

JUDGMENT OF THE COURT
22 September 1988 *

In Case 45/87

Commission of the European Communities, represented by Eric L. White, a member of its Legal Department, acting as Agent, with an address for service in Luxembourg at the office of Georgios Kremlis, Jean Monnet Building, Kirchberg,

applicant,

supported by

The Kingdom of Spain, represented by Jaime Folguera Crespo, Deputy Director General for Coordination of Community Affairs with responsibility for Legal Affairs, and Rafael Garcia-Valdecasas Fernández, Head of the Legal Department for matters before the Court of Justice of the European Communities, acting as Agents,

v

Ireland, represented by Louis J. Dockery, Chief State Solicitor, acting as Agent, assisted by E. Fitzsimmons, SC, with an address for service in Luxembourg at the Irish Embassy, 28 route d'Arlon,

defendant,

APPLICATION for a declaration that by allowing the inclusion in the contract specification for the Dundalk Water Supply Augmentation Scheme — Contract No 4 of Clause 4.29 providing that asbestos cement pressure pipes are to be certified as complying with Irish Standard 188: 1975 in accordance with the Irish Standard Mark Licensing Scheme of the Institute for Industrial Research and Standards and consequently refusing to consider (or rejecting without adequate justification) a tender providing for the use of asbestos cement pipes manufactured to an alternative standard providing equivalent guarantees of safety, performance and reliability (such as ISO 160), Ireland has failed to fulfil its obligations under Article 30 of the EEC Treaty and Article 10 of Council Directive 71/305/EEC,

* Language of the Case: English.

THE COURT

composed of: Lord Mackenzie Stuart, President, O. Due, J. C. Moitinho de Almeida and G. C. Rodríguez Iglesias (Presidents of Chambers), T. Koopmans, U. Everling, Y. Galmot, C. N. Kakouris and T. F. O'Higgins, Judges,

Advocate General: M. Darmon

Registrar: J.-G. Giraud

having regard to the Report for the Hearing and further to the hearing on 27 April 1988,

after hearing the Opinion of the Advocate General delivered at the sitting on 21 June 1988,

gives the following

Judgment

1 By application lodged at the Court Registry on 13 February 1987, the Commission of the European Communities brought an action under Article 169 of the EEC Treaty for a declaration that by allowing the inclusion in the contract specification for the Dundalk Water Supply Augmentation Scheme — Contract No 4 of a clause providing that the asbestos cement pressure pipes should be certified as complying with Irish Standard 188: 1975 in accordance with the Irish Standard Mark Licensing Scheme of the Institute for Industrial Research and Standards (IIRS) and consequently refusing to consider (or rejecting without adequate justification) a tender providing for the use of asbestos cement pipes manufactured to an alternative standard providing equivalent guarantees of safety, performance and reliability, Ireland has failed to fulfil its obligations under Article 30 of the EEC Treaty and Article 10 of Council Directive 71/305/EEC of 26 July 1971 concerning the coordination of procedures for the award of public works contracts (Official Journal, English Special Edition 1971 (II), p. 682).

- 2 Dundalk Urban District Council is the promoter of a scheme for the augmentation of Dundalk's drinking water supply. Contract No 4 of that scheme is for the construction of a water-main to transport water from the River Fane source to a treatment plant at Cavan Hill and thence into the existing town supply system. The invitation to tender for that contract by open procedure was published in the *Supplement of the Official Journal of the European Communities* on 13 March 1986 (Official Journal S 50, p. 13).
- 3 Clause 4.29 of the specification relating to Contract No 4, which formed part of the contract specification, included the following paragraph:

'Asbestos cement pressure pipes shall be certified as complying with Irish Standard Specification 188: 1975 in accordance with the Irish Standard Mark Licensing Scheme of the Institute for Industrial Research and Standards. All asbestos cement watermains are to have a bituminous coating internally and externally. Such coatings shall be applied at the factory by dipping.'
- 4 The dispute stems from complaints made to the Commission by an Irish undertaking and a Spanish undertaking. In response to the invitation to tender for Contract No 4, the Irish undertaking had submitted three tenders, one of which provided for the use of pipes manufactured by the Spanish undertaking. In the Irish undertaking's view, that tender, which was the lowest of the three submitted by it, gave it the best chance of obtaining the contract. The consulting engineers to the project wrote a letter to the Irish undertaking concerning that contract stating that there would be no point in its coming to the pre-adjudication interview if proof could not be provided that the firm supplying the pipes was approved by the IIRS as a supplier of products complying with Irish Standard 188: 1975 ('IS 188'). It is common ground that the Spanish undertaking in question had not been certified by the IIRS but that its pipes complied with international standards, and in particular with ISO 160: 1980 of the International Organization for Standardization.
- 5 Reference is made to the Report for the Hearing for a fuller account of the relevant provisions, the background to the case and the submissions and arguments of the parties and of the intervener, which are mentioned or discussed hereinafter only in so far as is necessary for the reasoning of the Court.

- 6 In the Commission's view, this action raises *inter alia* the question of the compatibility with Community law, in particular Article 30 of the EEC Treaty and Article 10 of Directive 71/305, of the inclusion in a contract specification of clauses like the disputed Clause 4.29. It further argues that the Irish authorities' rejection, without any examination, of a tender providing for the use of Spanish-made pipes not complying with Irish standards also infringed those provisions of Community law. It is appropriate to examine first the issues raised by Clause 4.29.

Directive 71/305

- 7 Article 10 of Directive 71/305, to which the Commission refers, provides that Member States are to prohibit the introduction into the contractual clauses relating to a given contract of technical specifications which mention products of a specific make or source or of a particular process and which therefore favour or eliminate certain undertakings. In particular, the indication of types or of a specific origin or production is to be prohibited. However, such indication is permissible if it is accompanied by the words 'or equivalent' where the authorities awarding contracts are unable to give a description of the subject of the contract using specifications which are sufficiently precise and intelligible to all parties concerned. The words 'or equivalent' do not appear in Clause 4.29 of the contract notice at issue in this case.
- 8 The Irish Government argues that the provisions of Directive 71/305 do not apply to the contract in question. It points out that Article 3 (5) of the directive provides that the directive is not to apply to 'public works contracts awarded by the production, distribution, transmission or transportation services for water and energy'. There is no doubt that the contract in this case was a public works contract to be awarded by a public distribution service for water.
- 9 The Commission does not deny that fact but points out that Ireland requested the publication of the relevant notice in the Official Journal by reference to the obligatory publication of contract notices laid down by the directive. The Commission, in common with the Spanish Government, which intervened in support of its conclusions, considers that, having voluntarily brought itself within the scope of the directive, Ireland was obliged to comply with its provisions.

- 10 With regard to this point, the Irish Government's argument must be accepted. The actual wording of Article 3 (5) is wholly unambiguous, in so far as it excludes public works contracts of the type at issue from the scope of the directive. According to the preamble to the directive, that exception to the general application of the directive was laid down in order to avoid the subjection of distribution services for water to different systems for their works contracts, depending on whether they come under the State and authorities governed by public law or whether they have separate legal personality. There is no reason to consider that the exception in question no longer applies, and the reasons underlying it are no longer valid, where a Member State has a contract notice published in the *Official Journal of the European Communities*, whether through an error or because it initially intended to seek a contribution from the Community towards the financing of the work.
- 11 The application must therefore be dismissed in so far as it is based on the infringement of Directive 71/305.

Article 30 of the Treaty

- 12 It must be observed at the outset that the Commission maintains that Dundalk Urban District Council is a public body for whose acts the Irish Government is responsible. Moreover, before accepting a tender, Dundalk Council has to obtain the authorization of the Irish Department of the Environment. Those facts have not been challenged by the Irish Government.
- 13 It must also be noted that according to the Irish Government the requirement of compliance with Irish standards is the usual practice followed in relation to public works contracts in Ireland.
- 14 The Irish Government points out that the contract at issue relates not to the sale of goods but to the performance of work, and the clauses relating to the materials to be used are completely subsidiary. Contracts concerned with the performance of work fall under the Treaty provisions relating to the free supply of services, without prejudice to any harmonization measures which might be taken under Article 100. Consequently, Article 30 cannot apply to a contract for works.

- 15 In that connection, the Irish Government cites the case-law of the Court and, in particular, the judgment of 22 March 1977 in Case 74/76 (*Iannelli & Volpi v Meroni* [1977] ECR 557), according to which the field of application of Article 30 does not include obstacles to trade covered by other specific provisions of the Treaty.
- 16 That argument cannot be accepted. Article 30 envisages the elimination of all measures of the Member States which impede imports in intra-Community trade, whether the measures bear directly on the movement of imported goods or have the effect of indirectly impeding the marketing of goods from other Member States. The fact that some of those barriers must be considered in the light of specific provisions of the Treaty, such as the provisions of Article 95 relating to fiscal discrimination, in no way detracts from the general character of the prohibitions laid down by Article 30.
- 17 The provisions on the freedom to supply services invoked by the Irish Government, on the other hand, are not concerned with the movement of goods but the freedom to perform activities and have them carried out; they do not lay down any specific rule relating to particular barriers to the free movement of goods. Consequently, the fact that a public works contract relates to the provision of services cannot remove a clause in an invitation to tender restricting the materials that may be used from the scope of the prohibitions set out in Article 30.
- 18 Consequently, it must be considered whether the inclusion of Clause 4.29 in the invitation to tender and in the tender specifications was liable to impede imports of pipes into Ireland.
- 19 In that connection, it must first be pointed out that the inclusion of such a clause in an invitation to tender may cause economic operators who produce or utilize pipes equivalent to pipes certified as complying with Irish standards to refrain from tendering.

- 20 It further appears from the documents in the case that only one undertaking has been certified by the IIRS to IS 188: 1975 to apply the Irish Standard Mark to pipes of the type required for the purposes of the public works contract at issue. That undertaking is located in Ireland. Consequently, the inclusion of Clause 4.29 had the effect of restricting the supply of the pipes needed for the Dundalk scheme to Irish manufacturers alone.
- 21 The Irish Government maintains that it is necessary to specify the standards to which materials must be manufactured, particularly in a case such as this where the pipes utilized must suit the existing network. Compliance with another standard, even an international standard such as ISO 160: 1980, would not suffice to eliminate certain technical difficulties.
- 22 That technical argument cannot be accepted. The Commission's complaint does not relate to compliance with technical requirements but to the refusal of the Irish authorities to verify whether those requirements are satisfied where the manufacturer of the materials has not been certified by the IIRS to IS 188. By incorporating in the notice in question the words 'or equivalent' after the reference to the Irish standard, as provided for by Directive 71/305 where it is applicable, the Irish authorities could have verified compliance with the technical conditions without from the outset restricting the contract only to tenderers proposing to utilize Irish materials.
- 23 The Irish Government further objects that in any event the pipes manufactured by the Spanish undertaking in question whose use was provided for in the rejected tender did not meet the technical requirements, but that argument, too, is irrelevant as regards the compatibility with the Treaty of the inclusion of a clause like Clause 4.29 in an invitation to tender.
- 24 The Irish Government further maintains that protection of public health justifies the requirement of compliance with the Irish standard in so far as that standard guarantees that there is no contact between the water and the asbestos fibres in the cement pipes, which would adversely affect the quality of the drinking water.

- 25 That argument must be rejected. As the Commission has rightly pointed out, the coating of the pipes, both internally and externally, was the subject of a separate requirement in the invitation to tender. The Irish Government has not shown why compliance with that requirement would not be such as to ensure that there is no contact between the water and the asbestos fibres, which it considers to be essential for reasons of public health.
- 26 The Irish Government has not put forward any other argument to refute the conclusions of the Commission and the Spanish Government and those conclusions must consequently be upheld.
- 27 It must therefore be held that by allowing the inclusion in the contract specification for tender for a public works contract of a clause stipulating that the asbestos cement pressure pipes must be certified as complying with Irish Standard 188: 1975 in accordance with the Irish Standard Mark Licensing Scheme of the Institute for Industrial Research and Standards, Ireland has failed to fulfil its obligations under Article 30 of the EEC Treaty.

The rejection of the tender providing for the use of the Spanish-made pipes

- 28 The second limb of the Commission's application is concerned with the Irish authorities' attitude to a given undertaking in the course of the procedure for the award of the contract at issue.
- 29 It became apparent during the hearing that the second limb of the application is in fact intended merely to secure the implementation of the measure which is the subject of the first limb. It must therefore be held that it is not a separate claim and there is no need to rule on it separately.

Costs

- 30 Under Article 69 (2) of the Rules of Procedure the unsuccessful party is to be ordered to pay the costs. Nevertheless, by virtue of the first subparagraph of Article 69 (3) the Court may order the parties to bear their own costs in whole or in part where each party succeeds on some and fails on other heads. As the Commission has failed in one of its submissions, the parties must be ordered to bear their own costs.

On those grounds,

THE COURT

hereby:

- (1) Declares that by allowing the inclusion in the contract specification for tender for a public works contract of a clause stipulating that the asbestos cement pressure pipes must be certified as complying with Irish Standard 188: 1975 in accordance with the Irish Standard Mark Licensing Scheme of the Institute for Industrial Research and Standards, Ireland has failed to fulfil its obligations under Article 30 of the EEC Treaty;**
- (2) Dismisses the remainder of the application;**
- (3) Orders the parties, including the intervener, to bear their own costs.**

Mackenzie Stuart	Due	Moitinho de Almeida	Rodríguez Iglesias	
Koopmans	Everling	Galmot	Kakouris	O'Higgins

Delivered in open court in Luxembourg on 22 September 1988.

J.-G. Giraud
Registrar

A. J. Mackenzie Stuart
President