

JUDGMENT OF THE COURT (Second Chamber)

13 January 2005 *

In Case C-84/03,

ACTION under Article 226 EC for failure to fulfil obligations brought on 26 February 2003,

Commission of the European Communities, represented by K. Wiedner and G. Valero Jordana, acting as Agents, with an address for service in Luxembourg,

applicant,

v

Kingdom of Spain, represented by S. Ortiz Vaamonde, acting as Agent, with an address for service in Luxembourg,

defendant,

* Language of the case: Spanish.

THE COURT (Second Chamber),

composed of C.W.A.Timmermans, President of the Chamber, R. Schintgen, J. Makarczyk (Rapporteur), G. Arestis and J. Klučka, Judges,

Advocate General: J. Kokott,

Registrar: R. Grass,

having regard to the written procedure,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

Judgment

¹ By its application the Commission of the European Communities has brought an action for a declaration that by failing correctly to transpose into its national legal system Council Directive 93/36/EEC of 14 June 1993 coordinating procedures for the award of public supply contracts (OJ 1993 L 199, p. 1) and 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, in particular,

- by excluding from the scope of the Ley de Contratos de las Administraciones Públicas (Law on contracts awarded by public authorities) of 16 June 2000, in the codified version approved by the Real Decreto Legislativo 2/2000 of 16 June

2000 (BOE No 148 of 21 June 2000; ‘the codified law’), more particularly in Article 1(3) of the codified law, entities governed by private law which fulfil the requirements laid down in the first, second and third indents of the second subparagraph of Article 1(b), of each of those directives;

- by excluding absolutely from the scope of the codified law, in Article 3(1)(c) thereof, cooperation agreements concluded between public authorities and the other public undertakings and, therefore, also agreements which constitute public contracts for the purpose of those directives; and

- by permitting in Article 141(a) and Article 182(a) and (g) of the codified law, the negotiated procedure to be used in two cases which are not provided for in those directives,

the Kingdom of Spain has failed to fulfil its obligations under the provisions of the EC Treaty and of those directives.

Legal background

Community legislation

- ² Article 1(b) of Directive 93/37 provides:

“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;

A “body governed by public law” means any body:

- established for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character, and

- having a legal personality, and

- financed, for the most part, by the State, or regional or local authorities, or other bodies governed by public law, or subject to management supervision by those bodies, or having an administrative, managerial or supervisory board, more than half of whose members are appointed by the State, regional or local authorities or by other bodies governed by public law. ...’

3 The provisions of Article 1(b) of Directive 93/36 are essentially the same.

4 Under Article 6(2) to (4) of Directive 93/36:

'2. The contracting authorities may award their supply contracts by negotiated procedure in the case of irregular tenders in response to an open or restricted procedure or in the case of tenders which are unacceptable under national provisions that are in accordance with provisions of Title IV, in so far as the original terms for the contract are not substantially altered. The contracting authorities shall in these cases publish a tender notice unless they include in such negotiated procedures all the enterprises satisfying the criteria of Articles 20 to 24 which, during the prior open or restricted procedure, have submitted tenders in accordance with the formal requirements of the tendering procedure.

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

(a) in the absence of tenders or 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;

(b) when the products involved are manufactured purely for the purpose of research, experiment, study or development, this provision does not extend to

quantity production to establish commercial viability or to recover research and development costs;

- (c) when, for technical or artistic reasons, or for reasons connected with protection of exclusive rights, the products supplied may be manufactured or delivered only by a particular supplier;

- (d) in so far as is strictly necessary when, for reasons of extreme urgency brought about by events unforeseeable 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;

- (e) for additional deliveries by the original supplier which are intended either as a partial replacement of normal supplies or installations or as the extension of existing supplies or installations where a change of supplier would oblige the contracting authority to acquire material having different technical characteristics which would result in incompatibility or disproportionate technical difficulties in operation and maintenance. The length of such contracts as well as that of recurrent contracts may, as a general rule, not exceed three years.

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

5 Under Article 7(3) and (4) of Directive 93/37:

'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 works 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.'

National legislation

6 The scope *ratione personae* of the Spanish legislation on public procurement is defined in Article 1 of the codified law, which includes all public authorities, whether State authorities or authorities of the autonomous communities and regional or local authorities.

7 Article 1(3) of the codified law provides:

‘This law shall also apply to the awarding of contracts by autonomous bodies in every case and to other bodies governed by public law having legal personality and connected with or under the control of a public authority, which fulfil the following criteria:

- (a) they were established for the specific purpose of meeting needs in the general interest, not being of an industrial or commercial nature;

- (b) they are financed, for the most part, by public authorities or other bodies governed by public law, or are subject to management supervision by those bodies, or have an administrative, managerial or supervisory board, more than half of whose members are appointed by public authorities or by other bodies governed by public law.’

- 8 The sixth additional provision of the codified law, entitled 'Rules applicable to the award of contracts in the public sector', provides that 'commercial companies in which public authorities or their autonomous bodies, or bodies governed by public law, hold, directly or indirectly, a majority shareholding, shall, when awarding contracts, comply with the advertising and competition rules, unless the nature of the operation to be carried out is incompatible with those rules'.
- 9 Article 3(1)(c) of the codified law excludes from its scope 'cooperation agreements between the State authorities, on the one hand, and the Social Security, autonomous communities, local bodies, their autonomous bodies and any other public body, on the other hand, or between these bodies'.
- 10 Articles 141(a) (concerning works contracts) and 182(a) (concerning supply contracts) of the codified law provide that that negotiated procedure may be used without prior publication of a tender notice where the contract has not been awarded during an open or restricted procedure, or where the candidates have not been allowed to submit tenders, so long as there has been no alteration of the contract's original conditions, except the price, which may not be increased by more than 10%.
- 11 Article 182(g) of the codified law states that the negotiated procedure may be used without prior publication of a tender notice in the procedures which concern goods whose uniformity has been declared necessary for their joint use by the administration, in so far as the choice of the type of goods in question was made previously and independently, pursuant to an invitation to tender, in accordance with the provisions of this chapter.

Pre-litigation procedure

- 12 Taking the view that the successive laws transposing Directives 93/36 and 93/37 into Spanish law were partly incompatible with them, the Commission sent a letter of formal notice to the Kingdom of Spain on 17 September 1997 and a supplementary letter of formal notice on 24 July 2000.

- 13 Following notification of the codified law by the Spanish authorities, the Commission took the view that certain contentious aspects of the transposition had been resolved.

- 14 Nevertheless, since in its view Directives 93/36 and 93/37 continued to be transposed incorrectly into Spanish law, the Commission sent a reasoned opinion to the Kingdom of Spain on 24 January 2001 and a supplementary reasoned opinion on 31 January 2002, calling on the Kingdom of Spain to take the measures necessary to comply within two months from the notification of the last reasoned opinion.

- 15 Since the Kingdom of Spain's response to the supplementary reasoned opinion was deemed to be unsatisfactory, the Commission decided to bring the present proceedings.

The action

- 16 In support of its action the Commission relies on three grounds of complaint.

- 17 By its first ground of complaint the Commission alleges that the Kingdom of Spain has excluded entities governed by private law, a priori, from the scope of the codified law, even though they may be bodies governed by public law for the purposes of the second subparagraph of Article 1(b) of Directives 93/36 and 93/37.
- 18 By its second ground of complaint the Commission alleges that the Kingdom of Spain has excluded from the codified law cooperation agreements concluded between bodies governed by public law, although those agreements may constitute public contracts for the purpose of Directives 93/36 and 93/37.
- 19 By its third ground of complaint the Commission alleges that the Kingdom of Spain has permitted the use of the negotiated procedure in two cases which are not provided for by Directives 93/36 and 93/37, that is the award of contracts following procedures which have been declared unsuccessful and the award of supply contracts for uniform goods.

First ground of complaint: exclusion of entities governed by private law fulfilling the conditions laid down in the first, second and third indents of the second subparagraph of Article 1(b) of Directives 93/36 and 93/37 from the scope of the codified law

Arguments of the parties

- 20 The Commission argues that the scope *ratione personae* of the codified law does not coincide with that of Directives 93/36 and 93/37, in so far as the national law applies

exclusively to bodies subject to a public law regime for the purposes of Spanish law, while the legal form of the body at issue falls outside the definition of ‘body governed by public law’ set out in those directives.

- 21 Relying on the judgment in Case C-44/96 *Mannesmann Anlagenbau Austria and Others* [1998] ECR I-73, paragraphs 17 to 35, the Commission recalls that the Court has held that a ‘body governed by public law’ must be understood as a body which fulfils the three cumulative conditions set out in the second subparagraph of Article 1(b) of Directive 93/37.
- 22 Relying on the judgments of the Court (in particular, the judgments in Case 31/87 *Beentjes* [1988] ECR 4635 and Case C-360/96 *BFI Holding* [1998] ECR I-6821, the Commission submits that the definition of a contracting authority in Article 1 of Directives 93/36 and 93/37 must be interpreted in functional terms.
- 23 Furthermore, the Commission asserts that the interpretation given by the Spanish Government of a ‘body governed by public law’ means that a Community concept which must be given a uniform interpretation throughout the Community ceases to be autonomous.
- 24 The Spanish Government opts for a literal interpretation of the definition of ‘body governed by public law’. It argues that Directives 93/36 and 93/37 do not include commercial companies under public control in that definition. In support of its arguments, it relies on Council Directive 93/38/EEC of 14 June 1993 coordinating the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors (OJ 1993 L 199, p. 84), which distinguishes between the

notion of 'body governed by public law', which is the same in the public contracts directives, and 'public undertaking', whose definition corresponds to the definition of public commercial company.

- 25 Furthermore, the Spanish Government rejects any solution of a general nature. It submits that a genuine delimitation of the definition of 'body governed by public law' may be made only after defining 'needs in the general interest' and, in particular, needs 'not having an industrial or commercial character', by means of a detailed examination of each body.
- 26 The Commission replies that Directive 93/38 is a special regulation, and that its exceptional character precludes its use in interpreting general provisions, in this case Directives 93/36 and 93/37.

Findings of the Court

- 27 It must be observed that according to settled case-law the definition of 'body governed by public law', a concept of Community law which must be given an autonomous and uniform interpretation throughout the Community, is defined in functional terms exclusively under the three cumulative conditions in the second subparagraph of Article 1(b) of Directives 93/36 and 93/37 (see, to that effect, *Mannesmann Anlagenbau Austria and Others*, paragraphs 20 and 21; Case C-470/99 *Universale-Bau and Others* [2002] ECR I-11617, paragraphs 51 to 53; Case C-214/00 *Commission v Spain* [2003] ECR I-4667, paragraphs 52 and 53; and Case C-283/00 *Commission v Spain* [2003] ECR I-11697, paragraph 69).

28 It follows that in order to determine whether a private law body is to be classified as a body governed by public law it is only necessary to establish whether the body in question satisfies the three cumulative conditions laid down in the second subparagraph of Article 1(b) of Directives 93/36 and 93/37, since an entity's private law status does not constitute a criterion for precluding it from being classified as a contracting authority for the purposes of those directives (Case C-214/00 *Commission v Spain*, paragraphs 54, 55 and 60).

29 The Court has also stated that that interpretation does not amount to a disregard for the industrial or commercial character of the general interest needs which the body concerned satisfies, since that factor is necessarily taken into consideration in order to determine whether or not it satisfies the condition laid down in the first indent of the second subparagraph of Article 1(b) of Directives 93/36 and 93/37 (see, to that effect, Case C-283/00 *Commission v Spain*, paragraph 75).

30 Furthermore, that conclusion is not invalidated by the want of an express reference in Directives 93/36 and 93/37 to the specific category of 'public undertakings' which is used in Directive 93/38 (see, to that effect, Case C-283 *Commission v Spain*, paragraph 76).

31 Thus it follows from the foregoing that the Spanish legislation constitutes an incorrect transposition of the definition of 'contracting authority' in Article 1(b) of Directives 93/36 and 93/37, in so far as it excludes the bodies of private law from its scope, even though they may satisfy the conditions laid down in the first, second and third indents of the second subparagraph of Article 1(b) of those directives.

32 In those circumstances the Commission's first ground of complaint must be upheld.

Second ground of complaint: exclusion of cooperation agreements concluded between bodies governed by public law from the scope of the codified law

Arguments of the parties

- 33 The Commission states that the codified law excludes from its scope cooperation agreements concluded either between the general State administration and the Social Security, autonomous communities, local bodies, their autonomous bodies and any other public body, or between public bodies themselves. It argues that that absolute exclusion constitutes an incorrect transposition of Directives 93/36 and 93/37, as some of those agreements may be of the same kind as the public contracts covered by them.
- 34 The Commission maintains that this exclusion is not found in Directives 93/36 and 93/37.
- 35 The Commission relies on the definition of a contract set out in Article 1(a) of Directives 93/36 and 93/37 and the case-law of the Court, according to which, in order to show the existence of a contract, it must be determined whether there has been an agreement between two separate persons (judgment in Case C-107/98 *Teckal* [1999] ECR I-8121, paragraph 49). It takes the view, therefore, that, in the light of the above, inter-administrative cooperation agreements may be contracts within the meaning of Directives 93/36 and 93/37.
- 36 The Spanish Government asserts that the agreements are the normal way for bodies governed by public law to establish relations between each other. It maintains that those relations are marginal to the contract. Furthermore, it questions whether the

judgment in *Teckal* is well founded and submits that the principle in Article 6 of Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts (OJ 1992 L 209, p. 1) is implicitly included in the other directives on public contracts.

Findings of the Court

- 37 According to the definitions given in Article 1(a) of Directives 93/36 and 93/37, public supply or public works contracts are contracts for pecuniary interest concluded in writing between a supplier or a contractor and a contracting authority within the meaning of Article 1(b) of the directives, for the purchase of products or the performance of a certain type of works.
- 38 In accordance with Article 1(a) of Directive 93/36, it is sufficient, in principle, if the contract was concluded between a local authority and a person legally distinct from it. The position can be otherwise only in the case where the local authority exercises over the person concerned a control which is similar to that which it exercises over its own departments and, at the same time, that person carries out the essential part of its activities with the controlling local authority or authorities. (judgment in *Teckal*, paragraph 50).
- 39 Having regard to the fact that the elements constituting the definition of a contract in Directives 93/36 and 93/37 are identical, except for the purpose of the contract in question, the approach adopted in *Teckal* must be applied to inter-administrative agreements covered by Directive 93/37.

40 Consequently, in so far as it excludes, a priori, from the scope of the codified law relations between public authorities, their public bodies and, in a general manner, non-commercial bodies governed by public law, whatever the nature of those relations, the Spanish law at issue in this case constitutes an incorrect transposition of Directives 93/36 and 93/37.

41 In those circumstances the Commission's second complaint must be upheld.

Third ground of complaint: use of the negotiated procedure laid down in the codified law in two cases not provided for by Directives 93/36 and 93/37

42 The Commission takes the view that the codified law authorises use of the negotiated procedure in two cases which are not provided for by Directives 93/36 and 93/37: the award of contracts following procedures declared unsuccessful and the award of supply contracts for uniform goods.

First part of the third ground of complaint concerning the award of contracts following unsuccessful procedures

Arguments of the parties

43 In the Commission's view, by permitting an increase of the original tender price of up to 10% in relation to the earlier open or restricted procedures, Articles 141(a) and

182(a) of the codified law contravene Directives 93/36 and 93/37, since they allow a substantial alteration of one of the original conditions of the contract, namely the price.

- 44 The Commission maintains that the list of cases in respect of which the negotiated procedure may be used is limited. The interpretation of the concept of 'non-substantial alteration' must therefore be restrictive.
- 45 The Spanish Government complains that the Commission has not indicated which price modifications must be regarded as substantial and which do not merit such a classification. For the purposes of legal certainty, the Spanish legislature transformed the vague notion of 'substantial modifications to the original conditions of the contract' into a well-defined notion.
- 46 In response, the Commission asserts that, in the context of an action for failure to fulfil obligations, it is neither bound to define the limits of the infringement nor to indicate measures which would enable the failure to fulfil obligations to be eliminated. Furthermore, it states that the aim of the national legislature in seeking to define the concepts contained in the directives can only result in failure to apply them.

Findings of the Court

- 47 As is clear, in particular, from the twelfth recital in the preamble to Directive 93/36 and the eighth recital in the preamble to Directive 93/37, the negotiated procedure is exceptional in nature and, therefore, must be applied only in cases which are set out

in an exhaustive list. To that end Articles 6(3)(a) of Directive 93/36 and Article 7(3)(a) of Directive 93/37 exhaustively list the cases in which the negotiated procedure may be used without prior publication of a tender notice.

- 48 According to settled case-law, the derogations from the rules intended to ensure the effectiveness of the rights conferred by the Treaty in connection with public works contracts must be interpreted strictly (judgments in Case C-57/94 *Commission v Italy* [1995] ECR I-1249, paragraph 23, and Case C-318/94 *Commission v Germany* [1996] ECR I-1949, paragraph 13). To prevent the directives at issue being deprived of their effectiveness, the Member States cannot, therefore, provide for the use of the negotiated procedure in cases not provided for in Directives 93/36 and 93/37, or add new conditions to the cases expressly provided for by those directives which make that procedure easier to use.
- 49 In the present case it cannot be denied that, in so far as they authorise the use of the negotiated procedure where it has not been possible to award the contract during an open or restricted procedure or where the candidates were not allowed to tender, provided that there were no modifications of the original conditions of the contract apart from the price, which cannot be increased by more than 10%, Articles 141(a) and 182(a) of the codified law do indeed add a new condition to the provisions of Directives 93/36 and 93/37 which is capable of undermining both their scope and their exceptional character. Such a condition cannot be regarded as a non-substantial alteration of the original terms of the contracts as provided for in Article 6(3)(a) of Directive 93/36 and Article 7(3)(a) of Directive 93/37.
- 50 In those circumstances it must be held that Articles 141(a) and 182(a) of the codified law constitute an incorrect transposition of Article 6(3)(a) of Directive 93/36 and Article 7(3)(a) of Directive 93/37.

Second part of the third ground of complaint concerning the award of supply contracts for uniform goods

Arguments of the parties

- 51 The Commission submits that the procedure set out in Article 182(g) of the codified law disregards the provisions of Article 6(2) and (3) of Directive 93/36, which sets out the cases in which the negotiated procedure may be applied.
- 52 In this case, the Spanish law provides that the negotiated procedure may be used without prior publication of a tender notice in respect of goods whose uniformity has been held to be necessary for their common use by the administration. The use of that procedure is possible in so far as the type of goods has been chosen in advance and independently, pursuant to a call for tenders.
- 53 The Spanish Government contends that the calls for tenders seeking to determine the type of uniform goods are similar to framework contracts.
- 54 Furthermore, the Spanish Government contends that the calls for tenders at issue do not differ in any way from the tendering procedures following an agreement or framework agreement provided for by another article of the codified law, which is not subject to any comment by the Commission. It takes the view, therefore, that the codified law is in accordance with the directives on public contracts.

- 55 Having set out the definition of the framework agreements, the Commission asserts that those agreements are not covered by Directive 93/36.

Findings of the Court

- 56 As regards the award of supply contracts for uniform goods, referred to in Article 182(g) of the codified law, the negotiated procedure may be used only in the cases exhaustively listed in Article 6(2) and (3) of Directive 93/36. Article 6(4) states, moreover, that 'in all other cases, the contracting authorities shall award their supply contracts by the open procedure or by the restricted procedure'.
- 57 The provision at issue, introduced by the Spanish legislature, does not correspond either to the case mentioned in Article 6(2) of Directive 93/36 or to one of the five situations listed in Article 6(3) in which the use of a negotiated procedure without prior publication of a tender notice is expressly permitted. It must be stated, moreover, that the concept of 'framework agreement' does not come within the scope of those exceptions.
- 58 Furthermore, the Court has consistently held that the provisions which authorise derogations from the rules intended to ensure the effectiveness of the rights conferred by the Treaty in the field of public supply contracts must be strictly interpreted (judgment in Case C-71/92 *Commission v Spain* [1993] ECR I-5923, paragraph 36). It is, therefore, for the Member States to show that their legislation constitutes a faithful transposition of the cases expressly provided for by the directive. In the present case, such evidence has not been provided by the Spanish Government.

59 Accordingly, to the extent that it authorises use of the negotiated procedure without prior publication of a tender notice for the procedures involving goods whose uniformity has been held to be necessary for their common use by the public authorities, provided that the choice of the type of goods has been made in advance, pursuant to a call for tenders, the law at issue constitutes an incorrect transposition of Article 6(2) and (3) of Directive 93/36.

60 In those circumstances the Commission's third complaint must be upheld.

61 In the light of the foregoing considerations, it must be held that, by failing to transpose correctly into its national legal system Directive 93/36 and Directive 93/37 and, in particular,

- by excluding from the scope of the codified law, more particularly in Article 1(3) thereof, the entities governed by private law fulfilling the requirements laid down in the first, second and third indents of the second subparagraph of Article 1(b) of each of those directives;

- by excluding absolutely from the scope of that law, in Article 3(1)(c) thereof, cooperation agreements concluded between public authorities and the other public undertakings and, therefore, also agreements which constitute public contracts for the purpose of those directives; and

- by permitting, in Article 141(a) and Article 182(a) and (g) of that law, the negotiated procedure to be used in two cases which are not provided for in those directives,

the Kingdom of Spain has failed to fulfil its obligations under those directives.

Costs

- ⁶² Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Commission has asked for costs and the Kingdom of Spain has been unsuccessful, the latter must be ordered to pay the costs.

On those grounds the Court (Second Chamber) hereby:

- 1. Declares that by failing to transpose correctly into its national legal system Council Directive 93/36/EEC of 14 June 1993 coordinating procedures for the award of public supply contracts and Council Directive 93/37/EEC of 14 June 1993 concerning the coordination of procedures for the award of public works contracts and, in particular,**

- **by excluding from the scope of the Ley de Contratos de las Administraciones Públicas (Law on contracts awarded by public**

authorities) of 16 June 2000, in the codified version approved by the Real Decreto Legislativo 2/2000 of 16 June 2000, more particularly in Article 1(3) thereof, the entities governed by private law fulfilling the requirements laid down in the first, second and third indents of the second subparagraph of Article 1(b) of each of those directives;

- by excluding absolutely from the scope of that law, in Article 3(1)(c) thereof, cooperation agreements concluded between public authorities and the other public undertakings and, therefore, also agreements which constitute public contracts for the purpose of those directives; and

- by permitting, in Article 141(a) and Article 182(a) and (g) of that law, the negotiated procedure to be used in two cases which are not provided for in those directives,

the Kingdom of Spain has failed to fulfil its obligations under those directives;

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

[Signatures]