

JUDGMENT OF THE COURT (Second Chamber)

2 October 2008*

In Case C-157/06,

ACTION under Article 226 EC for failure to fulfil obligations, brought on 23 March 2006,

Commission of the European Communities, represented by X. Lewis and D. Recchia, acting as Agents, with an address for service in Luxembourg,

applicant,

v

Italian Republic, represented by I.M. Braguglia, acting as Agent, and by G. Fiengo, avvocato dello Stato, with an address for service in Luxembourg,

defendant,

* Language of the case: Italian.

THE COURT (Second Chamber),

composed of L. Bay Larsen, President of the Sixth Chamber, acting for the President of the Second Chamber, K Schiemann, J. Makarczyk (Rapporteur), J.-C. Bonichot and C. Toader, Judges,

Advocate General: M. Poiares Maduro,
Registrar: B. Fülöp, Administrator,

having regard to the written procedure and further to the hearing on 15 May 2008,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

Judgment

- ¹ By its action, the Commission of the European Communities seeks a declaration from the Court that by adopting Decree No 558/A/04/03/RR of the Minister for the

Interior of 11 July 2003 ('the Ministerial Decree') authorising the derogation from the Community rules on public supply contracts in respect of the purchase of light helicopters for the use of police forces and the national fire service, without any of the conditions capable of justifying that derogation having been satisfied, the Italian Republic has failed to fulfil its obligations under Council Directive 93/36/EEC of 14 June 1993 coordinating procedures for the award of public supply contracts (OJ 1993 L 199, p. 1) and in particular under Articles 2(1)(b), 6 and 9 thereof.

Legal context

Community legislation

² Article 2(1)(b) of Directive 93/36 reads as follows:

'1. This Directive shall not apply to:

...

(b) supply contracts which are 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.'

3 Article 3 of Directive 93/36 provides:

'Without 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.'

4 Article 6 of Directive 93/36 provides:

'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.

2. The contracting authorities may award their supply contracts by negotiated procedure in the case of irregular tenders in response to an open or restricted procedure or in the case of tenders which are unacceptable under national provisions that are in accordance with provisions of Title IV, in so far as the original terms for the contract are not substantially altered. The contracting authorities shall in these cases publish a tender notice unless they include in such negotiated procedures all the enterprises satisfying the criteria of Articles 20 to 24 which, during the prior

open or restricted procedure, have submitted tenders in accordance with the formal requirements of the tendering procedure.

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

- (a) in the absence of tenders or appropriate tenders in response to an open or restricted procedure insofar as the original terms of the contract are not substantially altered and provided that a report is communicated to the Commission;
- (b) when the products involved are manufactured purely for the purpose of research, experiment, study or development, this provision does not extend to quantity production to establish commercial viability or to recover research and development costs;
- (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;
- (d) in so far as is strictly necessary when, for reasons of extreme urgency brought about by events unforeseeable by the contracting authorities in question, the time limit laid down for the open, restricted or negotiated procedures referred

to in paragraph 2 cannot be kept. The circumstances invoked to justify extreme urgency must not in any event be attributable to the contracting authorities;

- (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.’

5 Article 9 of Directive 93/36 reads as follows:

‘1. The contracting authorities shall make known, as soon as possible after the beginning of their budgetary year, by means of an indicative notice, the total procurement by product area which they envisage awarding during the subsequent 12 months where the total estimated value, taking into account the provisions of Article 5, is equal to or greater than [EUR] 750 000.

The product area shall be established by the contracting authorities by means of reference to the nomenclature “Classification of Products According to Activities

(CPA)". The Commission shall determine the conditions of reference in the notice to particular positions of the nomenclature in accordance with the procedure laid down in Article 32(2).

2. Contracting authorities who wish to award a public supply contract by open, restricted or negotiated procedure in the cases referred to in Article 6(2), shall make known their intention by means of a notice.

3. Contracting authorities who have awarded a contract shall make known the result by means of a notice. However, certain information on the contract award may, in certain cases, not be published where release of such information would impede law enforcement or otherwise be contrary to the public interest, would prejudice the legitimate commercial interests of particular enterprises, public or private, or might prejudice fair competition between suppliers.

4. The notices shall be drawn up in accordance with the models given in Annex IV and shall specify the information requested in those models. The contracting authorities may not require any conditions other than those specified in Article 22 and 23 when requesting information concerning the economic and technical standards which they require of suppliers for their selection (Section 11 of Annex IV B, Section 9 of Annex IV C and Section 8 of Annex IV D).

5. The contracting authorities shall send the notices as rapidly as possible and by the most appropriate channels to the Office for Official Publications of the European Communities. In the case of the accelerated procedure referred to in Article 12, the notice shall be sent by telex, telegram or telefax.

The notice referred to in paragraph 1 shall be sent as soon as possible after the beginning of each budgetary year.

The notice referred to in paragraph 3 shall be sent at the latest 48 days after the award of the contract in question.

6. The notices referred to in paragraphs 1 and 3 shall be published in full in the *Official Journal of the European Communities* and in the TED data bank in the official languages of the Communities, the text in the original language alone being authentic.

7. The notice referred to in paragraph 2 shall be published in full in the *Official Journal of the European Communities* and in the TED data bank in their original language. A summary of the important elements of each notice shall be published in the official languages of the Communities, the text in the original language alone being authentic.

8. The Office for Official Publications of the European Communities shall publish the notices not later than 12 days after their dispatch. In the case of the accelerated procedure referred to in Article 12, this period shall be reduced to five days.

9. The notices shall not be published in the Official Journals or in the press of the country of the contracting authority before the date of dispatch to the Office for Official Publications of the European Communities; they shall mention that date. They shall not contain information other than that published in the *Official Journal of the European Communities*.

10. The contracting authorities must be able to supply proof of the date of dispatch.

11. The cost of publication of the notices in the *Official Journal of the European Communities* shall be borne by the Communities. The length of the notice shall not be greater than one page of the Journal, or approximately 650 words. Each edition of the Journal containing one or more notices shall reproduce the model notice or notices on which the published notice or notices are based.'

National legislation

6 The Ministerial Decree provides:

'1. Supplies of light helicopters for the use of police forces and the national fire service must be accompanied by special security measures which also apply to documents of the technical evaluation group and the Interministerial Commission referred to in this decree.

2. With regard to the award of those supplies, derogation may be made from the provisions of Legislative Decree No 358 of [24 July 1992], as amended by Legislative Decree No 402 of [20 October 1998 ('Legislative Decree No 358/1992')], as the conditions referred to in Article 4 [point] (c) of that decree have been met in this instance.'

- 7 Legislative Decree No 358/1992, which is referred to by the Ministerial Decree, constitutes the legislation which transposes the Community legislation on public supply contracts.
- 8 Article 4 point (c) of Legislative Decree No 358/1992 repeats the provisions of Article 2(1)(b) of Directive 93/36.

The pre-litigation procedure

- 9 The Commission, having become aware of the existence of the Ministerial Decree and being of the opinion that it was not in compliance with Article 2(1)(b), 6 and 9 of Directive 93/36, sent a letter of formal notice to which the Italian Republic replied on 30 July 2004.
- 10 As the Commission was not satisfied with that answer, it sent the Italian Republic a reasoned opinion on 14 December 2004 calling on it to take the measures necessary to comply with that opinion within a period of two months from receipt thereof.
- 11 By letter of 22 March 2005, the Italian Republic informed the Commission that it had not yet replied in detail to that reasoned opinion but that it 'had initiated a process of in-depth reflection in that regard' the initial outcomes of which 'suggested that a

reading of that decree could give rise to some perplexity as regards its correspondence with the legislative framework in force at Community level in respect of procedures for the award of public supply contracts'. That letter continued by expressing a wish to engage in technical dialogue with the Commission's staff which could 'accompany the process of reflection in question and lead to a re-examination of the abovementioned legislation which duly takes account of the various relevant requirements'.

- ¹² Despite two letters from the Commission of 14 April and 26 May 2005 informing the Italian Republic that it was prepared to engage in dialogue with officials of the Ministry concerned, that technical dialogue never took place. In those circumstances, the Commission decided to bring the present action.

The action

Arguments of the parties

- ¹³ The Commission alleges that, by the Ministerial Decree, the Italian Republic improperly excluded supplies of light helicopters for the use of police forces and the national fire service from the scope of Directive 93/36, because none of the conditions laid down in Article 2(1)(b) had been complied with.

- 14 In that regard, the Commission points out that those helicopters are intended for police forces and the national fire service, that is to say for civilian departments, which should not normally take part in military operations. Furthermore, the fact that the installation of light arms is envisaged as a mere possibility confirms that the helicopters in question are intended for a use which is essentially civilian. Lastly, the fact that those helicopters have to have certain characteristics similar to those of military helicopters is not sufficient for them to be equated with military supplies. For the Commission, they are at the very most aircraft intended for a possible dual use.
- 15 In addition, the Commission takes the view that, even if military supplies were involved, Directive 93/36 should still be applied and the circumstances warranting the derogation provided for in Article 2(1)(b) of that directive should be established by the Member State which is relying on that derogation. The Commission considers that, in the present case, the Italian Republic has not established that it was legitimate to have recourse to the derogation set out in that provision.
- 16 The Italian Republic maintains that, in the current international context, the concepts of war and war material have departed significantly from their original meanings, as has the concept of protection of the essential interests of national security. The military nature of the helicopters constituting the subject-matter of the supplies provided for by the Ministerial Decree cannot be disputed as those helicopters may be used to carry out national security missions. In accordance with the requirements of an Interministerial Commission created for that purpose, those helicopters must possess certain technical characteristics making it possible for them to potentially be used as arms and defence systems, with the result that they require an approval from the Ministry of Defence.
- 17 The Italian Republic claims that the conditions set out in Article 2(1)(b) of Directive 93/36 have been satisfied. It bases its claim in particular on the argument that the greatest discretion must be maintained with regard to the supplies in question given their use as arms systems and their interoperability with other military

material. That is why confidentiality cannot be guaranteed in an open invitation to tender procedure.

18 Furthermore, the Italian Republic takes the view that since the aircraft in question may be classified without restriction as military material, even if it were to be found that the conditions set out in Article 2(1)(b) of Directive 93/96 could not apply in the present case, the disputed supplies would nevertheless be covered by the derogation referred to in Article 296 EC and would therefore fall outside the scope of the Community rules on public procurement.

19 Lastly, the Italian Republic regards this action as inadmissible in so far as it is contrary to the principle of *ne bis in idem*. It submits that the issue forming the subject-matter of the proceedings has already been examined and assessed by the Court in Case C-337/05 *Commission v Italy* [2008] ECR I-2173.

Findings of the Court

Admissibility

20 In that regard, it is sufficient to point out an essential difference between this case and that which gave rise to the judgment in *Commission v Italy*. In this case, the

Italian Republic acted pursuant to a decree of the Minister for the Interior while the case which gave rise to the judgment in *Commission v Italy* related to the lawfulness of a practice of the Italian authorities. That point is sufficient to establish that, in the present case, the principle of *ne bis in idem* cannot, on any basis, be effectively relied on.

- 21 Consequently, the plea of inadmissibility raised by the Italian Republic must be rejected.

Substance

- 22 It should be noted at the outset that it is common ground between the parties that the value of the contracts covered by the Ministerial Decree exceed the threshold, fixed in Article 5(1)(a) of Directive 93/36, capable of bringing them within the scope of that directive.

- 23 It must also be borne in mind that it is settled case-law that any derogations from the rules intended to ensure the effectiveness of the rights conferred by the EC Treaty in connection with public procurement must be strictly interpreted (see, to that effect, Case C-71/92 *Commission v Spain* [1993] ECR I-5923, paragraph 36) and that the burden of proving the actual existence of exceptional circumstances justifying a derogation lies on the person seeking to rely on those circumstances (see, to that effect, Case C-328/92 *Commission v Spain* [1994] ECR I-1569, paragraphs 15 and 16, and *Commission v Italy*, paragraphs 57 and 58).

- 24 In the present case, the Italian Republic maintains that the Ministerial Decree fulfils the conditions set out in Article 296 EC and Article 2(1)(b) of Directive 93/36 on the ground, inter alia, that the helicopters covered by that decree are dual-use items, that is to say, they may serve both military and civilian purposes.
- 25 In that regard, it is important to point out that, under Article 296(1)(b) EC, any Member State may take such measures as it considers necessary for the protection of the essential interests of its security and which are connected with the production of or trade in arms, munitions and war materials, provided, however, that such measures do not alter the conditions of competition in the common market regarding products which are not intended for specifically military purposes (see *Commission v Italy*, paragraph 46).
- 26 It is clear from the wording of that provision that the products in question must be intended for specifically military purposes. It follows that the purchase of equipment, the use of which for military purposes is hardly certain, must necessarily comply with the rules governing the award of public contracts (see *Italy v Commission*, paragraph 47).
- 27 It is not disputed that the Ministerial Decree applies, as the Italian Republic admits, to helicopters which are clearly for civilian use whereas their military use is only potential.
- 28 Consequently, Article 296(1)(b) EC, to which Article 3 of Directive 93/36 refers, cannot properly be invoked by the Italian Republic to justify national legisla-

tion authorising recourse to the negotiated procedure for the purchase of those helicopters.

29 The Italian Republic relies, in addition, on Article 2(1)(b) of Directive 93/36.

30 At the outset, it must be pointed out that the requirement to impose an obligation of confidentiality in no way prevents the use of a competitive tendering procedure for the award of a contract (*Commission v Italy*, paragraph 52).

31 Therefore, resort to Article 2(1)(b) of Directive 93/36 to justify national legislation authorising the purchase of the helicopters in question by the negotiated procedure appears disproportionate as regards the objective of preventing the disclosure of sensitive information relating to their production. The Italian Republic has not shown that such an objective was unattainable within a competitive tendering procedure such as that specified by the same directive (see *Commission v Italy*, paragraph 53).

32 It follows that, in the present case, the mere fact of stating that the supplies at issue are declared secret, that they are accompanied by special security measures or that it is necessary to exclude them from the Community rules in order to protect the essential interests of State security cannot suffice to prove that the exceptional circum-

stances justifying the derogations provided for in Article 2(1)(b) of Directive 93/36 actually exist.

³³ Consequently, Article 2(1)(b) of Directive 93/36 cannot properly be invoked by the Italian Republic to justify national legislation authorising recourse to the negotiated procedure for the purchase of those helicopters.

³⁴ Having regard to all of the foregoing, it must be held that by adopting the Ministerial Decree authorising the derogation from the Community rules on public supply contracts in respect of the purchase of light helicopters for the use of police forces and the national fire service, without any of the conditions capable of justifying that derogation having been satisfied, the Italian Republic has failed to fulfil its obligations under Directive 93/36, and in particular under Articles 2(1)(b), 6 and 9 thereof.

Costs

³⁵ Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. As the Commission applied for costs against the Italian Republic and as the Italian Republic has been unsuccessful, the latter must be ordered to pay the costs.

On those grounds, the Court (Second Chamber) hereby:

- 1. Declares that by adopting Decree No 558/A/04/03/RR of the Minister for the Interior of 11 July 2003, authorising the derogation from the Community rules on public supply contracts in respect of the purchase of light helicopters for the use of police forces and the national fire service, without any of the conditions capable of justifying that derogation having been satisfied, the Italian Republic has failed to fulfil its obligations under Council Directive 93/36/EEC of 14 June 1993 coordinating procedures for the award of public supply contracts, and in particular under Articles 2(1)(b), 6 and 9 thereof;**

- 2. Orders the Italian Republic to pay the costs.**

[Signatures]