settled case-law the significance of the directive on the award of public contracts for the free movement of services and for fair competition at European Union level. An arbitrary and subjective 'dismemberment' of uniform service contracts would undermine that objective.

Budgetary reasons for the division into construction sections could also not justify an artificial division of a unified contract value. It is contrary to the objective of the European public procurement directives for a unified proposed purchase which is carried out in several stages purely for budgetary reasons to be considered solely for that reason to consist of several independent contracts and thereby to be prevented from coming within the scope of application of the directive. Article 9(3) of the directive indeed forbids such an artificial division of a unified proposed purchase.

It must be concluded that the contracts in question constitute a unified proposed purchase, the value of which at the time of the contract award exceeded the threshold laid down in the directive. The contract should therefore have been the subject of a Europe-wide invitation to tender and awarded according to the procedure provided for in the directive. That is not the case and therefore the defendant infringed Directive 2004/18/EC.

([1]) Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (OJ 2004 L 134, p. 114).

Action brought on 9 December 2010 — European Commission v Republic of Hungary

(Case C-575/10)

(2011/C 72/09)

Language of the case: Hungarian

Parties

Applicant(s): European Commission (represented by: D. Kukovec and A. Sipos, Agents)

Defendant(s): Republic of Hungary

Form of order sought

— Declare that the Republic of Hungary has failed to fulfil its obligations under Articles 47(2) and 48(3) of Directive 2004/18/EC, ([1]) and Article 54(5) and (6) of Directive 2004/17/EC, ([2]) by failing to ensure that, in public procurement procedures, economic operators may, in a specific case, rely on the capacity of other entities, whatever the legal nature of the link between itself and those entities.

— order Republic of Hungary to pay the costs.

Pleas in law and main arguments

Both Directive 2004/17 and Directive 2004/18 allow tenderers in public procurement procedures to rely on the capacity of other entities to demonstrate their suitability and the satisfaction of the selection criteria whatever the legal nature of the link between itself and those entities.

In the view of the Commission, Hungarian rules which, in the case of certain suitability criteria, allow tenderers to use the resources of other entities which are not directly participating in the performance of the contract only if they have a controlling share in such entities do not comply with those provisions of the Directives. Thus, in the case of entities which do not participate as subcontractors in the performance of the contract, the contested national rules impose an additional requirement to be met to allow the tenderer to rely on the capacity of such entities in the public procurement procedure.

The provisions of the Directives are unequivocal: without requiring the entities which provide the resources to be directly involved in the performance of the contract, they require the national legislation to guarantee the possibility of relying on the resources of such entities, *whatever the legal nature* of the link between the tenderer and those entities. The sole requirement is that the tenderer be able to demonstrate to the awarding authority that it will actually have the resources necessary for the performance of the contract.

However, the Commission goes on to argue that the Hungarian rules at issue restrict the possibilities open to tenderers in this regard, so that, in practice, they have no option but to involve in the contract as subcontractors those entities which have such resources, unless, from the outset, they have a controlling share in such entities.

The Commission asserts that the national rules at issue cannot be justified by the objective of eliminating practices intended to evade the public procurement rules, because that objective cannot be relied on to justify a provision contrary to European Union law on public procurement which disproportionately restricts the rights and procedural obligations arising from the Directives. Of course, it is open to the Member States, within the limits imposed by the Directives, to decide the manner in which the tenderers must demonstrate that they actually will have the resources of other entities, but they must do so without making a distinction on the basis of the legal nature of the legal links with such entities.

The Commission rejects the argument of the Republic of Hungary that an entity which does not participate in the performance of the contract cannot demonstrate that it meets the minimum selection criteria which consist in being able actually to provide the necessary resources at the time of performance of the contract. In that connection, the Commission points out that Article 48(3) of Directive 1004/18/EC expressly provides that the tenderer may prove that it will have the resources of other entities at its disposal '*by producing an undertaking by those entities to place the necessary resources at the disposal of the economic operator*'. Thus, an entity which contributes its resources may prove that it has the resources which it must provide at the time of the performance of the contract, without being required to participate directly in the performance of the contract.

The Commission points out, finally, that the disputed national rules may discriminate against foreign tenderers. Although the relevant Hungarian legislation applies to all tenderers, in practice it limits the possibility of participating in tender procedures for foreign tenderers in particular. In general, such tenderers do not have at their disposal, in the place of performance of the contract, all the resources necessary for performance, since, in public procurement procedures, they are obliged to have recourse, more frequently than Hungarian tenderers, to the capacities of local economic operators who are independent of them.

([1]) Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (OJ 2004 L 134, p. 114).

([2]) Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors (OJ 2004 L 134, p. 1).

Action brought on 10 December 2010 — European Commission v Kingdom of Belgium

(Case C-577/10)

(2011/C 72/10)

Language of the case: French

Parties

Applicant: European Commission (represented by: E. Traversa and C. Vrignon, acting as Agents)

Defendant: Kingdom of Belgium

Form of order sought

— declare that by adopting Articles 137(8), third indent of 138, 153 and 157(3) of Framework Law (I) of 27 December 2006 ([1]), in the version in force since 1 April 2007, the Kingdom of Belgium has failed to fulfil its obligations under Article 56 of the Treaty on the Functioning of the European Union;

— order the Kingdom of Belgium to pay the costs.

Pleas in law and main arguments

By this action, the Commission claims that the national legislation which imposes a prior notification requirement on independent service providers established in other Member States (the 'Limosa' declaration), who wish to provide services in Belgium on a temporary basis, constitutes a restriction on the freedom to provide services.

The Commission points out, in the first place, that the provisions at issue constitute a discriminatory restriction insofar as, firstly, they impose non-negligible and deterrent additional administrative formalities on the independent service providers at issue and, secondly, they establish a monitoring system that applies only to providers established in another Member State, without any objective reasons to justify that difference in treatment.

In the second place, the applicant asserts that that restriction on the freedom to provide services, even if it is not discriminatory, is not justified by objectives in relation to the public interest, the maintenance of the financial balance of the social security system, the prevention of fraud or the protection of workers.

([1]) Moniteur Belge, 28 December 2006, p. 75178.

Reference for a preliminary ruling from the Hoge Raad der Nederlanden (Netherlands) lodged on 6 December 2010 — Staatssecretaris van Financiën v L.A.C. van Putten

(Case C-578/10)

(2011/C 72/11)

Language of the case: Dutch

Referring court

Hoge Raad der Nederlanden

Parties to the main proceedings

Applellant: Staatssecretaris van Financiën

Other party: L.A.C. van Putten