

OPINION OF ADVOCATE GENERAL

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delivered on 17 December 2008¹

1. The present action brought by the European Commission against Greece concerns a public procurement contract in relation to a power station on the island of Crete. The Commission argues that the contracting authority, by failing, firstly, to publish a call for tenders and, secondly, to give reasons for the rejection of one of the tenders in a timely manner, has failed to fulfil its obligations under Council Directive 93/38/EEC of 14 June 1993 coordinating the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors.²

Factual background

2. In July 2003 the Dimosia Epicheirisi Ilektrismou (Public Energy Corporation of Greece, 'DEI') published a call for tenders for the purchase and installation of two thermo-electrical units for the power station of Atherinolakos on the island of Crete. DEI found that the tenders submitted did not comply fully with the terms of the call for

tenders, so the project was aborted. In May 2004 a new call for competition for the same project was published, which was slightly different from the first one. All five tenders which were submitted in response to the second call were rejected as 'unsuitable' because they did not fully comply with certain technical specifications, and the procedure was again aborted.

3. On 14 December 2004, without publishing a fresh call for tenders, DEI wrote to the five tenderers who had participated in the second round and asked them to submit within 15 days their 'final financial offers' correcting any discrepancies, especially technical ones, between their earlier tenders and the project specifications. In that letter, DEI explained that it had decided to dispense with a call for competition because of, among other things, 'the overall history of the case'; 'the time necessary to install the two new units, namely 29 and 31 months respectively'; 'the requirement to cover in a timely manner the urgent, since 2007, needs of the island of Crete in electricity'; and 'the unforeseen delay in awarding the contract, which was due to the unsatisfactory outcome of the earlier calls for competition'. All five tenderers that had participated in the second round submitted new tenders.

1 — Original language: English.

2 — OJ 1993 L 199, p. 84.

4. On 7 February 2005 DEI wrote to one of the tenderers rejecting its tender without giving any reasons. That tenderer sent three letters to DEI on 10 and 11 February and 10 March 2005 and two letters to the Ministry of Development on 17 and 31 March 2005 asking to be informed of the reasons for the tender being rejected. DEI finally replied on 4 April 2005. The tenderer then applied to the Monomeles Protodikio Athinon (Court of First Instance, Athens) for an injunction, but its application was dismissed on 7 July 2005. DEI concluded the contract with another tenderer on 15 September 2005.

5. The unsuccessful tenderer lodged a complaint with the European Commission which, considering that the conduct of the procedure by DEI was incompatible with Community law and taking into account the very high value of the contract, initiated infringement proceedings against Greece. Not being satisfied by the reply of the Greek authorities to its formal letter of notice and reasoned opinion, the Commission brought an action requesting the Court to declare that Greece has failed to fulfil its obligations under Article 20(2)(a), on procurement procedures without a prior call for competition, and Article 41(4), on the obligation to give reasons to unsuccessful tenderers, of Directive 93/38.

I — The absence of a call for competition

6. The applicable provision is Article 20(2)(a) of Directive 93/38 which states: '[c]ontracting entities may use a procedure without prior call for competition in the following cases ... in the absence of tenders or suitable tenders in response to a procedure with a prior call for competition, provided that the original contract conditions have not been substantially changed'. As the Greek Government correctly points out, that provision empowers contracting authorities to dispense with the requirement for a call for competition where all three of the following conditions are met: (i) there has already been such a call, (ii) no tenders, or no suitable tenders have been submitted and (iii) the original contract conditions have remained substantially the same.

7. It is clear that, in the present case, the first condition is met. The Government and the Commission disagree as to whether the second and third conditions are also satisfied.

The concept of unsuitable tenders

8. DEI rejected the tenders submitted in response to the second call for competition as 'unsuitable' because they did not comply

fully with certain technical specifications. Was it right in its characterisation of the tenders? In other words, how should the term 'unsuitable' be interpreted? This is an important question because the answer to it determines whether the contracting entity may award the contract without publishing a call for tenders. If the submitted tenders can be correctly described as 'unsuitable', then no further call for competition is required; if, on the other hand, the rejected tenders cannot be deemed to be 'unsuitable', the contracting entity is under an obligation to repeat the entire procedure.

9. The Commission takes the view that only a tender which clearly cannot satisfy the needs of the contracting authority falls within the 'unsuitable' category; other discrepancies, of a less serious nature, may justify the rejection of a tender, but cannot render it 'unsuitable' and thus open the way for a contracting authority to award the contract without following the usual competitive procedure. By contrast, the Greek Government argues for a more liberal definition of 'unsuitable'. Placing considerable emphasis on recital 45 in the preamble to the directive, which states that 'the rules to be applied by the entities concerned should establish a framework for sound commercial practice and should leave a maximum of flexibility', it submits that contracting authorities should be allowed a wide margin of discretion in rejecting as 'unsuitable' all tenders which do not satisfy fully the criteria set out in the call for tenders, and then should be able to proceed without a fresh call for competition.

10. I think that the interpretation suggested by the Greek Government is too broad. When assessing how wide a discretion the contracting entities enjoy one should start with the requirements of the Treaty. In *Teleaustria* the Court found that public services concessions were outside the scope of the procurement directives, but held that the contracting entities concluding them were bound by the fundamental rules of the Treaty, in general, and the principle of non-discrimination on the ground of nationality, in particular, which implies an obligation of transparency.³ It then went on to explain what the content of this transparency obligation is: '[t]hat obligation of transparency which is imposed on the contracting authority consists in ensuring, for the benefit of any potential tenderer, a degree of advertising sufficient to enable the services market to be opened up to competition and the impartiality of procurement procedures to be reviewed'.⁴ Accordingly, transparency in public procurement is a requirement of primary Community law and, at the very least, entails some advertising. The importance of advertising is twofold: first, potential tenderers are made aware of the fact that a business opportunity exists, which in turn can lead to an increase in the degree of competition for the contract, as more tenders are likely to be submitted; second, advertising guards against partiality and corruption as it facilitates the review of procurement proced-

3 — Case C-324/98 *Teleaustria* [2000] ECR I-10745, paragraphs 60 to 61.

4 — *Ibid.*, paragraph 62.

ures.⁵ In the Court's case-law, transparency is linked to non-discrimination and is seen as a mechanism ensuring compliance with this fundamental principle of Community law.⁶

Directive ... is to open up public works contracts to competition. Exposure to Community competition in accordance with the procedures provided for by the Directive ensures that the public authorities cannot indulge in favouritism'.⁹ Effective competition, then, removes barriers that prevent new players from entering the market; benefits contracting entities which can choose from among more tenderers and, thus, are more likely to obtain value for money; and helps maintain the integrity of procurement procedures as such.

11. A further point which is relevant for the interpretation of the term 'unsuitable' is that one of the purposes of public procurement rules is the development of effective competition in the market. In its recent judgment in *Commission v Italy*, where the Commission claimed that Italy had failed to fulfil its obligations under a number of directives including Directive 93/38, the Court stated that '[t]he directives sought to eliminate practices that restrict competition in general and participation in public contracts by other Member States' nationals, in order to implement inter alia the freedom of establishment and freedom to provide services enshrined in Articles 43 EC and 49 EC respectively'.⁷ As the Court explained in an earlier case concerning Directive 93/37/EEC,⁸ 'the basic aim of the

12. As the above cases make clear, the requirement for a call for competition is rooted in primary Community law and should be complied with as a matter of course. Awarding contracts without a prior call for tenders may harm not only potential tenderers but also the public, which pays for procurement projects through taxation, and may distort the competitive nature of the public procurement market, undermining the effectiveness of the Treaty rules on fundamental Community freedoms. For this reason, a provision which allows a contracting authority to dispense with a call for tenders should be narrowly construed. Article 20(2) of Directive 93/38 is such a provision. It starts by stating that a contracting entity may award a

5 — A transparency obligation is expressly imposed on contracting entities by the new procurement directives. Article 2 of the new Public Sector Directive (Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (OJ 2004 L 134, p. 114)) and Article 10 of the new Utilities Directive (Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors (OJ 2004 L 134, p. 1)) provide that they should 'act in a transparent way'.

6 — See, inter alia, Case C-275/98 *Unitron Scandinavia* [1999] ECR I-8291, paragraph 31; Case C-19/00 *SIAC* [2001] ECR I-7725, paragraph 41; Case C-454/06 *presstext* [2008] ECR I-4401, paragraph 32.

7 — Case C-412/04 *Commission v Italy* [2008] ECR I-619, paragraph 2.

8 — Council Directive 93/37/EEC of 14 June 1993 concerning the coordination of procedures for the award of public works contracts (OJ 1993 L 199, p. 54).

9 — Case C-399/98 *Ordine degli Architetti* [2001] ECR I-5409, paragraph 75. See, to the same effect, Joined Cases C-285/99 and 286/99 *Impresa Lombardini* [2001] ECR I-9233, paragraph 35; and Case C-26/03 *Stadt Halle* [2005] ECR I-1, paragraph 44.

contract without a prior call for competition and then proceeds to set out exhaustively the cases in which this is possible. The Court has already ruled on the correct interpretative approach to this provision in *Commission v Greece*, a case which concerned subsections (c) and (d) thereof, on contracts that for technical or artistic reasons can be executed only by a particular contractor, and cases of extreme urgency respectively: '[i]t should as a preliminary point be noted that, as derogations from the rules relating to procedures for the award of public procurement contracts, the provisions of Article 20(2)(c) and (d) of Directive 93/38 must be interpreted strictly'.¹⁰ The present case falls to be decided under subsection (a) (on the absence of tenders and 'unsuitable' tenders), which should be interpreted in the same strict manner as subsections (c) and (d), given that there is nothing in either the spirit or the letter of Article 20(2) or in the judgment of the Court in *Commission v Greece* which could justify a different interpretative approach.

in *Ordine degli Architetti*, can easily identify a point in relation to which a submitted tender does not comply fully with the contract specifications, reject it as 'unsuitable' and then proceed to award the contract without a prior call for the submission of new tenders. This is especially true of large projects requiring advanced technical expertise where contract specifications are understandably very complex. But that is exactly the danger against which Community procurement rules, whether enshrined in the Treaty or in secondary legislation, are supposed to guard. By contrast, the interpretation offered by the Commission, namely that a tender can be rejected as 'unsuitable' and the contracting entity thus allowed to proceed without a call for competition only where the tender cannot cover the needs of that entity, leaves to the contracting authority enough discretion to assess the submitted tenders while ensuring that Community rules on public procurement are not by-passed.

13. In the light of the preceding analysis, the broad construction of the term 'unsuitable' advocated by the Greek Government cannot be accepted. Allowing contracting entities to rely even on minor discrepancies in the submitted tenders in order to reject them as 'unsuitable' means, in practice, giving them sweeping discretion to decide whether a call for competition will be published or not. A contracting entity which wishes to 'indulge in favouritism', to use the language of the Court

14. In support of the broad interpretation of Article 20(2)(c) of Directive 93/38 the Greek Government relied heavily on recital 45 in the preamble to the directive which refers to the need for a 'maximum of flexibility' in relation to the procurement rules for utilities. From this, the Government concludes that contracting authorities in this sector are given wide discretion in the application of the provisions of the directive, including the one on 'unsuitable' tenders, and awards of contracts without a prior call for competition. There are two objections to this argument.

¹⁰ — Case C-394/02 *Commission v Greece* [2005] ECR I-4713, paragraph 33.

15. Firstly, recital 45 is not a free-standing provision of law which can grant rights or impose obligations. Rather it performs, like all preambles to directives, an explanatory function, that is, it is there to assist those interpreting the directive to understand its aims and the spirit in which it was adopted. In the present case, recital 45 explains why the Community legislature adopted, for the utilities sector, a set of procurement rules which are less strict than the ones adopted for other sectors such as services and supplies. More importantly, Article 20(2) itself is an expression of the more flexible approach applied in the utilities sector, as it allows contracting authorities to proceed without a call for competition in more cases than under the directives regulating other sectors.¹¹ In other words, it was the Community legislature itself which decided in what way the rules on utilities should be more flexible by enacting the specific provisions of Directive 93/38, and it would be wrong to assume that recital 45 grants to contracting authorities some autonomous flexibility which is additional to the already flexible provisions of the directive.

16. Secondly, as I have already pointed out, the Court has held that advertising is a positive obligation imposed on contracting entities by the Treaty. Departures from that obligation must be expressly prescribed by law and narrowly construed. Even if there were such a general principle of flexibility for the interpretation of Directive 93/38 it could not supersede obligations rooted in primary Community law.

17. Something must be said, finally, about the relationship between the various procurement directives. The Greek Government has forcefully argued against the Commission's suggestion that a parallel reading of the Public Sector Directives may help in the interpretation of Directive 93/38. It claims that the latter directive introduces a system of rules specific to the utilities sector and it would be wrong to compare them with rules governing works or supply contracts. I do not agree with this contention. Only very rarely does one come across isolated legal provisions. Rules need to be placed in context; they become meaningful when read within the wider legal environment in which they operate. In the field of public procurement the Court has often referred to the procurement directives as a body of rules pursuing common aims and resting on common principles. I have already mentioned *Commission v Italy* where the Court stated that Directives 92/50,¹² 93/36,¹³ 93/37 and 93/38 have the common aim of

11 — As the Commission points out, this approach to 'flexibility' as an explanation of the nature of the procurement rules of Directive 93/38 is supported, by analogy, by recital 28 of the new Utilities Directive which replaced Directive 93/38. It states in relation to postal services: 'contracts awarded by contracting entities providing postal services should be subject to the rules of this Directive, including those in Article 30, which, safeguarding the application of the principles referred to in recital 9, create a framework for sound commercial practice and allow greater flexibility than is offered by Directive 2004/18/EC ...'. Here, the new Utilities Directive is compared with the new Public Sector Directive in order to explain in what sense the provisions of the former are more flexible than those of the latter.

12 — Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts (OJ 1992 L 209, p. 1).

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

eliminating anti-competitive practices in public procurement,¹⁴ and there are other recent examples in which the Court has used language indicating that the procurement directives must be approached in a systematic and coherent way.¹⁵ Was the Court then oblivious of the fact that each directive regulates a different area of public procurement and that there are differences in the rules they establish? Clearly not. What the Court meant was that the directives, their differences notwithstanding, constitute a network of rules with the common aim of ensuring that public procurement procedures are fair, open and efficient.

The contract conditions

19. Since the second of the three requirements of Article 20(2)(a) was not satisfied, DEI could not have availed itself of this provision, irrespective of whether the original contract conditions remained the same. However, for the sake of completeness, I will briefly explain why I think that the Commission is right in claiming that there was a substantial amendment to the original terms.

18. To conclude, I think that by characterising the rejected tender as 'unsuitable' and not publishing a call for competition DEI has failed to comply with Article 20(2) of Directive 93/38.

20. The second call for competition stated that discrepancies between the technical specifications required by the contracting authority and those offered by tenderers were not allowed. However, tenders which did not fully comply with those specifications could be accepted provided that any discrepancies were related to the technical characteristics of the machinery the tenderer proposed to use, were listed separately in the tender documents and did not affect the overall performance of the power station. In such a case, the tenderer was under no obligation to correct the discrepancies and bear the additional financial burden. In the third phase of the procedure, though, tenderers were asked to correct any discrepancies their previous tenders contained, themselves bearing the costs, and were required to submit a binding declaration to this effect.

14 — Case C-412/04 *Commission v Italy*, paragraph 2.

15 — See, inter alia, Case C-373/00 *Truley* [2003] ECR I-1931, paragraph 42 (settled case-law also shows that the purpose of the Community directives coordinating procedures for the award of public contracts is to avoid both the risk of preference being given to national tenderers or applicants whenever a contract is awarded by the contracting authorities and the possibility that a body financed or controlled by the State, regional or local authorities or other bodies governed by public law may choose to be guided by considerations other than economic ones); *pressetext*, paragraph 31 ('It is clear from the case-law that the principal objective of the Community rules in the field of public procurement is to ensure the free movement of services and the opening-up to undistorted competition in all the Member States'). Also, in Case C-513/99 *Concordia Bus Finland* [2002] ECR I-7213, paragraph 91, the Court held that 'there is no reason to give a different interpretation to two provisions which fall within the same field of Community law and have substantially the same wording'. The criterion, the Court tells us here, is the substance of the provisions to be interpreted; if the substance is the same, the interpretation should be the same.

21. The Greek Government argues that Article 20(2) does not prohibit all amendments to the original contract conditions but only those that are 'substantial'. When, at the hearing, the Judge-Rapporteur asked how the Government can reconcile its claim that all five tenders submitted in the second round were unsuitable and that no substantial changes were permitted in the third round with the fact that the contract was finally awarded to one of the five tenderers whose tender was initially rejected, counsel for the Government submitted that the only modifications DEI asked for in the third round concerned the discrepancies in the technical specifications that had been identified in the second round and had led to the rejection of the tender, while the other contract conditions remained the same.

22. I agree with the Government that the relevant criterion is the *substantial* nature of the amendment to the contract conditions, but I am not convinced that the amendment in question was insubstantial or not substantial enough for the purposes of Article 20(2)(a). An important new condition was introduced in the third phase: tenderers had to correct all discrepancies, themselves covering the costs, while under the terms of the contract notice in the second phase such discrepancies could have been accepted. Clearly, the contracting authority itself considered this new obligation to be of importance, otherwise it would not have asked the participating tenderers to submit binding declarations to this effect. Similarly, from the point of view of tenderers, such an amendment to the conditions of the contract is indeed substantial, as it excludes from the outset those who may not be able or willing to correct the discrepancies in their original tenders and incur the relevant costs. Such amendments to the original conditions of the

contract should always be considered 'substantial'. Moreover, as I have already pointed out, a provision which allows a contracting entity to award a contract without a call for competition, such as Article 20(2)(a), must be interpreted strictly, because it introduces an exemption from the Treaty-based rule of transparency. Therefore, contracting entities can dispense with a call for tenders only if the amendments in question clearly cannot affect, actually or potentially, the procurement process. In the present case, the amendment to the contract conditions cannot be said to be insubstantial or not substantial enough for the purposes of Article 20(2)(a).

23. Given that DEI had rejected the five tenders submitted in the second round because they did not comply fully with the required technical specifications, it was in practice impossible to award the contract in the third round to one of those five tenderers without its tender first being modified. Thus, DEI amended the contract conditions in the third round to make certain that tenderers would undertake the obligation to correct any discrepancies and asked them to prepare a new financial offer that would include the

relevant costs. Had DEI published a fresh call for competition, this would have been an entirely appropriate procedure. Instead, it invited only specific tenderers to submit tenders, despite the fact that the original contract conditions had been substantially changed. In doing so, it fell foul of Article 20(2)(a) of Directive 93/38.

had taken into account was that it had to act quickly.

Urgency

24. Article 20(2)(d) of Directive 93/38 provides that a procedure without a prior call for competition may be used 'in so far as is strictly necessary when, for reasons of extreme urgency brought about by events unforeseeable by the contracting entities, the time-limits laid down for open and restricted procedures cannot be adhered to'. The Commission argues that the way in which DEI's letter to the five tenderers of the second round justified its decision to proceed without a prior call for competition (for example, the references to the 'urgent needs' of Crete for electricity, the 'necessary time to install the two new units', the 'unforeseen delays') implies that it was relying not only on Article 20(2)(a) but Article 20(2)(d) too. The Greek Government disagrees. It submits that from the beginning DEI relied only on Article 20(2)(a) and made clear that the reason it followed the procedure without a call for tenders was because the two previous rounds had failed to produce a satisfactory outcome. This is what was meant by the phrase 'the overall history of the case'. The reference to the urgency of the situation was ancillary, indicating that one of the facts DEI

25. It is true that the way the letter of 14 December 2004 was phrased gives the impression that DEI is invoking urgency as one of the reasons justifying the use of a procedure without a prior call for tenders. However, it is not clear whether this is used as a free-standing justification based on Article 20(2)(d). In any case, given that the Greek Government does not rely on this subsection, the Court does not need to examine the issue any further.

II — The delay in giving reasons

26. Article 41(4) of Directive 93/38 reads as follows: '[t]he contracting entities carrying out one of the activities mentioned in Annexes I, II, VII, VIII and IX shall, promptly after the date on which a written request is received, inform any eliminated candidate or tenderer of the reasons for rejection of his application or his tender and any tenderer who has made an admissible tender of the characteristics and relative advantages of the tender selected as well as the name of the successful tenderer'. The Commission argues that the two-month delay in providing the unsuccessful tenderer with reasons for the rejection of its tender cannot be considered 'prompt' for the purposes of this provision. The Greek Government concedes that there

was some delay but claims that the criterion for assessing whether it falls foul of Article 41(4) is whether the tenderer has suffered prejudice in the exercise of its Community rights. Further, counsel for the Government submitted at the hearing that the legislative history of Article 41(4) — the Commission had initially proposed a 15-day period for giving reasons, as in the Public Sector Directives, and when the suggestion was rejected by the European Parliament the term ‘promptly’ was adopted — indicates that a certain latitude should be granted to contracting authorities when dealing with requests to give reasons for rejecting a tender. According to the Greek Government, since, in the present case, the unsuccessful tenderer was able to avail itself of a remedy to have the legality of the contracting entity’s decision reviewed, it cannot be said that DEI failed to comply with the directive by taking two months to respond to its request.

should respond to be decided on a case-by-case basis.

28. In assessing what is a ‘prompt’ reply in any given case, one of the factors to be taken into consideration is whether the tenderer was able to use the remedies made available to him by Community and national law in order to have the legality of the decision reviewed by a court. Indeed, unless the contracting entity explains why a particular tender was rejected, the unsuccessful tenderer cannot know whether it makes sense to challenge the decision and on what grounds this should be done.

27. I agree with the Government that the use of the term ‘promptly’ without a reference to a specific time-limit means that the approach to Article 41(4) should not be too rigid. The fact that the Public Sector Directives explicitly provide for a 15-day period,¹⁶ while Directive 93/38 on utilities does not, implies that the Community legislature deliberately left the question of how quickly a contracting entity

29. However, safeguarding the interests of tenderers that participate in a public procurement procedure is only one of the aims pursued by Article 41(4). This provision also serves to safeguard the integrity and efficiency of the procurement process as such; here, the beneficiaries are the contracting entities themselves and, ultimately, the tax-paying public. Therefore, in interpreting the term ‘promptly’, one should bear in mind that the obligation of contracting entities to provide reasons in a timely manner discourages favouritism and promotes compliance with the requirements of Community law. Article 41(4) constitutes a procedural guarantee which helps to ensure that the reasons given for the rejection of a tender are not a pretext for awarding contracts in an arbitrary manner. In other words, this rule performs a deterrence function: a contracting authority

16 — Article 8(1) of Directive 93/37; Article 7(1) of Directive 93/36; Article 12(1) of Directive 92/50.

which knows that, immediately after choosing a tender, it will be called upon to justify its choice and explain why the others were rejected is less likely to depart from Community procurement rules.

30. Further, excessive delays in responding to a request for reasons may have significant efficiency costs. For example, in the present case DEI itself had emphasised that the island of Crete was in *urgent* need of additional electricity supplies. However, it delayed the project for two months by not explaining why it had chosen one particular tender and rejected the others. The Greek Government has not offered any reasons for DEI's tardiness, which can hardly be reconciled with the urgent nature of the contract in question. Given that many large projects in various Member States are funded, to some extent, by the Community budget it is reasonable to expect contracting authorities to apply Community procurement rules in a way that takes into account the need for efficiency.

ive 93/38, provides in Article 49(2) that contracting entities are to inform unsuccessful tenderers of the reasons for the rejection of their tenders 'as soon as possible' and that '[t]he time taken to do so may under no circumstances exceed 15 days from receipt of the written enquiry'. The drafters of the directive have themselves assessed what is an acceptable period for giving reasons and have thus removed all discretion from contracting authorities. Admittedly, the present case falls to be decided, *rationae temporis*, under Directive 93/38 and not Directive 2004/17. However, we cannot ignore the fact that the Community legislature has decided that, whatever considerations justified in the past a more flexible approach in relation to this issue in the utilities sector, they no longer exist. Accordingly, utilities are now subject to the same, stricter rule that applies to contracts for goods, supplies and services and provides that under no circumstances may the 15-day period be exceeded. Although the provision is not applicable in this case, it would be clearly artificial to suggest that the Court should ignore it. Ultimately, under Directive 93/38, what constitutes a reasonable delay will have to be decided on a case-by-case basis, bearing in mind the general need for expediency in public procurement which is not limited to the protection of the rights of tenderers. I think, therefore, that the concept of 'prompt' reply should be narrowly construed, taking into account the usual time-limits in other areas of public procurement. I am of the opinion that DEI's failure for two months to provide the unsuccessful tenderer with reasons constitutes — in the absence of any specific justifications for such a delay that clearly exceeds the usual time-limits applicable in public procurement — a breach of Article 41(4) of Directive 93/38.

31. It should be noted also that the new Utilities Directive, which replaced Direct-

III — Conclusion

32. I suggest that the Court should declare that, in failing, through DEI, to publish a call for competition and give promptly to the unsuccessful tenderer reasons for the rejection of its tender, Greece has failed to fulfil its obligations under Articles 20(2) and 41(4) of Directive 93/38/EEC of 14 June 1993 coordinating the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors.