2. If the first question is answered in the affirmative, can the indirect discrimination thus established be justified by the terms of Article 6(3) of the Agreement annexed to Protocol No 14 on Social Policy [annexed to the Treaty on European Union]?

3. If the second question is answered in the negative, do the provisions of Directive 79/7/EEC [1] preclude the maintenance in force of Articles L. 12(b) and R. 13 of the French Civil and Military Retirement Pensions Code?

4. If the first question is answered in the affirmative and the second and third questions are answered in the negative, must any challenge to those articles be limited solely to the discrimination that they imply or does it relate to the impossibility for civil servants of both sexes to benefit from them?

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[1] Council Directive 79/7/EEC of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security (OJ 1979 L 6, p. 24).

Action brought on 9 December 2010 — European Commission v Federal Republic of Germany

(Case C-574/10)

(2011/C 72/08)

Language of the case: German

Parties

Applicant: European Commission (represented by: G. Wilms and C. Zadra, acting as Agents)

Defendant: Federal Republic of Germany

Form of order sought

— Declare that, by having contracts for architectural services relating to the construction of the recreation centre awarded by the municipality of Niedernhausen without conducting a Europe-wide invitation to tender, the defendant infringed its obligations under Articles 2, 9 and 20 in conjunction with Articles 23 to 55 of Directive 2004/18/EC [1];

— order Federal Republic of Germany to pay the costs.

Pleas in law and main arguments

The subject-matter of the present action is the service contracts for consideration relating to architectural services, which the municipality of Niedernhausen as contracting authority concluded with an engineering agency. Although the architectural tasks in question all relate to a uniform construction project, namely the construction of a recreation centre, they were awarded separately to the same engineering agency as the drawing up of plans for the individual building components, without a Europe-wide invitation to tender being conducted. The contract values were accordingly separately calculated for the individual contracts.

The present architectural contracts are contracts for consideration concerning the provision of services within the meaning of Article 1(2)(d) of Directive 2004/18/EC. Architectural services are priority services in accordance with Annex II A, Category 12 to the directive.

The Commission is of the view that the drawing up of plans concerns a uniform procurement procedure for which it can find no objective grounds for it to be divided into separate individual contracts. It concerns the part performance of the construction of a single building, planned, decided and implemented as a general project. They serve that uniform aim and are in close physical, economic and functional relation. Therefore, the contract value should have been calculated according to the total value of the architectural services provided in the context of the construction. In that case, the contract value would have exceeded the threshold laid down in Article 7B of Directive 2004/18/EC and the architectural contract should have been the subject of a Europe-wide invitation to tender.

The construction of the recreation centre itself concerns a single construction contract for the purposes of European procurement law. That is at least a strong indication that the corresponding planning is also to be regarded as a uniform procurement procedure. If architectural services, such as in the present case, are connected with a uniform construction contract and its contents are defined by the planned construction, there is no logical reason to choose another method of calculation. Architectural services are therefore to a certain extent accessory to the construction service. Why a uniform construction service would require a non-uniform architectural service is, in the opinion of the Commission, unclear.

The Court considers the uniform economic and technical function of the individual parts of the contract as an indication that it concerns a single procurement procedure. Although the stated criterion of the functional approach was applicable to construction contracts, the Commission is of the opinion that it is also applicable to service contracts. The criterion of the technical and economic uniformity of the drawing up of plans is fulfilled in the present case since it concerns the construction of a single building.

An almost arbitrary division of the contracts is contrary to the effectiveness of the directive. It would indeed often lead to values artificially falling below the threshold and thereby to a reduction of its scope of application. The Court notes in its

settled case-law the significance of the directive on the award of public contracts for the free movement of services and for fair competition at European Union level. An arbitrary and subjective 'dismemberment' of uniform service contracts would undermine that objective.

Budgetary reasons for the division into construction sections could also not justify an artificial division of a unified contract value. It is contrary to the objective of the European public procurement directives for a unified proposed purchase which is carried out in several stages purely for budgetary reasons to be considered solely for that reason to consist of several independent contracts and thereby to be prevented from coming within the scope of application of the directive. Article 9(3) of the directive indeed forbids such an artificial division of a unified proposed purchase.

It must be concluded that the contracts in question constitute a unified proposed purchase, the value of which at the time of the contract award exceeded the threshold laid down in the directive. The contract should therefore have been the subject of a Europe-wide invitation to tender and awarded according to the procedure provided for in the directive. That is not the case and therefore the defendant infringed Directive 2004/18/EC.

([1]) 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).

Action brought on 9 December 2010 — European Commission v Republic of Hungary

(Case C-575/10)

(2011/C 72/09)

Language of the case: Hungarian

Parties

Applicant(s): European Commission (represented by: D. Kukovec and A. Sipos, Agents)

Defendant(s): Republic of Hungary

Form of order sought

— Declare that the Republic of Hungary has failed to fulfil its obligations under Articles 47(2) and 48(3) of Directive 2004/18/EC, ([1]) and Article 54(5) and (6) of Directive 2004/17/EC, ([2]) by failing to ensure that, in public procurement procedures, economic operators may, in a specific case, rely on the capacity of other entities, whatever the legal nature of the link between itself and those entities.

— order Republic of Hungary to pay the costs.

Pleas in law and main arguments

Both Directive 2004/17 and Directive 2004/18 allow tenderers in public procurement procedures to rely on the capacity of other entities to demonstrate their suitability and the satisfaction of the selection criteria whatever the legal nature of the link between itself and those entities.

In the view of the Commission, Hungarian rules which, in the case of certain suitability criteria, allow tenderers to use the resources of other entities which are not directly participating in the performance of the contract only if they have a controlling share in such entities do not comply with those provisions of the Directives. Thus, in the case of entities which do not participate as subcontractors in the performance of the contract, the contested national rules impose an additional requirement to be met to allow the tenderer to rely on the capacity of such entities in the public procurement procedure.

The provisions of the Directives are unequivocal: without requiring the entities which provide the resources to be directly involved in the performance of the contract, they require the national legislation to guarantee the possibility of relying on the resources of such entities, *whatever the legal nature* of the link between the tenderer and those entities. The sole requirement is that the tenderer be able to demonstrate to the awarding authority that it will actually have the resources necessary for the performance of the contract.

However, the Commission goes on to argue that the Hungarian rules at issue restrict the possibilities open to tenderers in this regard, so that, in practice, they have no option but to involve in the contract as subcontractors those entities which have such resources, unless, from the outset, they have a controlling share in such entities.

The Commission asserts that the national rules at issue cannot be justified by the objective of eliminating practices intended to evade the public procurement rules, because that objective cannot be relied on to justify a provision contrary to European Union law on public procurement which disproportionately restricts the rights and procedural obligations arising from the Directives. Of course, it is open to the Member States, within the limits imposed by the Directives, to decide the manner in which the tenderers must demonstrate that they actually will have the resources of other entities, but they must do so without making a distinction on the basis of the legal nature of the legal links with such entities.