

JUDGMENT OF THE COURT (Second Chamber)

18 July 2007*

In Case C-503/04,

ACTION under Article 228 EC for failure to fulfil obligations, brought on
7 December 2004,

Commission of the European Communities, represented by B. Schima, acting as
Agent, with an address for service in Luxembourg,

applicant,

v

Federal Republic of Germany, represented by W.-D. Plessing and C. Schulze-Bahr,
acting as Agents, and H.-J. Priëß, Rechtsanwalt,

defendant,

* Language of the case: German.

supported by

French Republic, represented by G. de Bergues and J.-C. Gracia, acting as Agents, with an address for service in Luxembourg,

Kingdom of the Netherlands, represented by H.G. Sevenster and D.J.M. de Grave, acting as Agents,

Republic of Finland, represented by T. Pynnä, acting as Agent, with an address for service in Luxembourg,

interveners,

THE COURT (Second Chamber),

composed of C.W.A. Timmermans (Rapporteur), President of the Chamber, P. Küris, K. Schiemann, J. Makarczyk and J.-C. Bonichot, Judges,

Advocate General: V. Trstenjak,

Registrar: H. von Holstein, Deputy Registrar,

having regard to the written procedure and further to the hearing on 7 December 2006,

after hearing the Opinion of the Advocate General at the sitting on 28 March 2007,

gives the following

Judgment

- 1 By its application, the Commission of the European Communities requests the Court to declare that, by failing to adopt all the necessary measures to comply with the judgment in Joined Cases C-20/01 and C-28/01 *Commission v Germany* [2003] ECR I-3609 regarding the conclusion of a contract for the collection of waste water by the municipality of Bockhorn (Germany) and of a contract for waste disposal by the City of Brunswick (Germany), the Federal Republic of Germany has failed to fulfil its obligations under Article 228(1) EC, and to order that Member State to pay to the Commission's own resources account of the European Community a penalty payment of EUR 31 680 for each day of delay in implementing the measures necessary to comply with that judgment in respect of the contract relating to the municipality of Bockhorn and of EUR 126 720 for each day of delay in implementing the measures necessary to comply with the abovementioned judgment in respect of the contract relating to the City of Brunswick, in each case from the date of delivery of that judgment until the measures are implemented.

- 2 By order of the President of the Court of 6 June 2005, the French Republic, the Kingdom of the Netherlands and the Republic of Finland were granted leave to intervene in support of the forms of order sought by the Federal Republic of Germany.

Legal context

- 3 Article 2(6) of 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) provides:

‘The effects of the exercise of the powers referred to in paragraph 1 on a contract concluded subsequent to its award shall be determined by national law.

Furthermore, except where a decision must be set aside prior to the award of damages, a Member State may provide that, after the conclusion of a contract following its award, the powers of the body responsible for the review procedures shall be limited to awarding damages to any person harmed by an infringement.’

- 4 Article 3(1) of Directive 89/665 states:

‘The Commission may invoke the procedure for which this Article provides when, prior to a contract being concluded, it considers that a clear and manifest infringement of Community provisions in the field of public procurement has been committed during a contract award procedure falling within the scope of Directives 71/305/EEC and 77/62/EEC.’

The judgment in *Commission v Germany*

5 In paragraphs 1 and 2 of the operative part of the judgment in *Commission v Germany*, the Court:

- ‘1. Declare[d] that since the Municipality of Bockhorn (Germany) failed to invite tenders for the award of the contract for the collection of its waste water and failed to publish notice of the results of the procedure for the award of the contract in the Supplement to the *Official Journal of the European Communities*, the Federal Republic of Germany, at the time of the award of that public service contract, failed to fulfil its obligations under Article 8 in conjunction with Article 15(2) and Article 16(1) 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);

2. Declare[d] that since the City of Braunschweig (Germany) awarded a contract for waste disposal by negotiated procedure without prior publication of a contract notice, although the criteria laid down in Article 11(3) of Directive 92/50 for an award by privately negotiated procedure without a Community-wide invitation to tender had not been met, the Federal Republic of Germany, at the time of the award of that public service contract, failed to fulfil its obligations under Article 8 and Article 11(3)(b) of that directive.’

Pre-litigation procedure

6 By letter of 27 June 2003, the Commission requested the German Government to notify it of the measures taken to comply with the judgment in *Commission v Germany*.

- 7 Since it was not satisfied by the German Government's response of 7 August 2003, on 17 October 2003 the Commission requested the German authorities to submit their observations within two months.
- 8 In its letter of 23 December 2003, the German Government referred to a letter sent in early December 2003 to the government of the *Land* of Lower Saxony asking it to ensure compliance with the public procurement legislation in force and to notify it of the measures intended to prevent similar infringements in future. In addition, the German Government referred to Paragraph 13 of the German Vergabeverordnung (Public Procurement Regulation) which entered into force on 1 February 2001 and which provides that a contract concluded by a contracting authority is invalid if unsuccessful tenderers have not been informed of the conclusion of that contract at least 14 days before its award. That government also submitted that Community law did not require the rescission of the two contracts at issue in the case which gave rise to the judgment in *Commission v Germany*.
- 9 On 1 April 2004, the Commission sent a reasoned opinion to the Federal Republic of Germany, to which the latter responded on 7 June 2004.
- 10 Since the Commission considered that the Federal Republic of Germany had failed to comply with the judgment in *Commission v Germany*, it decided to bring the present action.

The action

The subject-matter of the action

- 11 Since the Federal Republic of Germany stated in its defence that on 28 February 2005 the contract for the collection of waste water concluded by the municipality of Bockhorn was to be annulled, the Commission stated in its reply that it was not pursuing either its action or its claim for imposition of a periodic penalty payment in so far as they related to that contract.

- 12 As the Commission has partly discontinued its action, it is necessary to examine it only in so far as it relates to the contract concluded by the City of Brunswick for waste disposal.

Admissibility

- 13 The Federal Republic of Germany alleges, firstly, that the Commission has no interest in bringing proceedings because of its failure to submit an application for interpretation within the meaning of Article 102 of the Rules of Procedure. According to that Member State, the dispute relating to the consequences which follow from the judgment in *Commission v Germany* could and should have been resolved by way of an application for interpretation of that judgement and not by way of an action based on Article 228 EC.

- 14 However, that argument cannot be accepted.

- 15 In proceedings for failure to fulfil obligations under Article 226 EC, the Court is required to find only that a provision of Community law has been infringed. Pursuant to Article 228(1) EC, the Member State concerned is required to take the measures necessary to comply with the judgment of the Court (see, to that effect, Case C-126/03 *Commission v Germany* [2004] ECR I-11197, paragraph 26). Since a question concerning the measures required for the implementation of a judgment establishing a failure to fulfil obligations under Article 226 EC does not form part of the subject-matter of such a judgment, such a question cannot form the subject-matter of an application for interpretation of a judgment (see also, to that effect, order in Joined Cases 146/85 INT and 431/85 INT *Maindiaux and Others v ESC and Others* [1988] ECR 2003, paragraph 6).
- 16 Furthermore, it is precisely at the stage of an action under Article 228(2) EC that it is for the Member State, whose responsibility it is to draw the conclusions to which the judgment establishing the failure to fulfil obligations appears to it to give rise, to justify the validity of those conclusions, should they be criticised by the Commission.
- 17 Secondly, in its rejoinder, the Federal Republic of Germany, supported by the Kingdom of the Netherlands, requests the Court to close the procedure by application of Article 92(2) of the Rules of Procedure, as the action has become devoid of purpose since, with effect from 10 July 2005, the contract concluded by the City of Brunswick concerning waste disposal has also been rescinded.
- 18 The Commission responds, in its observations relating to the statements in intervention of the French Republic, the Kingdom of the Netherlands and of the Republic of Finland, that it retains an interest in obtaining from the Court a ruling on whether, on expiry of the period laid down in the reasoned opinion issued under Article 228 EC, the Federal Republic of Germany had already complied with the judgment of 10 April 2003 in Joined Cases C-20/01 and C-28/01 *Commission v Germany*. The Commission states, however, that an order for payment of a periodic penalty payment is no longer necessary.

- 19 In that regard, it should be recalled that, according to settled case-law, the reference date for assessing whether there has been a failure to fulfil obligations under Article 228 EC is the date of expiry of the period prescribed in the reasoned opinion issued under that provision (see Case C-119/04 *Commission v Italy* [2006] ECR I-6885, paragraph 27, and case-law cited).
- 20 In the present case, the period referred to in the reasoned opinion which, as is apparent from the receipt stamp, was received by the German authorities on 1 April 2004, was one of two months. The reference date for assessing whether there has been a failure to fulfil obligations under Article 228 EC is therefore 1 June 2004. At that date, the contract concluded by the City of Brunswick for waste disposal had not yet been terminated.
- 21 Nor, moreover, is the action inadmissible contrary to the Federal Republic of Germany's submissions at the hearing, on the ground that the Commission is no longer requesting the imposition of a periodic penalty payment.
- 22 Since the Court has jurisdiction to impose a financial penalty not suggested by the Commission (see, to that effect, Case C-304/02 *Commission v France* [2005] ECR I-6263, paragraph 90), the action is not inadmissible simply because the Commission takes the view, at a certain stage of the procedure before the Court, that a penalty is no longer necessary.
- 23 With regard, thirdly, to the plea of inadmissibility based on Article 3 of Directive 89/665, to which the Advocate General refers in point 44 of her Opinion, it is appropriate to note that the particular procedure laid down in that provision constitutes a preventive measure which can neither derogate from nor replace the powers of the Commission under Articles 226 EC and 228 EC (see, to that effect, Case C-394/02 *Commission v Greece* [2005] ECR I-4713, paragraph 27, and case-law cited).

24 It follows from all the foregoing that the action is admissible.

Substance

25 The Commission takes the view that the Federal Republic of Germany has not adopted measures sufficient to comply with the judgment in Joined Cases C-20/01 and C-28/01 *Commission v Germany*, since that Member State did not, before the date of expiry of the period laid down in the reasoned opinion, rescind the contract concluded by the City of Brunswick for waste disposal.

26 The Federal Republic of Germany reiterates the position expressed in the letter from the German Government of 23 December 2003 that rescission of the contracts affected by that judgment was not required and submits that the steps set out in that communication constituted measures sufficient to comply with that judgment.

27 In that regard, it should be recalled that, as is apparent from paragraph 12 of the judgment in Joined Cases C-20/01 and C-28/01 *Commission v Germany*, the City of Brunswick and Braunschweigsche Kohlebergwerke ('BKB') concluded a contract under which BKB was made responsible for residual waste disposal by thermal processing for a period of 30 years from June/July 1999.

28 As the Advocate General observes in point 72 of her Opinion, the measures mentioned by the German Government in its letter of 23 December 2003 were intended exclusively to prevent the conclusion of new contracts which would constitute failures to fulfil obligations similar to those found in that judgment. However, they did not prevent the contract concluded by the City of Brunswick from continuing to have full effect on 1 June 2004.

29 Accordingly, since that contract had not been terminated on 1 June 2004, the failure to fulfil obligations continued on that date. The adverse effect on the freedom to provide services arising from the disregard of the provisions of Directive 92/50 subsists throughout the entire performance of the contracts concluded in breach thereof (Joined Cases C-20/01 and C-28/01 *Commission v Germany*, paragraph 36). Furthermore, at that date, the failure to fulfil obligations was to continue for decades, given the long period for which the contract in question had been concluded.

30 Having regard to all those facts, the view cannot be taken, in a situation such as that of the present case, that, with regard to the contract concluded by the City of Brunswick, the Federal Republic of Germany had adopted, as at 1 June 2004, measures implementing the judgment in Joined Cases C-20/01 and C-28/01 *Commission v Germany*.

31 However, the Federal Republic of Germany, supported by the French Republic, the Kingdom of the Netherlands and the Republic of Finland, submits that the second subparagraph of Article 2(6) of Directive 89/665, which allows Member States to provide in their legislation that, after the conclusion of a contract following the award of a public contract, the bringing of an action can give rise only to an award of damages and, thus, to exclude any possibility of rescission of that contract, precludes a finding of failure to fulfil obligations within the meaning of Article 226 EC with regard to such a contract entailing the obligation to rescind it. According to those Member States, the principles of legal certainty and of the protection of legitimate expectations, the principle *pacta sunt servanda*, the fundamental right to property, Article 295 EC and the case-law of the Court regarding the limitation in time of the effects of a judgment also preclude such a result.

32 However, such arguments cannot be upheld.

- 33 With regard, firstly, to the second subparagraph of Article 2(6) of Directive 89/665, the Court has already held that, although that provision permits the Member States to preserve the effects of contracts concluded in breach of directives relating to the award of public contracts and thus protects the legitimate expectations of the parties thereto, its effect cannot be, unless the scope of the EC Treaty provisions establishing the internal market is to be reduced, that the contracting authority's conduct vis-à-vis third parties is to be regarded as in conformity with Community law following the conclusion of such contracts (Joined Cases C-20/01 and C-28/01 *Commission v Germany*, paragraph 39).
- 34 If the second subparagraph of Article 2(6) of Directive 89/665 does not affect the application of Article 226 EC, nor can it affect the application of Article 228 EC, without, in a situation such as that in the present case, reducing the scope of the Treaty provisions establishing the internal market.
- 35 Furthermore, the second subparagraph of Article 2(6) of Directive 89/665, which has the objective of guaranteeing the existence, in all Member States, of effective remedies for infringements of Community law in the field of public procurement or of the national rules implementing that law, so as to ensure the effective application of the directives on the coordination of public procurement procedures (Case C-470/99 *Universale-Bau and Others* [2002] ECR I-11617, paragraph 71), relates, as is apparent from its wording, to the compensation which a person harmed by an infringement committed by a contracting authority may obtain from it. That provision, because of its specific nature, cannot be regarded also as regulating the relations between a Member State and the Community in the context of Articles 226 EC and 228 EC.
- 36 With regard, secondly, even if it were to be accepted that the principles of legal certainty and of the protection of legitimate expectations, the principle *pacta sunt servanda* and the right to property could be used against the contracting authority

by the other party to the contract in the event of rescission, Member States cannot rely thereon to justify the non-implementation of a judgment establishing a failure to fulfil obligations under Article 226 EC and thereby evade their own liability under Community law (see, by analogy, Case C-470/03 *AGM.-COS.MET* [2007] ECR I-2749, paragraph 72).

³⁷ With regard, thirdly, to Article 295 EC, according to which ‘this Treaty shall in no way prejudice the rules in Member States governing the system of property ownership’, it should be recalled that that article does not have the effect of exempting the Member States’ systems of property ownership from the fundamental rules of the Treaty (see Case C-463/00 *Commission v Spain* [2003] ECR I-4581, paragraph 67, and case-law cited). The particular features of the system of property ownership in a Member State cannot therefore justify the continuation of a failure to fulfil obligations which consists of an obstacle to the freedom to provide services in disregard of the provisions of Directive 92/50.

³⁸ Moreover, it should be recalled that a Member State cannot plead provisions, practices or situations prevailing in its domestic legal order to justify the failure to observe obligations arising under Community law (see *Commission v Italy*, paragraph 25, and case-law cited).

³⁹ Fourthly, with regard to the Court’s case-law on the limitation in time of the effects of a judgment, it is sufficient to state that, in any event, that case-law does not justify the non-implementation of a judgment establishing a failure to fulfil obligations under Article 226 EC.

- 40 Although, with regard to the contract concluded by the City of Brunswick, it must therefore be held that the Federal Republic of Germany had not, as at 1 June 2004, adopted the measures to implement the judgment in Joined Cases C-20/01 and C-28/01 *Commission v Germany*, the same is not, however, true at the date of examination of the facts by the Court. It follows that the imposition of the periodic penalty payment, which the Commission is in fact no longer requesting, is not justified.
- 41 In the same way, the facts of the present case are such that it does not appear necessary to order payment of a lump sum.
- 42 Accordingly, it must be held that, by having failed, at the date on which the period laid down in the reasoned opinion issued by the Commission pursuant to Article 228 EC, to adopt all the necessary measures to comply with the judgment in Joined Cases C-20/01 and C-28/01 *Commission v Germany* regarding the conclusion of a contract for waste disposal by the City of Brunswick, the Federal Republic of Germany has failed to fulfil its obligations under that article.

Costs

- 43 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. As the Commission has asked that costs be awarded against the Federal Republic of Germany and the latter has been unsuccessful, the Federal Republic of Germany must be ordered to pay the costs. The intervening Member States, the French Republic, the Kingdom of the Netherlands and the Republic of Finland, must be ordered to bear their own costs in accordance with Article 69(4) of the Rules of Procedure.

On those grounds, the Court (Second Chamber) hereby:

- 1. Declares that, by having failed, at the date on which the period laid down in the reasoned opinion issued by the Commission of the European Communities pursuant to Article 228 EC, to adopt all the necessary measures to comply with the judgment of 10 April 2003 in Joined Cases C-20/01 and C-28/01 *Commission v Germany* regarding the conclusion of a contract for waste disposal by the City of Brunswick (Germany), the Federal Republic of Germany has failed to fulfil its obligations under that article;**

- 2. Orders the Federal Republic of Germany to pay the costs;**

- 3. Orders the French Republic, the Kingdom of the Netherlands and the Republic of Finland to bear their own costs.**

[Signatures]