

JUDGMENT OF THE COURT (Grand Chamber)

8 April 2008*

In Case C-337/05,

ACTION under Article 226 EC for failure to fulfil obligations, brought on 15 September 2005,

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

applicant,

v

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

defendant,

* Language of the case: Italian.

THE COURT (Grand Chamber),

composed of V. Skouris, President, P. Jann, A. Rosas, K. Lenaerts and G. Arestis, Presidents of Chambers, K. Schiemann, J. Makarczyk (Rapporteur), P. Kūris, E. Juhász, E. Levits and A. Ó Caoimh, Judges,

Advocate General: J. Mazák,
Registrar: M. Ferreira, Principal Administrator,

having regard to the written procedure and further to the hearing on 17 April 2007,

after hearing the Opinion of the Advocate General at the sitting on 10 July 2007,

gives the following

Judgment

- ¹ By its application, the Commission of the European Communities is asking the Court to declare that by adopting a procedure, which has been in existence for a long time and is still followed, of directly awarding to Agusta SpA ('Agusta') contracts for the purchase of Agusta and Agusta Bell helicopters to meet the requirements of several

military and civilian corps of the Italian State, without any competitive tendering procedure and, 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 (OJ 1993 L 199, p. 1), as amended by European Parliament and Council Directive 97/52/EC of 13 October 1997 (OJ 1997 L 328, p. 1; 'Directive 93/36'), and previously, by Council Directive 77/62/EEC of 21 December 1976 coordinating procedures for the award of public supply contracts (OJ 1977 L 13, p. 1), as amended and supplemented by Council Directives 80/767/EEC of 22 July 1980 (OJ 1980 L 215, p. 1) and 88/295/EEC of 22 March 1988 (OJ 1988 L 127, p. 1; 'Directive 77/62'), the Italian Republic has failed to fulfil its obligations under those directives.

Legal framework

² By its action, the Commission claims a declaration of failure to fulfil obligations under Directive 93/36 and, as regards the period prior to the date on which that directive entered into force, under Directive 77/62. In view of the similarity of the provisions of those directives and in the interests of clarity, reference will be made here to Directive 93/36 alone.

³ The 12th recital in the preamble to Directive 93/36 is in the following terms:

'... the negotiated procedure should be considered to be exceptional and therefore applicable only in limited cases'.

4 Article 1 of Directive 93/36 states that, for the purposes of that directive:

‘(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;

(b) “contracting authorities” shall be the State, regional or local authorities, bodies governed by public law, associations formed by one or several of such authorities or bodies governed by public law.

...

(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.’

5 Under Article 2(1)(b), that directive is not to apply to:

‘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.’

6 Article 3 of the same directive 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.’

7 Article 5(1)(a) of Directive 93/36 is worded as follows:

‘(a) Titles II, III and IV and Articles 6 and 7 shall apply to public supply contracts awarded by:

- (i) the contracting authorities referred to in Article 1(b), including contracts awarded by the contracting authorities listed in Annex I in the field of

defence in so far as products not covered by Annex II are concerned, where the estimated value net of value-added tax (VAT) is not less than the equivalent in [euros] of 200 000 special drawing rights (SDRs);

- (ii) the contracting authorities listed in Annex I whose estimated value net of VAT is not less than the equivalent in [euros] of 130 000 SDRs; in the case of contracting authorities in the field of defence, this shall apply only to contracts involving products covered by Annex II.'

8 Article 6(1) to (3) of the same directive 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:

...

(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 deliver[ies] 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.'

9 Article 33 of Directive 93/36 is worded as follows:

'Directive 77/62/EEC ... is hereby repealed, without prejudice to the obligation of the Member States concerning the deadlines for transposition into national law and for application indicated in Annex V.

References to the repealed Directives shall be construed as reference to this Directive and should be read in accordance with the correlation table set out in Annex VI.’

Pre-litigation procedure

¹⁰ Since the Commission was unaware of any information pertaining to the organisation of a tendering procedure at Community level for the supply of helicopters to meet the requirements of various corps of the Italian State, it considered that such Agusta and Agusta Bell helicopters had been purchased directly, without any competitive tendering procedure at Community level, in breach of the provisions of Directives 77/62 and 93/36. Accordingly, on 17 October 2003, it sent the Italian Republic a letter of formal notice, inviting it to present its observations within a period of 21 days from the receipt of that letter.

¹¹ The Italian authorities replied to that letter by fax of 9 December 2003.

¹² Since it considered that the Italian authorities had not provided sufficient arguments to refute the observations formulated in the letter of formal notice, and in the absence of further communication from them, the Commission, on 5 February 2004, sent the Italian Republic a reasoned opinion, inviting it to comply therewith within a period of two months from its notification.

- 13 The Italian authorities replied to that reasoned opinion by three letters of 5 April, 13 May and 27 May 2004.
- 14 Since it considered that the Italian Republic's arguments in reply to the reasoned opinion were insufficient and finding that it had adopted no measure intended to terminate the impugned practice in awarding public supply contracts, the Commission decided to bring the present action.

The action

Admissibility

Arguments of the parties

- 15 The Italian Republic pleads that the action is inadmissible on the ground that the Commission made no complaint, in the pre-litigation procedure, about contracts for military supplies. Only civilian supplies were in question. Consequently, there are divergences between, on the one hand, the complaints made in the course of the pre-litigation procedure and, on the other, those formulated in the present action.
- 16 The Italian Republic submits also that the part of the action covering the supply contracts concluded for the requirements of the Corpo forestale dello Stato (State Forestry Corps) is inadmissible. It is contrary to the principle of no double jeopardy,

since the failure to fulfil obligations relating to that category of contracts has already been examined and determined by the Court in Case C-525/03 *Commission v Italy* [2005] ECR I-9405.

- 17 In addition, in its rejoinder, the Italian Republic contends that, having regard to the vague and imprecise character of the facts reported by the Commission both in the letter of formal notice and in the reasoned opinion, the action does not satisfy the requirements of coherence and detail under the case-law, which has gravely affected its rights of defence.
- 18 The Commission counters that the pre-litigation procedure never concerned military supplies, but concerned civilian supplies for, in particular, the requirements of certain military corps of the Italian State. It points out also that the subject-matter of the proceedings which gave rise to the judgment in *Commission v Italy*, cited above, differed from that of the present action.

Findings of the Court

- 19 It is settled case-law that the purpose of the pre-litigation procedure is to give the Member State concerned an opportunity, on the one hand, to comply with its obligations under Community law and, on the other, to avail itself of its right to defend itself against the objections formulated by the Commission (see, among others, Case C-152/98 *Commission v Netherlands* [2001] ECR I-3463, paragraph 23; Case C-439/99 *Commission v Italy* [2002] ECR I-305, paragraph 10; and Case C-185/00 *Commission v Finland* [2003] ECR I-14189, paragraph 79).

- 20 The proper conduct of that procedure thus constitutes an essential guarantee required by the EC Treaty in order to protect the rights of the Member State concerned. It is only when that guarantee is observed that the contentious procedure before the Court can enable it to judge whether that State has in fact failed to fulfil the obligations which the Commission alleges it has breached (see, in particular, Case C-145/01 *Commission v Italy* [2003] ECR I-5581, paragraph 17).
- 21 It is in the light of that case-law that it is necessary to examine whether the Commission has respected the rights of the defence with regard to the Italian Republic in the pre-litigation procedure.
- 22 First, as regards the alleged divergences between the complaints made during the pre-litigation procedure and those formulated before the Court, it suffices to state that the reasoned opinion and the application commencing the proceedings, which are in almost identical terms, are based on the same complaints. Therefore, the Italian Republic's argument to show that the complaints raised in the course of the pre-litigation procedure do not correspond to those developed in that application cannot be accepted.
- 23 Secondly, as regards the alleged lack of clarity and precision in the definition of the complaints made against the Italian Republic in the pre-litigation procedure, it must be observed that, 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 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 (see, in particular, Case 274/83 *Commission v Italy* [1985] ECR 1077, paragraph 21; Case C-279/94 *Commission v Italy* [1997] ECR I-4743, paragraph 15; and Case C-221/04 *Commission v Spain* [2006] ECR I-4515, paragraph 36).

24 In this case, the Commission's allegations in the pre-litigation procedure were sufficiently clear to enable the Italian Republic to deploy its defence, as is shown by the course which that part of the procedure took.

25 Thirdly, as regards the alleged breach of the principle of no double jeopardy, Case C-525/03 *Commission v Italy*, cited above, was a case with a completely different subject-matter since, in that instance, the Commission's action concerned an ordinance of the President of the Italian Council of Ministers authorising recourse to negotiated procedures by derogation from Community directives on public supply contracts, and the action was declared inadmissible since that ordinance had ceased to have any effect before the expiry of the period fixed in the reasoned opinion. The subject-matter of the present action is not a re-examination of the legality of the abovementioned ordinance, but concerns a long-standing practice of the Italian State of directly awarding contracts for the purchase of Agusta and Agusta Bell helicopters without any competitive tendering procedure at Community level.

26 Accordingly, the Italian Republic's plea of inadmissibility must be rejected.

Substance

Arguments of the parties

27 In support of its action, the Commission alleges that it has established the existence of a general practice of directly awarding contracts for the purchase of Agusta and Agusta Bell helicopters to cover the requirements of various military and civilian corps of the Italian State.

28 It refers to several contracts concluded in the period 2000 to 2003 with the Corpo dei Vigili del Fuoco (Corps of Fire Brigades), the Carabinieri, the Corpo Forestale dello Stato, the Guardia Costiera (Coastguard), the Guardia di Finanza (Revenue Guard Corps), the Polizia di Stato (State Police) and the Department of Civil Protection in the Presidency of the Council of Ministers. As regards the period prior to the year 2000, the Italian authorities admitted having purchased Agusta and Agusta Bell helicopters without any competitive tendering procedure. The Commission observes finally that the fleets of the State corps concerned are formed exclusively of such helicopters none of which was purchased following a competitive tendering procedure at Community level.

29 Since those contracts satisfy the conditions specified by Directive 93/36, the Commission submits that they should have been the subject of an open or a restricted procedure, in compliance with Article 6 of that directive, but not of a negotiated procedure.

30 The Italian Republic contends, first of all, that the supplies intended for the military corps of the Italian State are covered by Articles 296 EC and 2(1)(b) of Directive 93/36. It submits that those provisions are applicable because the helicopters in question are 'dual-use items', that is to say, they may serve both military and civilian purposes.

31 That Member State argues next that, because of the technical specificity of the helicopters and of the additional nature of the supplies in question, it could, pursuant to Article 6(3)(c) and (e) of Directive 93/36, use the negotiated procedure.

32 Generally, it points out that its practice does not differ from that implemented in the majority of the Member States which produce helicopters.

33 The Italian Republic argues, finally, that, until the end of the 1990s, the relations of the Italian State with Agusta could be analysed as ‘in-house’ relations as referred to in Case C-107/98 *Teckal* [1999] ECR I-8121.

Findings of the Court

34 At the outset, it is important to note that it is common ground between the parties that the value of the contracts in question exceeded the threshold fixed in Article 5(1)(a) of Directive 93/36, capable of bringing them within the scope of that directive.

35 It must also be stated that the documents concerning the helicopter purchase contracts annexed to the Italian Republic’s defence confirm the Commission’s view that the purchase of those helicopters using the negotiated procedure was a consistent practice of long standing.

— The ‘in-house’ relationship between the Italian State and Agusta

36 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 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 (see *Teckal*, cited above, paragraph 50; Case C-26/03 *Stadt Halle and RPL Lochau* [2005] ECR I-1, paragraph 49; Case C-84/03 *Commission v Spain* [2005] ECR I-139, paragraph 38; Case C-29/04 *Commission v Austria* [2005] ECR I-9705, paragraph 34; Case C-340/04 *Carbotermo and Consorzio Alisei* [2006] ECR I-4137, paragraph 33; and Case C-295/05 *Asemfo* [2007] ECR I-2999, paragraph 55).

³⁷ Therefore, it must be examined whether the two conditions required by the case-law mentioned in the preceding paragraph are met with regard to Agusta.

³⁸ As regards the first condition, relating to the public authority's control, it is important to note 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 (see *Stadt Halle and RPL Lochau*, cited above, paragraph 49).

³⁹ In that regard, as is shown by the study annexed to the defence on the Italian State's shareholdings in EFIM (Ente Partecipazioni e Finanziamento Industrie Manifatturiere), Finmeccanica and Agusta, the latter, which has, since its formation, been a company governed by private law, has, since 1974, always been a private company with government participation, that is to say a company whose capital is held in part by that State and in part by private shareholders.

40 Thus, since Agusta is a company in part open to private capital and therefore meets the criterion stated in paragraph 38 of the present judgment, the Italian State cannot exercise over that company a control similar to that which it exercises over its own departments.

41 In such circumstances, and without the necessity of examining whether Agusta carries out the essential part of its activities with the concession-granting public authority, the Italian Republic's argument that there is an 'in-house' relationship between that company and the Italian State must be rejected.

— The legitimate requirements of national interest

42 It should be noted at the outset that measures adopted by the Member States in connection with the legitimate requirements of national interest are not excluded in their entirety from the application of Community law solely because they are taken in the interests of public security or national defence (see, to that effect, Case C-186/01 *Dory* [2003] ECR I-2479, paragraph 30).

43 As the Court has already held, the Treaty provides for derogations applicable in situations which may involve public safety, in particular, in 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. The recognition of the existence of such an exception, regardless of the specific requirements laid down by the Treaty, would be liable to impair the binding nature of Community law and its uniform application (see, to that effect, Case 222/84 *Johnston* [1986] ECR 1651, paragraph 26; Case C-273/97 *Sirdar* [1999] ECR I-7403, paragraph 16; Case C-285/98 *Kreil* [2000] ECR I-69, paragraph 16; and *Dory*, cited above, paragraph 31).

⁴⁴ In that regard, 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 exceptional cases (see, to that effect, Case C-414/97 *Commission v Spain* [1999] ECR I-5585, paragraph 22).

⁴⁵ In this case, the Italian Republic contends that the purchases of Agusta and Agusta Bell helicopters meet 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, that is to say, they may serve as well for civilian as for military purposes.

⁴⁶ First, 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.

47 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. The supply of helicopters to military corps for the purpose of civilian use must comply with those same rules.

48 It is established that the helicopters in question, as the Italian Republic admits, are certainly for civilian use and possibly for military use.

49 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 recourse to the negotiated procedure for the purchase of those helicopters.

50 Secondly, that Member State relies on the confidential nature of the information which is obtained to put the helicopters manufactured by Agusta into production to justify the award of the contracts to that company following the negotiated procedure. In that regard, the Italian Republic cites Article 2(1)(b) of Directive 93/36.

51 However, the Italian Republic has not stated the reasons for which it submits that the confidentiality of the information communicated for the production of the helicopters manufactured by Agusta would be less well guaranteed were such production entrusted to other companies, be they established in Italy or in other Member States.

52 In that regard, 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.

53 Therefore, resort to Article 2(1)(b) of Directive 93/36 to justify the purchase of the helicopters in question by the negotiated procedure seems to be 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.

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

— The requirement for homogeneity of the fleet of helicopters

55 To justify the use of the negotiated procedure, the Italian Republic also invokes Article 6(3)(c) and (e) of Directive 93/36. It maintains, first, that, having regard to their technical specificity, the manufacture of the helicopters in question could be entrusted only to Agusta and, second, that it was necessary to ensure the interoperability of its fleet of helicopters, in order, particularly, to reduce the logistic, operational and pilot-training costs.

56 As is clear, in particular, from the 12th recital in the preamble to Directive 93/36, the negotiated procedure is exceptional in nature and may be applied only in cases which are set out in an exhaustive list. To that end, Article 6(2) and (3) of Directive 93/36 exhaustively and expressly lists the only exceptions for which recourse to the negotiated procedure is allowed (see, to that effect, as regards Directive 77/62, Case C-71/92 *Commission v Spain* [1993] ECR I-5923, paragraph 10; as regards Directive 93/36, see *Teckal*, paragraph 43, and Case C-84/03 *Commission v Spain*, cited above, paragraph 47).

57 According to settled case-law, the 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 (see Case C-57/94 *Commission v Italy* [1995] ECR I-1249, paragraph 23; Case C-318/94 *Commission v Germany* [1996] ECR I-1949, paragraph 13; and Case C-394/02 *Commission v Greece* [2005] ECR I-4713, paragraph 33). 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 (see, to that effect, Case C-84/03 *Commission v Spain*, paragraph 48).

58 In addition, it must be recalled that 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 Case 199/85 *Commission v Italy* [1987] ECR 1039, paragraph 14, and *Commission v Greece*, cited above, paragraph 33).

59 In this case, the Italian Republic has not discharged the burden of proof as regards the reason for which only helicopters produced by Agusta would be endowed with the requisite technical specificities. In addition, that Member State has confined itself to pointing out the advantages of the interoperability of the helicopters used by its various corps. It has not however demonstrated in what respect a change of supplier would have constrained it to acquire material manufactured according to a different technique likely to result in incompatibility or disproportionate technical difficulties in operation and maintenance.

60 Having regard to all the foregoing, it must be declared that, by adopting a procedure, which has been in existence for a long time and is still followed, of directly awarding to Agusta contracts for the purchase of Agusta and Agusta Bell helicopters to meet the requirements of several military and civilian corps of the Italian State, without any competitive tendering procedure, and, in particular, without complying with the procedures provided for by Directive 93/36 and, previously, by Directive 77/62, the Italian Republic has failed to fulfil its obligations under those directives.

Costs

61 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. Since the Commission has applied for costs and the Italian Republic has been unsuccessful in its submissions, the latter must be ordered to pay the costs.

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

1. **Declares that, by adopting a procedure, which has been in existence for a long time and is still followed, of directly awarding to Agusta SpA contracts for the purchase of Agusta and Agusta Bell helicopters 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 Council Directive 93/36/EEC of 14 June 1993 coordinating procedures for the award of public supply contracts, as amended by European Parliament and Council Directive 97/52/EC of 13 October 1997, and previously, by Council Directive 77/62/EEC of 21 December 1976 coordinating procedures for the award of public supply contracts, as amended and supplemented by Council Directives 80/767/EEC of 22 July 1980 and 88/295/EEC of 22 March 1988, the Italian Republic has failed to fulfil its obligations under those directives;**

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

[Signatures]