

Action brought on 20 February 2009 — Provincie Groningen and Provincie Drenthe v Commission**(Case T-69/09)**

(2009/C 90/51)

*Language of the case: Dutch***Parties**

Applicants: Provincie Groningen (Groningen, Netherlands) and Provincie Drenthe (Assen, Netherlands) (represented by: C. Dekker and E. Belhadi, lawyers)

Defendant: Commission of the European Communities

Form of order sought

— annul in part Article 2 of Commission Decision C(2008) 8355 of 11 December 2008 on the reduction of the aid from the European Regional Development Fund within the framework of the single programming document for the Groningen-Drenthe region coming under objective 2 — no 97.07.13.003 — granted in accordance with Commission Decision C(1997) 1362 of 26 May 1997, in so far as the former decision relates to the 2% flat-rate adjustment to the budget in the amount of EUR 1 139 346,24 which was applied and the expenditure amounting in total to NLG 8 441 804 which it was declared could not be subsidised, and in so far as it relates to the extrapolation adjustment of 5,76% and also in so far as it concerns the adjustment of NLG 1 160 456 in connection with the failure to put out to tender contracts with a value below the threshold referred to in the procurement directives;

— order the Commission to pay the costs of the proceedings.

Pleas in law and main arguments

In support of their application, the applicants first submit that there has been a breach of Article 24 of Regulation No 4253/88 ⁽¹⁾ by reason of the fact that the Commission applied an extrapolated adjustment of 5,76% in respect of established errors and a flat-rate adjustment of 2% in respect of the failure to meet specific conditions of the project and programme, even though those adjustments cannot be based on that article.

Second, the applicants allege that there has been a breach of Articles 28 EC and 49 EC by reason of the fact that the Commission failed to realise that contracts with a value below the threshold values referred to in Directive 93/37/EEC, ⁽²⁾ Directive 93/38/EEC ⁽³⁾ and Directive 92/50/EEC ⁽⁴⁾ in respect of public contracts may be awarded in accordance with the provisions governing the free movement of goods and services only if there is a cross-border element.

Third, the applicants allege an infringement of the principles of legal certainty and legitimate expectation inasmuch as the

Commission established that contracts with a value below the threshold values referred to in the public procurement directives may be awarded only in accordance with the provisions on free movement of goods and services, even though this was not clear at the time when the single programming document for the Groningen-Drenthe region coming under objective 2 was being implemented.

Fourth, the applicants argue that there has been a breach of the EC Treaty, in particular Article 211 EC, by virtue of the fact that the Commission applied a flat-rate reduction of 2% in respect of the alleged failure to comply with the national conditions governing the project, even though it had no power to do so.

Fifth, the applicants allege a breach of Regulations No 4253/88 and No 2064/97 ⁽⁵⁾ by reason of the fact that the Commission failed to realise that the applicants had complied with their obligations concerning the monitoring and control system.

Sixth, the applicants allege infringement of the principle of legitimate expectation in that the Commission provided the applicants with grounds for a well-founded expectation that the existing monitoring and control system and other forms of supervision were sufficient for them to meet their obligations.

Seventh, the applicants allege a breach of Regulation No 4253/88 on the ground that the Commission wrongly concluded that the project for the 'Noord-Zuidroute' had not been completed in time and that there were shortcomings in the monitoring and control systems, in respect of which a fixed adjustment of 2% was applied.

Eighth, the applicants contend that there was a breach of Directive 93/36/EEC ⁽⁶⁾ by virtue of the fact that the Commission wrongly found that, in the context of the 'Waterfabriek Noorder Dierenpark Emmen' project, contracts had been concluded for the supply of membranes and a process monitoring system which, contrary to Directive 93/36/EEC, were allegedly awarded without any form of competition, even though Directive 93/36/EEC does indeed allow such in that situation.

Ninth, the applicants allege a breach of Directives 92/50/EEC and 93/37/EEC on the ground that the Commission wrongly held that, in the context of the 'Waterfabriek Noorder Dierenpark Emmen' project, a contract had been concluded in respect of project and framework management which, contrary to Directive 92/50/EEC, was allegedly awarded without any form of competition, even though that contract formed part of the realisation of the work within the terms of Directive 93/37/EEC and therefore did not have to be the subject of a separate tender.

Tenth, the applicants allege a breach of Directive 93/38/EEC on the ground that the Commission wrongly held that, within the framework of the 'Centraal Station Groningen' project, a contract for the renting of temporary accommodation units was awarded contrary to Directive 93/38/EEC, even though the arranging of that temporary accommodation was to be classified as 'work' within the terms of Directive 93/38/EEC.

Eleventh, the applicants allege a breach of Regulation No 4253/88 by virtue of the fact that the Commission wrongly held that the subsidisation of the 'Noord-Nederland' technology centre was not in accordance with the single programming document.

The applicants conclude by alleging a breach of the EC Treaty and of Regulation No 4253/88 by reason of the fact that, for the purpose of establishing the total error percentage, the Commission wrongly took into account the findings relating to the renovation plan for the Martini Hall in Groningen.

- (¹) Council Regulation (EEC) No 4253/88 of 19 December 1988 laying down provisions for implementing Regulation (EEC) No 2052/88 as regards coordination of the activities of the different Structural Funds between themselves and with the operations of the European Investment Bank and the other existing financial instruments (OJ 1988 L 374, p. 1).
- (²) 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).
- (³) Council Directive 93/38/EEC of 14 June 1993 coordinating the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors (OJ 1993 L 199, p. 84).
- (⁴) 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).
- (⁵) Commission Regulation (EC) No 2064/97 of 15 October 1997 establishing detailed arrangements for the implementation of Council Regulation (EEC) No 4253/88 as regards the financial control by Member States of operations co-financed by the Structural Funds (OJ 1997 L 290, p. 1).
- (⁶) Council Directive 93/36/EEC of 14 June 1993 coordinating procedures for the award of public supply contracts (OJ 1993 L 199, p. 1).

Action brought on 19 February 2009 — Netherlands v Commission

(Case T-70/09)

(2009/C 90/52)

Language of the case: Dutch

Parties

Applicant: Kingdom of the Netherlands (represented by: C. Wissels and M. Noort, Agents)

Defendant: Commission of the European Communities

Form of order sought

— annul in part Commission Decision C(2008) 8355 of 11 December 2008 on the reduction of the aid from the European Regional Development Fund within the framework of the single programming document for the Groningen-Drenthe region coming under objective 2 — no 97.07.13.003 — granted in accordance with Commission Decision C(1997) 1362 of 26 May 1997, in

so far as the former decision relates to the 2% flat-rate adjustment to the budget in the amount of EUR 1 139 346,24 which was applied and the expenditure amounting in total to NLG 1 160 456 which it was declared could not be subsidised; and

— order the Commission to pay the costs.

Pleas in law and main arguments

In support of its application the Netherlands first alleges infringement of the principle of legal certainty in that obligations are imposed on a Member State on the basis of case-law of the Court of Justice which post-dates the imposition of those obligations and which at that moment were not clear, precise and foreseeable for the Member State concerned.

In the alternative, the Netherlands alleges infringement of the principle that reasons must be given by virtue of the fact that no more detailed grounds were provided as to the nature of the cross-border interest of the project in question, that project having in the interim been approved and the value of which fell below the thresholds laid down in the public procurement directives.

In conclusion, the Netherlands alleges a breach of Article 211 EC by reason of the fact that the Commission applied a flat-rate reduction of 2% on the ground of the alleged failure to comply with the national conditions governing the project, even though the Commission has power only in respect of compliance with the Community conditions.

Action brought on 17 February 2009 — hofherr kommunikation v OHIM (NATURE WATCH)

(Case T-77/09)

(2009/C 90/53)

Language of the case: English

Parties

Applicant: hofherr kommunikation GmbH (Innsbruck, Austria) (represented by S. Warbek, lawyer)

Defendant: Office for Harmonisation in the Internal Market (Trade Marks and Designs)

Form of order sought

— Annul the decision of the First Board of Appeal of the Office for Harmonisation in the Internal Market (Trade Marks and Designs) of 4 December 2008 in case R 1410/2008-1 and allow registration of the trade mark applied for; and

— Order OHIM to pay the legal costs.