

JUDGMENT OF THE COURT (Fifth Chamber)
19 September 1996^{*}

In Case C-236/95,

Commission of the European Communities, represented by Dimitrios Goulousis, Legal Adviser, acting as Agent, with an address for service in Luxembourg at the office of Carlos Gómez de la Cruz, of its Legal Service, Wagner Centre, Kirchberg,

applicant,

v

Hellenic Republic, represented by Aikaterini Samoni-Rantou, Assistant Special Legal Adviser in the Special Department for Community Legal Affairs in the Ministry of Foreign Affairs, and Dimitra Tsagkaraki, Adviser to the Deputy Minister for Foreign Affairs, acting as Agents, with an address for service in Luxembourg at the Greek Embassy, 117 Val Sainte-Croix,

defendant,

APPLICATION for a declaration that, by not adopting or not notifying to the Commission within the prescribed period the laws, regulations and administrative provisions necessary to comply fully with Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts (OJ 1989 L 395, p. 33), the Hellenic Republic has failed to fulfil its obligations under the EC Treaty and that directive,

^{*} Language of the case: Greek.

THE COURT (Fifth Chamber),

composed of: D. A. O. Edward, President of the Chamber, J. C. Moitinho de Almeida (Rapporteur), C. Gulmann, L. Sevón and M. Wathelet, Judges,

Advocate General: P. Léger,
Registrar: H. A. Rühl, Principal Administrator,

having regard to the Report for the Hearing,

after hearing oral argument from the parties at the hearing on 23 May 1996, at which the Hellenic Republic was represented by Aikaterini Samoni-Rantou and Dimitra Tsagkaraki, and the Commission by Dimitrios Gouloussis and Dimitrios Triantafyllou, of its Legal Service, acting as Agent,

after hearing the Opinion of the Advocate General at the sitting on 20 June 1996,

gives the following

Judgment

- 1 By application lodged at the Court Registry on 6 July 1995, the Commission of the European Communities brought an action under Article 169 of the EC Treaty for a declaration that, by not adopting or not notifying to it within the prescribed period the laws, regulations and administrative provisions necessary to comply fully with Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works

contracts (OJ 1989 L 395, p. 33, hereinafter 'the directive'), the Hellenic Republic has failed to fulfil its obligations under the EC Treaty and that directive.

- 2 According to Article 1(1) of the directive, the Member States are to take the measures necessary to ensure that, as regards award procedures for public supply and public works contracts, decisions taken by the contracting authorities may be reviewed effectively and, in particular, as rapidly as possible where Community law in the field of public procurement or national rules implementing that law have been infringed. Article 1(3) further provides that the Member States must ensure that the review procedures introduced are available at least to any person having or having had an interest in obtaining a particular public supply or public works contract and who has been or risks being harmed by an alleged infringement.
- 3 Under Article 2 of the directive, the bodies responsible for the review procedure must be empowered to take interim measures to suspend a procedure for the award of a public contract or the implementation of any decision taken by the contracting authority, set aside unlawful decisions and award damages to persons harmed by an infringement.
- 4 In addition, Article 3 of the directive authorizes the Commission to intervene with the competent authorities of the Member State and the contracting authority, if it considers that a clear and manifest infringement has been committed during a procedure for the award of a public contract, so as to ensure that appropriate measures are taken in order rapidly to remedy any alleged infringement.
- 5 Lastly, under Article 5 of the directive, Member States are to bring into force, before 21 December 1991, the measures necessary to comply with the directive and to communicate to the Commission the texts of the main national laws, regulations and administrative provisions which they adopt in the field governed by the directive.

- 6 Since it had received no notification of the measures adopted and had no other information suggesting that the Hellenic Republic had fulfilled its obligations under the directive, the Commission sent it a letter before action on 20 May 1992. By letter dated 17 June 1993, the Greek Government informed the Commission that Presidential Decree No 23 of 15 January 1993 had been adopted in order to implement the directive as far as public works contracts were concerned. Since no measure had been adopted in the field of public supply contracts, the Commission delivered a reasoned opinion on 4 July 1994. By letter dated 18 August 1994, the Greek Government informed the Commission that an implementing presidential decree was in preparation. The Commission thereupon decided to bring these proceedings.
- 7 It should first be observed that, as the Commission made clear at the hearing, the action relates only to the failure to transpose the provisions of the directive on the award of public supply contracts.
- 8 The Hellenic Republic admits that it failed to adopt within the prescribed period the measures necessary formally to transpose the directive in the field of public supply contracts. It argues nevertheless that the Greek legislation in force on public works and supply contracts, considered together with the provisions of the Code of Civil and Administrative Procedure and the Statutes of the Council of State, more particularly Article 52 of Presidential Decree No 18/89 entitled 'Codification of legislative provisions relating to the Council of State', already affords sufficient judicial protection to meet the requirements of the directive, bearing in mind that that protection has been further reinforced by recent case-law of the Council of State. In addition, the Greek Government states that a draft presidential decree was drawn up and notified to the Commission on 22 July 1994 and is now at the stage of final signature. The subsequent delay in adopting the draft decree is attributable to formal and procedural difficulties and to recent changes in the case-law of the judicial division of the Council of State.
- 9 That argument cannot be accepted.

- 10 As far as the suspension of procedures for the award of public contracts referred to in Article 2(1)(a) of the directive is concerned, the national legislation referred to and, more specifically, Article 52 of Presidential Decree No 18/89 constitute general provisions on the procedure for the suspension of operation of an administrative measure against which an action for annulment has been brought, and could not suffice in themselves to secure the correct transposition of the directive.
- 11 The suspension procedure provided for by Article 52 of Presidential Decree No 18/89 expressly covers only applications for annulment brought by legal persons governed by public law, whereas, under Article 1 of the directive, the review procedures introduced by the Member States must be 'available ... at least to any person having or having had an interest in obtaining a particular public supply or public works contract and who has been or risks being harmed by an alleged infringement'. What is more, Article 52 of the decree in question relates only to procedures for suspension of operation of measures and presupposes the existence of a main action seeking to have the contested administrative measure annulled, whereas, under Article 2 of the directive, the Member States are under a duty more generally to empower their review bodies to take, independently of any prior action, any interim measures 'including measures to suspend or to ensure the suspension of the procedure for the award of a public contract'.
- 12 Admittedly, the Council of State interprets Article 52 of the presidential decree in conformity with the directive and holds that any interested party has the capacity to seek suspension of operation of measures of contracting authorities.
- 13 However, the Court has consistently held that it is particularly important, in order to satisfy the requirement for legal certainty, that individuals should have the benefit of a clear and precise legal situation enabling them to ascertain the full extent of their rights and, where appropriate, to rely on them before the national courts (see to this effect Case 29/84 *Commission v Germany* [1985] ECR 1661, paragraph 23, Case 363/85 *Commission v Italy* [1987] ECR 1733, paragraph 7, and C-59/89 *Commission v Germany* [1991] ECR I-2607, paragraph 18).
- 14 Having regard, however, to the wording of Article 52 of the presidential decree, which seems to confine the capacity to bring proceedings to legal persons governed by public law, case-law such as that of the Council of State cannot, in any event, satisfy those requirements of legal certainty.

15 Moreover, the national legislation referred to contains no provision on damages, as provided for in Article 2(1)(c) of the directive, for persons harmed in the event of an infringement of Community law in the field of public procurement or national rules implementing that law.

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16 Neither does the national legislation mentioned transpose Article 3 of the directive, which organizes the procedure for the intervention of the Commission with the Member State's competent authorities and the contracting authority in question if it considers that a clear and manifest infringement has been committed during a procedure for the award of a public contract.

17 Private persons and, in particular, undertakings receiving subsidies from public authorities may, in certain circumstances, be given the responsibilities of contracting authorities in connection with the award of contracts covered by the directive. To that extent, the obligation of bona fide cooperation and assistance to which the Member States are subject under Article 5 of the EC Treaty in order to facilitate the achievement of the Commission's tasks is not sufficient to secure the implementation of Article 3 of the directive. The Member States should therefore implement that provision in order to ensure that it is also complied with by such private persons.

18 Lastly, as regards the formal and procedural difficulties referred to by the Hellenic Republic in order to justify the delay in adopting the draft presidential decree, it should be observed that, as the Court has repeatedly held, a Member State may not plead provisions, practices or circumstances existing in its internal legal system in order to justify a failure to comply with the obligations and time-limits laid down in a directive (see, in particular, Case C-147/94 *Commission v Spain* [1995]

ECR I-1015, paragraph 5, Case C-259/94 *Commission v Greece* [1995] ECR I-1947, paragraph 5, and Case C-253/95 *Commission v Germany* [1996] ECR I-2423, paragraph 12).

- 19 Consequently, it should be held that, by not adopting within the prescribed period the laws, regulations and administrative provisions necessary to comply fully with the directive, the Hellenic Republic has failed to fulfil its obligations under Article 5 of that directive.

Costs

- 20 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs. Since the Hellenic Republic has failed in its submissions, it must be ordered to pay the costs.

On those grounds,

THE COURT (Fifth Chamber)

hereby:

1. Declares that, by not adopting within the prescribed period the laws, regulations and administrative provisions necessary to comply fully with Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the

application of review procedures to the award of public supply and public works contracts, the Hellenic Republic has failed to fulfil its obligations under Article 5 of that directive;

2. Orders the Hellenic Republic to pay the costs.

Edward

Moitinho de Almeida

Gulmann

Sevón

Wathelet

Delivered in open court in Luxembourg on 19 September 1996.

R. Grass

D. A. O. Edward

Registrar

President of the Fifth Chamber