OPINION OF MR ADVOCATE GENERAL LENZ
delivered on 26 February 1992 *

Mr President,
Members of the Court,

A — Introduction

1. In the present Treaty infringement proceedings the Commission claims that the Unità Sanitaria Locale (Local Health Authority, hereinafter referred to as 'the USL') XI, Genoa 2, has infringed Directive 77/62/EEC coordinating procedures for the award of public supply contracts. [1] The USL published on 10 October 1988 an invitation to tender for the supply of several products in the course of 1989, including beef valued at LIT 5 800 000 000. The invitation laid down a minimum condition for admittance to participate in the invitation to tender, namely that the potential tenderer should have supplied identical products to the value of six times the value of each supply requested, 50% of that amount to be made up of *supplies to public administrative authorities.* The Commission considered that condition to be contrary to Community law. The invitation to tender lapsed on 31 December 1989.

2. The Italian Government responded to the application to the Court by defending itself on a number of levels. First, in the defence, it suggested that the application be withdrawn because the contested clause produced no effects, after the expiry, at the end of 1989, of the invitation to tender and subsequent invitations to tender did not include it. In the further course of the written procedure the defendant Government formally raised an objection of inadmissibility on the ground that when the reasoned opinion was delivered in March 1990, and thus necessarily before the expiry of the period set therein, there was no longer any infringement.

3. The Italian Government also took the view that a Member State could not be charged with infringement of a directive by a public body where the directive had been duly transposed into domestic law. That State thus complied with its obligations under Article 189 of the EEC Treaty. Furthermore national implementing provisions have precedence over a directive with the result that legal protection against any infringements can be granted only within the framework of national law.

4. As regards the substantive content of the action, the Italian Government contends that the contested clause is not an unlawful criterion for exclusion but merely one factor in assessing the evidence, in accordance with the directive, of the technical capacity of the potential tenderer.

* Original language: German.

1 — Council Directive 77/62/EEC of 21 December 1976 (OJ 1977 L 13 p. 1).

5. The Commission claims that the Court should:

— declare that, since the USL imposed a requirement that 50% of the minimum quantity of goods required to have been supplied over the last three years to enable tenderers to participate in a tendering procedure had been supplied to public administrations, the Italian Republic has failed to fulfil its obligations under EEC Council Directive 77/62 of 21 December 1976 coordinating procedures for the award of public supply contracts;

— order the Italian Republic to pay the costs.

6. The Italian Government contends that the Court should:

— dismiss the action;

— order the Commission to pay the costs.

In its rejoinder it contends that the Court should:

— declare the action inadmissible.

7. Reference is made to the Report for the Hearing for the facts of the case, the legal background and the arguments of the parties.

B — Observations

1. *Admissibility*

8. *Only in the rejoinder* did the Italian Government *formally apply for the action to be dismissed as inadmissible,* so that the question arises whether this was sufficient for that application by the defendant to be considered as a proper one made in due time.

9. First, the defendant Government has already put forward in the defence all the arguments which in its view lead to the inadmissibility of the action. Secondly, in the defence to the application it contended the action should be dismissed. That contention also contains the request that the action should be dismissed as inadmissible. The applicant had an opportunity in its reply to deal with the defendant's arguments. Finally, the admissibility of an action is a matter which it is for the Court to examine of its own motion. On those grounds there is no reason not to consider objections of inadmissibility because they are pleaded belatedly.

10. The application could be inadmissible in the present case because, as the Commission admitted at the hearing, the reasoned opinion in the preliminary procedure was delivered only in March 1990 and therefore, on the expiry of the period stipulated in the reasoned opinion for putting an end to the infringement of the Treaty, the alleged infringement, through the invitation to tender for 1989, could no longer have existed. Furthermore the contested clause was no longer included in the invitations to tender for 1990 and 1991.

11. Pursuant to the second paragraph of Article 169 of the EEC Treaty it is a condition for bringing an action that an infringement of the Treaty should exist after the period laid down in the reasoned opinion. According to the case-law,[2] which has to be read as being to that effect, there is no legal interest in a declaration by the Court of an infringement of the Treaty if the infringement has been terminated before the expiry of that period. That case-law is consistent with the ratio of the preliminary procedure, which is aimed at bringing about the termination of the Treaty infringement before the proceedings before the Court. Accordingly there is in principle no interest in obtaining a declaration of infringement of the Treaty if the infringement had already ceased on the expiry of the period laid down in the reasoned opinion.

12. The case-law relating to the positive finding of an interest in bringing proceedings in the context of the action for failure to fulfil Treaty obligations[3] (such as possible obligations to compensate on the part of the defendant Member State vis-à-vis other Member States of the Community or individuals who are affected) applies only where the alleged infringement of the Treaty was terminated *after* the expiry of the period laid down in the reasoned opinion. Accordingly, where the infringements were terminated *before* that period there is in principle no ground for considering that there is an interest in pursuing the action.

2 — Judgment in Case 52/84 Commission v Belgium [1986] ECR 89; judgment in Case 103/84 Commission v Italy [1986] ECR 1759, paragraph 6 et seq.: see also my Opinion in Case 103/84, Point B. 1. a.; judgment in Case 199/85 Commission v Italy [1987] ECR 1039, paragraph 7 et seq.; judgment in Case 240/86 Commission v Hellenic Republic [1988] ECR 1835, paragraphs 15 and 16; see also my Opinion in Case 240/86, paragraph 7 et seq..

3 — Judgment in Case 26/69 Commission v France [1970] ECR 565; see also the judgment in Case C-361/88 Commission v Germany, judgment in Case C-59/89 Commission v Germany, judgment in Case C-353/89 Commission v Netherlands [1991] ECR I-4069, and in Case 103/84, cited above.

13. The only exceptions to that rule are in cases of seasonal infringements[4] where, because of its purpose and legal nature, the infringement of the Treaty is confined to a limited period (as for example in the case of the import and export restrictions introduced on a seasonal basis for the protection of national traders) and where, because of this, the conduct of the procedure prior to the actions for failure fulfil obligations is made, purely in terms of time, more difficult, if not altogether impossible.

14. In my opinion in the present case there is no reason for considering whether it is possible to apply such an exception, even though the contested clause in the invitation to tender was from the outset limited in time, because that period was so calculated that the proper conduct of the Treaty infringement procedure was possible without any difficulty in relation to time: the invitation to tender was published on 10 October 1988 and ceased to have effect at the end of 1989. A period of almost 15 months was therefore available for action to be taken against the irregularities in the context of a pre-litigation procedure.

15. If it is borne in mind that the Commission gave the defendant Member State only 14 days to answer each of its letters in the pre-litigation procedure (the warning letter of 10 September 1989 and the reasoned opinion of 27 March 1990), it cannot be said that work on the case demanded exceptionally long periods, for example, on account of enquiries which had to be made or the complexity of the problem.

4 — Judgments in Case 240/86, cited above and in Case C-110/89, cited above.

16. Since it was objectively possible, without any difficulty, to conduct the procedure prior to the bringing of an action for the infringement of the Treaty during the 15 months in which the invitation to tender was valid, there is no discernible reason to depart from the rule that there must be an infringement of the Treaty after the period laid down in the reasoned opinion has expired. The action must therefore be regarded as inadmissible.

17. At the *hearing* on 16 January 1992 the Commission submitted that the reasoned opinion of 27 March 1990 was actually a second opinion. The first reasoned opinion had been delivered on 17 August 1989. Since the defendant Government replied to the warning letter, after considerable delay, only on 30 June 1989, a reply received by the Commission on 6 July 1989, and since the content of that reply could not be taken into account in the drafting of the reasoned opinion of 17 August 1989, the Commission considered it expedient to draft a second opinion to take account of all the objections of the Italian Government. The delay in the preliminary procedure was therefore attributable to the defendant Government.

18. The first question which arises in considering those arguments is whether the factual matters put forward for the first time at the hearing can at all be taken into account.

19. Article 42 of the Rules of Procedure provides:

'1. In reply or rejoinder a party may offer further evidence. The party must, however, give reasons for the delay in offering it.

2. No new plea may be introduced in the course of proceedings unless it is based on matters of law or of fact which come to light in the course of the procedure.

...

The decision on the admissibility of the plea shall be reserved for the final judgment.'

20. The reasoned opinion directed to the defendant Member State on 17 August 1989 is certainly not a fact which first came to light in the course of the written procedure. The proper conduct of the preliminary procedure is a prior condition for the admissibility of an action for failure to fulfil Treaty obligations under Article 169 of the EEC Treaty and the burden of proving this lies on the Commission. From the outset the Commission relied only on the reasoned opinion of 27 March 1990. Only when the Court enquired about the subject-matter of its action against the background of the reasoned opinion issued on 27 March 1990 and the commencement of the action on 11 December 1990 did the Commission find itself compelled to mention the previous reasoned opinion. The Court's question can scarcely be regarded as a 'matter of law' within the meaning of Article 42(2) of the

Rules of Procedure, establishing the relevance of the plea.

21. I am therefore of the opinion that all the submissions on the alleged first reasoned opinion should be dismissed as out of time, and thus inadmissible, so that the inadmissibility of the action as already found remains.

22. Assuming however, for the sake of argument, that the Commission's arguments are to be regarded a relevant defence, it is difficult to imagine why no account of the objections of the Italian Government in its letter of 30 June 1989, which was received by the Commission on 6 July 1989, could be taken in the opinion of 17 August 1989, although there was a period of six weeks for consideration, while the Italian Government was in each case given only 14 days to reply to the warning letter and the reasoned opinion. I cannot understand why in those circumstances the delivery of a second opinion in March 1990 was the fault of the Italian Government. In my view the Commission alone is responsible for the delay in dealing with the matter in general and, in particular, for the reasoned opinion of 27 March 1990, so that there was no interest in bringing the action because the alleged infringement was terminated before the expiry of the period prescribed in the reasoned opinion.

23. Since the action must thus be dismissed as inadmissible, the following considerations concerning its merits are set out only in the alternative.

2. *The merits*

(a) The scope of the obligations of a Member State in transposing and applying directives

24. The Italian Government argues, as against the infringement with which it is charged, that once a directive has been properly transposed into domestic law the domestic rules prevail both as regards substantive provisions and as regards legal protection.

25. In the preliminary procedure the defendant Government put forward the defence, in its reply of 30 June 1989, that the contested clause was consistent with the measure implementing Directive 77/62. In the course of the subsequent procedure its premise has always been that the directive had been correctly transposed.

26. The objections of the Italian Government call for a discussion of the extent of the duties of a Member State in transposing and applying directives. The defendant Government is certainly wrong in its view that a Member State, on duly transposing a directive into domestic law, has performed all its duties under Article 189 in implementing Community law. Formal transposition is only *one* of the obligations of Member State under Community law. In addition, Member States are required to give effect, in their national legal systems, to the objectives of the directive, not only in the abstract by means of legislative measures, but also in a concrete manner. This duty to ensure that a directive is 'fully effective'[5] concerns first and foremost all

5 — Judgment in Case 14/83 von Colson and Kamann v Land Nordrhein-Westfalen [1984] ECR 1891, paragraph 15.

State authorities. It follows, on the one hand, directly from Article 189 of the EEC Treaty and, on the other hand, from Article 5, which requires Member States to take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of the Treaty or resulting from actions taken by the institutions of the Community.

27. It is against the background of those obligations that it is necessary to respond to the Italian Government's objection that only in the reply did the Commission submit that the Italian Government had not only to transpose Directive 77/62 into Italian law but also to ensure that it was fully effective. That, according to the Italian Government, is a different plea from those put forward in the reasoned opinion and the application and is therefore one which should be rejected as being out of time.

28. According to the Commission, it was the specific infringement by USL — Genoa's invitation to tender which was from the outset the subject of the proceedings. It was only in response to the Italian Government's plea in defence in the proceedings before the Court, namely that after transposing the directive correctly it had no further direct obligations, that the Commission referred to the continuing wider obligation which in its view lay on the Member State.

29. This amounts to no more than an exposition of the Commission's preliminary view of the law which prompted it to pursue the suspected infringement in the first place. There can therefore be no question of an extension of the subject-matter of the action or a new issue.

30. In principle directives partake of the primacy [6] of Community law. Where, therefore, after correct transposition, doubts arise in the interpretation of the national legal measure, the directive is always the decisive factor. In the event of belated or defective transposition, the Court has even, within the limits which it has set, [7] recognized that the provisions of a directive are directly applicable. [8]

31. If therefore, a discrepancy between the measure transposing the directive and the directive itself were to give rise to a question of infringement of the Treaty, as was suggested in the preliminary procedure, the sole criterion for the purpose would be the directive. In such a case the infringement of Community law would, irrespective of whether it led to specific proceedings for infringement of the Treaty, consist both in the defective transposition of the directive and in the application of the law in a manner contrary to the directive.

32. If, on the other hand the directive were correctly transposed, it would still be

6 — See the Opinion of Mr Advocate General van Gerven in Case C-106/89, point 9.

7 — In the case of unconditional and sufficiently precise provisions, see the judgments in Case 148 Pubblico Ministero v Ratti [1979] ECR 1629 and in Case 8/81 Becker v Finanzamt Münster-Innenstadt [1982] ECR 53.

8 — As regards the legal effects of a directive in domestic law, see the judgment of the Bundesverfassungsgericht (Federal Constitutional Court) of 28 January 1992 on the prohibition of night work for women — 1 BvR 1025/82 — 1 BvL 16/83 — 1 BvL 10/91.

necessary, for the purpose of deciding whether there was an infringement of the Treaty, to take the directive as the criterion for interpretation. In any event, therefore, the question is whether, in the case of the USL's contested invitation to tender, the provisions of Directive 77/62 were correctly applied.

33. A completely different question, which does not arise in the present case, is the legal consequences of a simple infringement of the national implementing provisions by independent persons. In so far as the acts of a *State body* are in question, the formal responsibility for the measure in the context of Treaty infringement proceedings must be held to lie with the Member State [9] and the authorities and institutions of the Member State must be considered to have a substantive obligation to ensure that effect is given to Community law. [10]

34. If in Treaty infringement proceedings the conduct of State bodies is generally a matter for review because the Member State is responsible vis-à-vis the Community also for those institutions which are organized on an independent basis, that is so *a fortiori* within the sphere of application of the directive concerning the coordination of procedures for the award of public works contracts. [11]

35. Article 1(b) of Directive 77/62 provides expressly that "'contracting authorities" shall be the State, regional or local authorities and the legal persons governed by public law or, in Member States where the latter are unknown, bodies corresponding thereto as specified in Annex I'.

36. The USL — Genoa 2, which issued the invitation to tender, is a municipal authority and it is not in dispute that it is a 'contracting authority' within the meaning of the directive.

37. The judgment in Case 31/87, [12] on which both parties in the present proceedings rely, was concerned with the question whether the relevant authority in that case was to be regarded as a State authority in order to come within the ambit *ratione personae* of Directive 71/305/EEC on the coordination of procedures for the award of public works contracts. I have to agree with the Italian Government that the judgment in Case 31/87 was by way of a preliminary ruling, so that no decision was given on the responsibility of a Member State in the context of Treaty infringement proceedings in which it was alleged that there was an infringement of the provisions of Community law on invitations to tender. However, in view of the obligation, which I have already mentioned, of the Member State vis-à-vis the Community in the matter of implementing directives, it is necessary in principle to start from the premise that the acts of a State authority for the purposes of the directive fall within the area of responsibility of the Member State as regards the application of Community law. That consequence follows from the definition of the sphere of application *ratione personae* of the directive on the award of public contracts.

9 — See the Opinion in Case C-247/89 Commission v Portuguese Republic [1991] ECR I-3659, I-3670, paragraph 10 et seq. and in Case C-24/91 Commission v Kingdom of Spain [1992] ECR I-1989, I-1995, paragraph 9 et seq..

10 — See judgment in Case 103/88 Costanzo v Commune di Milano [1989] ECR 1839.

11 — Council Directive 71/305/EEC of 26 July 1971, OJ, English Special Edition 1971 (II), p. 682.

12 — Case 31/87 Beentjes v Netherlands State [1988] ECR 4635.

38. The defendant Government's objections to the applicability of the directive as a criterion for determining whether there is an infringement of the Treaty are accordingly to be rejected.

(b) The relationship between the legal remedies in the Community and in the Member State

39. It is, finally necessary to consider he Italian Government's argument that the legal remedies for a possible infringement of the provisions of Community law on invitations to tender are to be sought before the courts of the Member State and that in that case, the system of remedies provided by Community law play only an ancillary role.

40. In that respect it must be observed that there is no national legal remedy which could take precedence over Treaty infringement proceedings. In an action for failure to fulfil Treaty obligations the issue is always one of the relationship between the duties of the Member States and the Community. Nor is it possible to set up any general rule according to which the legal remedy afforded by Community law in principle takes second place. At most, it is in the context of actions for damages that situations are conceivable in which a subsidiary role might be accepted. It is also quite possible that a judgment declaratory of an infringement of the Treaty, given in the abstract, may have an effect in an action for damages by an injured party. [13]

13 — See the judgment in Joined Cases C-60/90 and C-9/90 Francovich and Bonifaci v Italian Republic [1991] ECR in relation to a claim for damages by individuals against a Member State for failure to transpose a directive.

41. There is therefore nothing to stand in the way of a substantive examination of the question whether the clause complained of is contrary to Community law. The question comes down to determining whether the condition that proof must be adduced that 50% of supplies have been made to public authorities represents an unlawful condition of participation.

(c) The infringement of Directive 77/62

42. Article 14 of Directive 77/62 provides:

'In restricted procedures, the notice shall include at least the following information:

...

(d) ... the information and formalities necessary for an appraisal of the minimum economic and technical standards which the contracting authorities require of suppliers for their selections; those requirements may not be other than those referred to in Article 20, 22 and 23.'

43. According to Article 23 of the directive, evidence of the supplier's technical capacity may be furnished by:

'...

(a) a list of the principal deliveries effected in the past three years, with the sums, dates and recipients, public or private, involved:

— where to public authorities awarding contracts, evidenced to be in the form of certificates issued or countersigned by the competent authorities;

— were to private purchasers, delivery to be certified by the purchaser or, failing this, simply declared by the supplier to have been effected'.

44. The provision lists the forms of evidence which may serve to prove the volume of contracts of an undertaking during a particular period in order that the necessary conclusions about technical capacity may be drawn. The wording of Article 14 of the directive in conjunction with Article 23 leads to the inference that the enumeration of the forms of proof of technical capacity is exclusive. The situation is different as regards the proof of the financial and economic capacity of the undertaking, but that is not relevant in the present case.

45. Article 23(1)(a) of the directive is concerned primarily with the volume of deliveries. The distinction between public authorities awarding contracts and private purchasers thus seems to have been made because different forms of proof are prescribed with respect to supplies to them.

46. Every minimum amount of deliveries to public authorities awarding contracts or private purchasers laid down in advance in an additional criterion and thus an extension of the requirements of proof laid down in the directive. This is so as regards both a minimum volume of supplies to a class of purchasers and evidence of an absolute minimum amount of supplies as proof of technical capacity, even if the latter is in certain circumstances permissible in connection with proof of financial and economic capacity pursuant to Article 22(1)(a), which, however, is something that need not be considered here.

47. The fixing of a particular percentage of the volume of supplies to public authorities is not, as the Italian Government contends, a question of assessment of the evidence, since from the outset all tenderers are excluded who have not provided the requisite minimum volume of supplies to public authorities. Assessment of the evidence takes place only at a later stage, that is, when the authorized tenderers have adduced evidence of supplies, and then in the selection procedure an assessment is made of the purchasers who have been supplied.

48. In the result, the clause complained of must therefore be regarded as an exclusionary criterion which is not provided for in the directive.

C — Proposal

49. I propose that the Court:

1. dismiss the application;

2. order the Commission to pay the costs.