

Case C-337/05

Commission of the European Communities

v

Italian Republic

(Failure of a Member State to fulfil obligations — Public supply contracts — Directives 77/62/EEC and 93/36/EEC — Award of public contracts without prior publication of a notice — Absence of competitive tendering — Agusta and Agusta Bell helicopters)

Opinion of Advocate General Mazák delivered on 10 July 2007	I - 2176
Judgment of the Court (Grand Chamber), 8 April 2008	I - 2195

Summary of the Judgment

1. *Actions for failure to fulfil obligations — Pre-litigation procedure — Formal notice (Art. 226 EC)*

2. *Approximation of laws — Procedures for the award of public supply contracts — Directive 93/36 — Derogations from common rules — Restrictive interpretation*
(Council Directive 93/36, Art. 6(2) and (3))
3. *Approximation of laws — Procedures for the award of public supply contracts — Directives 77/62 and 93/36 — Award of contracts*
(Council Directives 93/36 and 77/62)

1. In the pre-litigation procedure for failure to fulfil obligations, while the reasoned opinion referred to in Article 226 EC must contain a coherent and detailed statement of the reasons which led the Commission to conclude that the Member State in question has failed to fulfil one of its obligations under the Treaty, the letter of formal notice cannot be subject to such strict requirements of precision, since it cannot, of necessity, contain anything more than an initial brief summary of the complaints.

and may be applied only in cases which are set out in an exhaustive list. To that end, Article 6(2) and (3) of that directive exhaustively and expressly lists the only exceptions for which recourse to the negotiated procedure is allowed. Derogations from the rules intended to ensure the effectiveness of the rights conferred by the Treaty in connection with public contracts must be interpreted strictly. To prevent Directive 93/36 being deprived of its effectiveness, the Member States cannot, therefore, provide for the use of the negotiated procedure in cases not provided for by that directive, or add new conditions to the cases expressly provided for by the directive in question which make that procedure easier to use. In addition, the burden of proving the existence of exceptional circumstances justifying the derogation from those rules lies on the person seeking to rely on those circumstances.

(see para. 23)

2. It is clear, in particular, from the 12th recital in the preamble to Directive 93/36 coordinating procedures for the award of public supply contracts, that the negotiated procedure is exceptional in nature

(see paras 56-58)

3. A Member State which adopted a procedure, which has been in existence for a long time and is still followed, of directly awarding contracts for the purchase of helicopters of a certain national make to meet the requirements of several military and civilian corps, without any competitive tendering procedure, and, in particular, without complying with the procedures provided for by Directive 93/36 coordinating procedures for the award of public supply contracts, as amended by Directive 97/52, and previously, by Directive 77/62 coordinating procedures for the award of public supply contracts, as amended and supplemented by Directives 80/767 and 88/295, is failing to fulfil its obligations under those directives.

Such a procedure cannot be justified by the existence of an 'in-house' relationship if a private undertaking has a shareholding, even a minority holding, in the capital of the company which produces the helicopters and in which the contracting authority in question is also a participant, such that it cannot exercise over that company a control similar to that which it exercises over its own departments.

Moreover, as regards the legitimate requirements of national interest foreseen in Articles 296 EC and 2(1)(b) of Directive 93/36, on the ground that those helicopters are dual-use items, any Member State may, under Article 296(1)(b) EC, 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. Therefore, 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. The supply of helicopters to military corps for the purpose of civilian use must comply with those same rules.

(see paras 38-41, 46-49, 60,
operative part)