

1. Does recourse to a clause in calls for tenders for public works contracts which prevents the participation of undertakings which have not submitted with their tenders explanations in respect of the price indicated, being equal to at least 75 % of the figure specified in the tender conditions, represent an obstacle to the application of Article 30(4) of Directive 93/37⁽¹⁾?
2. Does the establishment of a mechanism for automatically identifying tenders which overstep a threshold indicative of irregularities and whose validity should therefore be checked, based on a case-by-case criterion and an arithmetical mean, which is such that undertakings are unable to ascertain that threshold in advance, represent an obstacle to the application of Article 30(4) of Directive 93/37?
3. Does the fact that provision is made for a prior exchange of views, without the undertaking which has allegedly submitted an irregular tender having an opportunity to state its reasons, after the opening of the envelopes and before the adoption of the measure excluding it, represent an obstacle to the application of Article 30(4) of Directive 93/37?
4. Does a provision under which the contracting authority may take account of explanations relating solely to the economy of the construction method or the technical solutions adopted or the exceptionally favourable conditions available to the tenderer represent an obstacle to the application of Article 30(4) of Directive 93/37?
5. Does the exclusion of explanations relating to items for which minimum figures can be inferred from official lists represent an obstacle to the application of Article 30(4) of Directive 93/37?

⁽¹⁾ Council Directive of 14 June 1993, OJ 1993 L 199 of 9.8.1993, p. 54.

Action brought on 3 August 1999 by the Council of the European Union against Dr Martin Bangemann

(Case C-290/99)

(1999/C 314/03)

An action against Dr Martin Bangemann was brought before the Court of Justice of the European Communities on 3 August 1999 by the Council of the European Union represented by Jean-Claude Piris, Director-General of the Legal Service of the Council, and Martin Bauer, a member of the Legal Service, assisted by Professor Doctor Hans-Jürgen Rabe, of the Hamburg Bar and the Brussels firm Gaedertz, with an address for service in Luxembourg at the office of Alessandro Morbilli, General Counsel, Legal Affairs Directorate of the European Investment Bank, 100 Boulevard Konrad Adenauer, L-2920 Luxembourg-Kirchberg.

The Council claims that the Court should:

- disallow Dr Bangemann's rights as a former member of the Commission to a pension or other payments in lieu, in particular any transitional allowance to which he may be entitled under Article 7 of regulation No 422/67/EEC, 5/67/Euratom of the Council of 25 July 1967⁽¹⁾; the Council leaves to the discretion of the Court for how long and to what extent those rights should be disallowed;
- declare that disallowance of those rights does not apply to those entitled under Regulation No 422/67/EEC, 5/67/Euratom of the Council of 25 July 1967 in the event of Dr Bangemann's death;
- order Dr Bangemann to pay the costs of the proceedings.

Pleas in law and main arguments

The Council's action is founded on subparagraph 3 of Article 213(2) of the EC Treaty, subparagraph 3 of Article 9(2) of the ECSC Treaty and subparagraph 3 of Article 126(2) of the EAEC Treaty, and, specifically, solely on the duty to behave with discretion. It is the view of the Council that to satisfy this duty, it is necessary not only to comply with applicable legislation and rules but also to assess and evaluate with circumspection what is the appropriate course of conduct in a given situation so as, in particular, not to jeopardise the Commission's reputation as an independent and impartial body. The Council considers that, in taking up a post with Telefonica, Herr Bangemann breached the duty to behave with discretion incumbent upon him because

- he is a politician in the public eye;
- he has been responsible for the field of information technology and telecommunications within the Commission since 1992 and has now taken up a post with one of the largest companies in that very sphere;
- he made public the fact that he was taking up the post when he was still a member of the Commission and indeed stated that he intended to take up his new post immediately;
- the Commission was at that time in an extremely delicate position and it suffered damage to its reputation;
- the reactions of citizens, the media, political circles and public opinion were, in view of those circumstances, clearly foreseeable.

⁽¹⁾ Regulation No 422/67/EEC, 5/67/Euratom of the Council of 25 July 1967 determining the emoluments of the President and Members of the Commission and of the President, Judges, Advocates General and Registrar of the Court of Justice.