the protection of Member States' essential interests of security which are connected with the production of or trade in arms, munitions and war material

58. It follows that that derogation, as for example the derogation in Article 30 EC, cannot be considered an automatic and/or blanket exemption which Member States may invoke regardless of the particular circumstances of a given situation. Article 296 EC should be applied by Member States on a case-by-case basis and in a case such as this one each individual procurement contract must be assessed. Under Article 296 EC the measures, which are applied by a Member State and which are connected with the production of or trade in arms, munitions and war material, must be *necessary* for the protection of the essential interests of its security. In addition, Article 296 EC is subject to the condition that 'such measures shall not adversely affect the conditions of competition in the common market regarding products which are not intended for *specifically* military purposes' (emphasis

26 — Case C-186/01 *Dory* [2003] ECR I-2479, paragraph 31; Case 222/84 *Johnston* [1986] ECR 1651, paragraph 26; Case C-273/97 *Sirdar* [1999] ECR I-7403, paragraph 16; and Case C-285/98 *Kreil* [2000] ECR I-69, paragraph 16.

27 — Case C-54/99 *Église de scientologie de Paris* [2000] ECR I-1335, paragraph 17 and the case-law cited therein.

28 — Case C-414/97 *Commission v Spain* [1999] ECR I-5585, paragraph 22. See also Case C-367/89 *Richardt and 'Les Accessoires Scientifiques'* [1991] ECR I-4621, paragraphs 20 and 21 and the case-law cited therein.

added). Moreover, Article 296 EC is applicable only to products that are enumerated on the list included in a Council decision of 15 April 1958.<sup>29</sup>

59. In my view, where the application of Article 296 EC by a Member State adversely affects competition in the common market, the Member State in question must prove that the products are intended for *specifically* military purposes.<sup>30</sup> To my mind, that in itself already precludes dual-use products.<sup>31</sup>

60. The nature of the products on the 1958 list and the explicit reference in Article 296 EC to 'specifically military purposes' confirms that only the trade in equipment which is designed, developed and produced for specifically military purposes can be exempted from Community rules on competition on the basis of Article 296(1)(b) EC.<sup>32</sup> The requirement that products be destined for specifically military purposes

means for example that the supply of a helicopter to the *military corps* which is intended for civil purposes must comply with the public procurement rules. *A fortiori*, helicopters supplied to certain *civil departments* of a Member State which could only hypothetically be used, as Italy claims, for military purposes too, inevitably have to comply with those rules.

61. In the present case, Italy has never contended that all the helicopters in question were purchased for specifically military purposes. Rather, the Italian Government essentially submits that the helicopters in question can *also* hypothetically be used for military purposes but are, however, used at the same time for civil purposes. It is thus clear from the file before the Court that the helicopters in question were not intended to be used for specifically military purposes. As a result, Italy cannot rely in its defence on Article 296(1)(b) EC.

62. Italy has not attempted to demonstrate that its concerns with regard to confidentiality could not have been adequately resolved pursuant to the procedures laid down in the directive, in particular the restricted procedure mentioned in Article 1(e) thereof. Rather, Italy removed a substantial part of supplies of helicopters to the central administration of the Italian State from the

29 — The Council adopted the list of products to which this Article applies on 15 April 1958. The list itself has never been officially published or amended, but is in the public domain. See Written Question E-1324/01 by Bart Staes (Verts/ALE) to the Council: Article 296(1)(b) of the EC Treaty, OJ 2001C 364 E, p. 85.

30 — In Case C-414/97 *Commission v Spain*, cited in footnote 28, at paragraph 22 the Court stated that 'it is for the Member State which seeks to rely on those exceptions [that is to say inter alia Articles 30 EC and 296 EC] to furnish evidence that the exemptions in question do not go beyond the limits of such cases'.

31 — *A contrario sensu*, however, I should note that products which appear on the list and are not intended for specifically military purposes do fall under the procurement rules.

32 — See *Fiocchi munizioni*, cited in footnote 25, paragraphs 59 and 61.



scope of application of the rules on public procurement by systematically awarding contracts directly to Agusta. This practice is clearly disproportionate by reference to the expressed concern of protecting confidentiality.<sup>33</sup>

the supplies in question constituted additional deliveries, the Government was entitled to award the contracts by a negotiated procedure, in application of Article 6(3)(c) and (e) of Directive 93/36.

63. Furthermore, as regards Article 2(1)(b) of the Directive, the fact that the helicopters in question serve for exclusively or primarily civil purposes renders invalid Italy's argument on the necessity to protect the confidentiality of purchases of the helicopters in the case at hand and thus the derogation under that provision is not applicable to the purchases of helicopters which are subject to these proceedings.

65. The Commission contends that the two exceptions mentioned above are not pertinent in the present case. As regards additional deliveries, the Commission submits that, in addition, the general three-year rule provided for in Article 6(3)(e) of the Directive applied and, in any event, since the previous deliveries were unlawful the additional deliveries were by definition also unlawful.

4. On homogeneity/interoperability of the fleet

(a) Main arguments of the parties

(b) Appraisal

64. Italy submits that owing to the technical specificity of helicopters and to the fact that

66. It suffices to state that Italy failed to explain and to prove to a sufficient extent what led it to consider that only Agusta helicopters had the required characteristics to justify the purchases under Article 6(3)(c) and (e) of the Directive. Moreover, I agree with the Commission and find that the fact

33 — I agree with the Commission that it is appropriate to recall in this respect the Opinion of Advocate General Léger in Case C-349/97 *Spain v Commission* [2003] ECR I-3851, points 249 to 257, where he concluded that requirements of confidentiality could not be invoked in order to exempt a public contract from competition. In that case the applicable provision was Directive 77/62, which was repealed by Directive 93/36.

alleged by Italy that other Member States producing helicopters follow the same procedure is not pertinent for the purposes of the present proceedings.

#### IV — Costs

67. It follows that in the light of the foregoing considerations, I propose that the Court declare that the Italian Republic has failed to fulfil its obligations under Directive 93/36 and, earlier, under Directives 77/62, 80/767, and 88/295.

68. Under Article 69(2) of the Rules of Procedure of the Court of Justice the Italian Government as the unsuccessful party should be ordered to bear the costs.

#### V — Conclusion

69. In the light of the foregoing considerations, I propose that the Court:

- (1) declare that, since the Italian Government and, in particular, the Ministries of Home Affairs, Defence, Economics and Finance, for Agricultural and Forestry Policy, and for Infrastructure and Transport, and the Department of Civil Protection of the Presidency of the Council of Ministers, have adopted a procedure, which has been in existence for a long time and is still followed, of directly awarding to the firm Agusta contracts for the purchase of helicopters manufactured by Agusta and Agusta Bell to meet the requirements of the military corps

of the fire brigade, the Carabinieri, the State Forestry Corps, the Coastguard, the Revenue Guard Corps, the State Police and the Department of Civil Protection, without any tendering procedure, in particular without complying with the procedures provided for by Council Directive 93/36/EEC of 14 June 1993 coordinating procedures for the award of public supply contracts, and, earlier, by Council Directive 77/62/EEC, Council Directive 80/767/EEC and Council Directive 88/295/EEC, the Italian Republic has failed to fulfil its obligations under the abovementioned directives;

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