

JUDGMENT OF THE COURT (Sixth Chamber)
17 September 1998^{*}

In Case C-323/96,

Commission of the European Communities, represented by Hendrik van Lier, 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

Kingdom of Belgium, represented by Michel Flamée, of the Brussels Bar, acting as Agent, with an address for service in Luxembourg at the Belgian Embassy, 4 Rue des Girondins,

defendant,

APPLICATION for a declaration that, by failing to publish a contract notice in the *Official Journal of the European Communities* both for the overall project and for each of the lots relating to the construction of the premises of the Vlaamse Raad, and by failing to apply the award procedures laid down in Council Directive 89/440/EEC of 18 July 1989, amending Directive 71/305/EEC concerning coordination of procedures for the award of public works contracts (OJ 1989 L 210, p. 1), and in 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) and, more specifically, by having awarded Lot No 4 by negotiated procedure

^{*} Language of the case: Dutch.

without justification, the Kingdom of Belgium has failed to fulfil its obligations under those directives and, more specifically, Articles 7 and 11 of Directive 93/37,

THE COURT (Sixth Chamber),

composed of: H. Ragnemalm, President of the Chamber, G. F. Mancini, P. J. G. Kapteyn, J. L. Murray and K. M. Ioannou (Rapporteur), Judges,

Advocate General: S. Alber,
Registrar: H. von Holstein, Deputy Registrar,

having regard to the Report for the Hearing,

after hearing oral argument from the parties at the hearing on 5 February 1998, during which the Commission was represented by Henrik van Lier and the Belgian Government by Philippe Colle and Katelijne Ronse, of the Brussels Bar,

after hearing the Opinion of the Advocate General at the sitting on 19 March 1998,

gives the following

Judgment

- 1 By application lodged at the Registry of the Court on 2 October 1996 the Commission of the European Communities brought an action under Article 169 of the EC Treaty for a declaration that:
 - by failing to publish a contract notice in the *Official Journal of the European Communities* (hereinafter 'OJEC'), both for the overall project and for each of the lots relating to the construction of the premises of the Vlaamse Raad, and

- by failing to apply the award procedures laid down in Council Directive 89/440/EEC of 18 July 1989, amending Directive 71/305/EEC concerning coordination of procedures for the award of public works contracts (OJ 1989 L 210, p. 1), and in 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) and, more specifically, by having awarded Lot No 4 by negotiated procedure without justification,

the Kingdom of Belgium has failed to fulfil its obligations under those directives and, more specifically, Articles 7 and 11 of Directive 93/37.

Facts

- 2 It is apparent from the documents before the Court that, in 1993, the Vlaamse Raad, the Flemish Parliament in the Belgian federal system, decided to have premises of its own built in Brussels.
- 3 For the construction of those new premises the Vlaamse Raad followed a restricted procedure, in which 32 undertakings were invited to participate. No notice was published in the OJEC, either for the overall project or for the various lots, even though each lot exceeded the threshold laid down in the Community rules.
- 4 Lot No 4 (finishing and sanitary installations) was the subject of a 'non-open' national procedure which commenced on 17 February 1994, without prior publication in the OJEC. After considering the 14 offers submitted in that context in the light of the award criteria, the lowest price, the Régie des Bâtiments selected the offer of an undertaking which had, in the meantime, been declared insolvent.

- 5 By decision of 19 May 1994 the executive of the Vlaamse Raad therefore annulled the tendering procedure and applied the single tender procedure, again without prior publication in the OJEC.

The pre-litigation procedure

- 6 By telex of 17 June 1994 the Commission informed the Belgian authorities that the procedure applied by the Vlaamse Raad constituted a clear and manifest infringement of the Community rules relating to public works contracts, and of the principle of equal treatment of candidates, which forms the basis for those rules. It consequently requested the Belgian authorities to annul the procedure relating to Lot No 4 immediately.

- 7 In the absence of any decision, notwithstanding the undertaking made by the Belgian authorities at a meeting on 1 July 1994 to adopt a decision as quickly as possible concerning the procedure for the award of Lot No 4, the Commission initiated the procedure under Article 169 of the Treaty by sending a letter of formal notice to the Belgian Government on 28 July 1994.

- 8 By letter of 31 August 1994 the Belgian Government replied that the Belgian public procurement legislation applied only to the executive authority, that is to say the administrations of the State, the Communities and the Regions and, so long as Directive 93/37 had not been correctly transposed with regard to the legislative authority, the latter was not required to comply with Community law. As regards Lot No 4 more specifically, the Belgian Government informed the Commission that the executive of the Vlaamse Raad had refused to annul the tendering procedure.

- 9 By letter of 16 November 1995 the Commission issued a reasoned opinion calling upon the Kingdom of Belgium to adopt the measures necessary to comply with it within 30 days of having cognisance of it.
- 10 By letter of 15 December 1995 the Belgian Permanent Representation to the European Union submitted a letter to the Commission dated 14 December 1995, in which the President of the Vlaamse Raad pointed out that there was no national legislation ensuring the independence of the Vlaamse Raad, as a parliamentary institution, when awarding public contracts. Furthermore, the letter stated that specific draft measures were being prepared and that the Vlaamse Raad was discussing the matter with the federal authority.
- 11 By letter of 10 April 1996 the Belgian Permanent Representation to the European Union subsequently submitted a further letter to the Commission, dated 25 February 1996 and signed by the President of the Vlaamse Raad, according to which, since it was no longer possible to wait for the opinion of the federal authority, the Vlaamse Raad was preparing a decree to transpose the directives concerned and would send further information to the Commission shortly.
- 12 In the absence of any communication since that time, the Commission brought the present proceedings.

Directive 93/37

- 13 As is clear from the first recital in its preamble, Directive 93/37 is intended, for reasons of clarity and better understanding, to consolidate the provisions of Council Directive 71/305/EEC of 26 July 1971 concerning coordination of procedures for the award of public works contracts (OJ, English Special Edition 1971 (II), p. 682) and the provisions amending them.

14 Article 1 of Directive 93/37 provides:

'For the purpose of this Directive:

...

(b) "contracting authorities" shall be the State, regional or local authorities, bodies governed by public law, associations formed by one or several of such authorities or bodies governed by public law;

...

...

(e) "open procedures" are those national procedures whereby all interested contractors may submit tenders;

(f) "restricted procedures" are those national procedures whereby only those contractors invited by the contracting authority may submit tenders;

(g) "negotiated procedures" are those national procedures whereby contracting authorities consult contractors of their choice and negotiate the terms of the contract with one or more of them;

...'

15 Article 6(1) and (3) of Directive 93/37 states:

‘1. The provisions of this Directive shall apply to public works contracts whose estimated value net of VAT is not less than ECU 5 000 000.

...

3. Where a work is subdivided into several lots, each one the subject of a contract, the value of each lot must be taken into account for the purpose of calculating the amounts referred to in paragraph 1. Where the aggregate value of the lots is not less than the amount referred to in paragraph 1, the provisions of that paragraph shall apply to all lots. Contracting authorities shall be permitted to depart from this provision for lots whose estimated value net of VAT is less than ECU 1 000 000 provided that the total estimated value of all the lots exempted does not, in consequence, exceed 20% of the total estimated value of all lots.’

16 Article 7 of Directive 93/37 provides:

‘1. In awarding public works contracts the contracting authorities shall apply the procedures defined in Article 1(e), (f) and (g), adapted to this Directive.

2. The contracting authorities may award their public works contracts by negotiated procedure, with prior publication of a contract notice and after having selected the candidates according to publicly known qualitative criteria, in the following cases:

...

3. The contracting authorities may award their public works contracts by negotiated procedure without prior publication of a contract notice, in the following cases:

- (a) in the absence of tenders or of appropriate tenders in response to an open or restricted procedure in so far as the original terms of the contract are not substantially altered and provided that a report is communicated to the Commission at its request;
- (b) when, for technical or artistic reasons or for reasons connected with the protection of exclusive rights, the work may only be carried out by a particular contractor;
- (c) in so far as is strictly necessary when, for reasons of extreme urgency brought about by events unforeseen by the contracting authorities in question, the time-limit laid down for the open, restricted or negotiated procedures referred to in paragraph 2 cannot be kept. The circumstances invoked to justify extreme urgency must not in any event be attributable to the contracting authorities;
- (d) for additional works not included in the project initially considered or in the contract first concluded but which have, through unforeseen circumstances,

become necessary for the carrying out of the work described therein, on condition that the award is made to the contractor carrying out such work:

- when such works cannot be technically or economically separated from the main contract without great inconvenience to the contracting authorities, or

- when such works, although separable from the execution of the original contract, are strictly necessary to its later stages.

However, the aggregate amount of contracts awarded for additional works may not exceed 50% of the amount of the main contract;

- (e) for new works consisting of the repetition of similar works entrusted to the undertaking to which the same contracting authorities awarded an earlier contract, provided that such works conform to a basic project for which a first contract was awarded according to the procedures referred to in paragraph 4.

As soon as the first project is put up for tender, notice must be given that this procedure might be adopted and the total estimated cost of subsequent works shall be taken into consideration by the contracting authorities when they apply the provisions of Article 6. This procedure may only be adopted during the three years following the conclusion of the original contract.

4. In all other cases, the contracting authorities shall award their public works contracts by the open procedure or by the restricted procedure.'

17 Finally, Article 11(2) and (9) of Directive 93/37 provides:

'2. Contracting authorities who wish to award a public works contract by open, restricted or negotiated procedure referred to in Article 7(2), shall make known their intention by means of a notice.

...

9. The notices referred to in paragraphs 2, 3 and 4 shall be published in full in the *Official Journal of the European Communities* and in the TED data bank in the original languages. A summary of the important elements of each notice shall be published in the other official languages of the Community, the original text alone being authentic.'

18 According to Article 36(1) of Directive 93/37, Directive 71/305 is repealed, together with the provisions which amended it, without prejudice to the obligations of the Member States concerning the deadlines for transposition into national law and for application.

Directive 89/440

19 Directive 89/440 is one of the directives which amended Directive 71/305, prior to the adoption of Directive 93/37.

- 20 With the exception of a few differences in drafting, the provisions of Directive 71/305 as amended by Directive 89/440 concerning the definition of contracting authorities (Article 1(b)), the definition of the material scope (Article 4a), the procedures to be applied by the contracting authorities (Article 5) and the detailed rules concerning the publication of notices with which they were to comply, in particular when applying the negotiated procedure (Article 12(2) and (9)) were identical to the corresponding provisions of Directive 93/37, reproduced in paragraphs 14 to 17 above.

The application

- 21 As a preliminary point, it should be noted that, in its application, the Commission claims that the Kingdom of Belgium has failed to comply with Directives 89/440 and 93/37. It is apparent from the documents before the Court that Directive 89/440 was in force when the first tendering procedure was initiated and that Directive 93/37 was in force when the procedure relating to Lot No 4 was initiated. Furthermore, it should be recalled that Directive 93/37 repealed and replaced Directive 71/305, including the provisions which amended it, *inter alia* those in Directive 89/440.
- 22 The Commission argues that, in the present case, since 'non-open' procedures were applied, without a contract notice and without publication in the OJEC, the Belgian Government failed to comply with Directive 89/440 and Article 11(2) and (9) of Directive 93/37.
- 23 It also points out that, in order to award a contract by negotiated procedure, the conditions laid down in Article 7 of Directive 93/37 must be satisfied. Thus, a contracting authority may only award a contract by negotiated procedure without prior publication of a notice when the conditions laid down in Article 7(3) of that directive are satisfied.

- 24 Therefore, by applying a negotiated procedure for the second phase of Lot No 4, notwithstanding the fact that none of the justifications required by Article 7 of Directive 93/37 were satisfied, the Kingdom of Belgium infringed that provision.
- 25 In order to resolve the dispute now before the Court, it is first necessary to consider whether the Vlaamse Raad is a contracting authority within the meaning of Article 1(b) of Directive 71/305 as amended by Article 1(1) of Directive 89/440, and within the meaning of Article 1(b) of Directive 93/37.
- 26 The definition of contracting authority, which is identical in both directives, states that, for the purposes of each, "contracting authorities" shall be the State, regional or local authorities, bodies governed by public law, associations formed by one or several of such authorities or bodies governed by public law'.
- 27 The term 'the State' referred to by that provision necessarily encompasses all the bodies which exercise legislative, executive and judicial powers. The same is true of the bodies which, in a federal state, exercise those powers at federal level.
- 28 Furthermore, in Case 31/87 *Beentjes* [1988] ECR 4635, paragraphs 11 to 13, the Court, after stating that the term 'the State', within the meaning of Article 1(b) of Directive 71/305 should be interpreted in functional terms, held that a local land consolidation committee fell within that definition notwithstanding the fact that it was not an integral part of the State administration in formal terms. It would be inconsistent to hold that a legislative body does not fall within the definition of the State for the purposes of the Community directives on public works contracts, when a body which is not an integral part of the State administration in formal terms has been held to fall within that definition for the purposes of the application of one of those directives.

- 29 It follows that a legislative body such as the Vlaamse Raad must be held as falling within the definition of the State and thus constituting a contracting authority within the meaning of Article 1(b) of Directive 71/305 as amended by Article 1(1) of Directive 89/440, and within the meaning of Article 1(b) of Directive 93/37.
- 30 Furthermore, it is not disputed that each of the lots which were the subject of the works contracts put out to tender by the Vlaamse Raad exceeded the threshold laid down by Article 4a of Directive 71/305, as inserted by Article 1(6) of Directive 89/440, and by Article 6 of Directive 93/37.
- 31 In those circumstances, the contracts put out to tender by the Vlaamse Raad fell within the scope of Directive 71/305, as amended by Directive 89/440, and Directive 93/37 and should therefore have been awarded in accordance with the rules set out therein.
- 32 Among those rules, Article 12(2) and (9) of Directive 71/305, as amended by Article 1(12) of Directive 89/440, provides that contracting authorities who wish to award a public works contract by open, restricted or negotiated procedure referred to in Article 5(2) are to make known their intention by means of a notice published in the OJEC.
- 33 Similarly, Article 11(2) and (9) of Directive 93/37 requires 'contracting authorities who wish to award a public works contract by open, restricted or negotiated procedure referred to in Article 7(2)' to make known their intention by publishing a notice in the OJEC.
- 34 It follows from those provisions that the obligation to publish a notice does not exist only when the contracting authorities intend to award a public works contract

by negotiated procedure referred to in Article 5(3) of Directive 71/305, as amended by Directive 89/440, or in Article 7(3) of Directive 93/37.

35 In the present case, the Belgian Government does not contest the fact that no notice was published in the OJEC, nor the fact that the conditions laid down in Article 5(3) of Directive 71/305, as amended by Directive 89/440, and in Article 7(3) of Directive 93/37 for carrying out a negotiated procedure without prior publication of a notice were not satisfied.

36 At the hearing, however, the Belgian Government referred to Article 4 of Directive 93/37 in support of a submission that, under certain circumstances, a Member State could legitimately dispense with the obligations laid down in that directive.

37 That article provides that Directive 93/37 does not apply to:

‘(a) contracts awarded in the fields referred to in Articles 2, 7, 8 and 9 of Directive 90/531/EEC or fulfilling the conditions in Article 6(2) of that Directive;

(b) works contracts which are declared secret or the execution of which must be accompanied by special security measures in accordance with the laws, regulations or administrative provisions in force in the Member State concerned or when the protection of the basic interests of the Member State’s security so requires’.

38 Quite apart from the question of the belated nature of that plea, which the Belgian Government raised for the first time at the hearing without submitting any valid reason to explain the delay, it should be observed that the Belgian Government has

not put forward anything to show that the works contracts put out to tender by the Vlaamse Raad came within one of the situations referred to in Article 4.

39 That plea must therefore be dismissed.

40 The Belgian Government also submitted that, at national level, the Law of 14 July 1976, which was in force at the material time, Article 2(1) of which provides that 'Every Minister has authority, within the limits of his powers, to adopt decisions concerning the conclusion and performance of contracts of the State and the bodies which fall under its hierarchial authority', did not apply to legislative bodies, *inter alia*, because the independence and supremacy of the legislative authority under the Belgian Constitution prevented the legislative chambers, and thus the Vlaamse Raad, from being subject to Ministerial authority.

41 First, it should be pointed out that this plea, based on national law, affects neither the finding that the Vlaamse Raad constitutes a contracting authority within the meaning of Article 1(b) of Directive 71/305 as amended by Article 1(1) of Directive 89/440, and within the meaning of Article 1(b) of Directive 93/37, nor the resulting obligation to comply with the provisions of those directives as regards publication and award procedures.

42 According to settled case-law, a Member State cannot rely on provisions, practices or circumstances existing in its internal legal order in order to justify its failure to comply with the obligations and time-limits laid down by a directive (see, in particular, Case C-144/97 *Commission v France* [1998] ECR I-613, paragraph 8).

43 That plea must therefore also be dismissed.

44 In view of all the foregoing considerations, it must be held that

- by failing to publish a contract notice in the OJEC both for the overall project and for each of the lots relating to the construction of the premises of the Vlaamse Raad, and

- by failing to apply the award procedures laid down in Directive 71/305, as amended by Directive 89/440, and Directive 93/337 and, more specifically, by awarding Lot No 4 by negotiated procedure without justification,

the Kingdom of Belgium has failed to fulfil its obligations under those directives and, more specifically, under Articles 7 and 11(2) and (9) of Directive 93/37.

Costs

45 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs. Since the Kingdom of Belgium has been unsuccessful, it must be ordered to pay the costs.

On those grounds,

THE COURT (Sixth Chamber)

hereby:

1. Declares that,

- by failing to publish a contract notice in the Official Journal of the European Communities both for the overall project and for each of the lots relating to the construction of the premises of the Vlaamse Raad, and

- by failing to apply the award procedures laid down in Council Directive 71/305/EEC of 26 July 1971 concerning the coordination of procedures for the award of public works contracts, as amended by Council Directive 89/440/EEC of 18 July 1989, and Council Directive 93/37/EEC of 14 June 1993 concerning the coordination of procedures for the award of public works contracts and, more specifically, by having awarded lot No 4 by negotiated procedure without justification,

the Kingdom of Belgium has failed to fulfil its obligations under those directives and, more specifically, under Articles 7 and 11(2) and (9) of Directive 93/37;

2. Orders the Kingdom of Belgium to pay the costs.

Ragnemalm

Mancini

Kapteyn

Murray

Ioannou

Delivered in open court in Luxembourg on 17 September 1998.

R. Grass

H. Ragnemalm

Registrar

President of the Sixth Chamber