

Reference for a preliminary ruling by the Finanzgericht Hamburg by order of that Court of 16 October 2002 in the case of Deutsche See-Bestattungs-Genossenschaft e. G. against Hauptzollamt Kiel

(Case C-389/02)

(2003/C 19/20)

Reference has been made to the Court of Justice of the European Communities by order of the Finanzgericht Hamburg (Finance Court, Hamburg) of 16 October 2002, received at the Court Registry on 5 November 2002, for a preliminary ruling in the case of Deutsche See-Bestattungs-Genossenschaft e. G. against Hauptzollamt Kiel on the following question:

Does sailing in Community waters in craft for other than private non-commercial purposes constitute navigation within the meaning of the first paragraph of Article 8(1)(c) of Directive 92/81 (1)?

(1) OJ L 316 of 31.10.1992, p. 12.

Reference for a preliminary ruling by the Corte di Appello di Lecce — Sezione penale by order of that Court of 7 October 2002 in the criminal proceedings against Sergio Adelchi

(Case C-391/02)

(2003/C 19/21)

Reference has been made to the Court of Justice of the European Communities by order of the Corte di Appello di Lecce — Sezione penale (Court of Appeal, Lecce, Criminal division) of 7 October 2002, received at the Court Registry on 8 November 2002, for a preliminary ruling in the criminal proceedings against Sergio Adelchi on the following questions:

1. With reference to the duty of each Member State to adopt 'appropriate penalties' for the infringements established by the first and fourth directives (Directive 68/151/EEC (1) and Directive 78/660/EEC (2)), must the directives themselves and in particular the combined provisions of Article 44(3)(g) of the EC Treaty, Articles 2(1)(f) and 6 of the first directive (Directive 68/151/EEC) and Article 2(2), (3) and (4) of the fourth directive (Directive 78/660/EEC), as consolidated by Directive 83/349 (3) and Directive 90/605 (4), be interpreted as meaning that that legislation precludes a law of a Member State which, in amending the system of penalties already in force in respect of

company law offences concerning the infringement of the obligations imposed in order to safeguard the principle of public and accurate information on companies, lays down a sanctionative system which in the specific instance is not informed by the criteria of effectiveness, proportionality and dissuasiveness of the sanctions imposed in order to ensure that that principle is upheld?

2. Must those directives and, in particular, Article 44(3)(g) of the EC Treaty, Articles 2(1)(f) and 6 of the first directive (Directive 68/151/EEC) and Article 2(2), (3) and (4) of the fourth directive (Directive 78/660/EEC), as consolidated by Directive 83/349 and Directive 90/605, be interpreted as meaning that that legislation precludes a law of a Member State which does not make it a punishable offence for companies to infringe obligations concerning disclosure and the provisions of accurate information on certain company documents (including the balance sheet and the profit and loss account) where the disclosure of false company accounts or the failure to provide information result in a distortion of the financial results for a given period, or a distortion in the net assets, which does not exceed a certain percentage threshold?

3. Must those directives and, in particular, Article 44(3)(g) of the EC Treaty, Articles 2(1)(f) and 6 of the first directive (Directive 68/151/EEC) and Article 2(2), (3) and (4) of the fourth directive (Directive 78/660/EEC), as consolidated by Directive 83/349 and Directive 90/605, be interpreted as meaning that that legislation precludes a law of a Member State which does not make it a punishable offence for companies to infringe obligations concerning disclosure and the provision of accurate information where statements are made which, although aimed at deceiving members or the public with a view to securing an unjust profit, are the consequence of estimated valuations which, taken individually, depart from actual values to an extent not greater than a certain threshold?

4. Irrespective of progressive limits or thresholds, must those directives and, in particular, Article 44(3)(g) of the EC Treaty, Articles 2(1)(f) and 6 of the first directive (Directive 68/151/EEC) and Article 2(2), (3) and (4) of the fourth directive (Directive 78/660/EEC), as consolidated by Directive 83/349 and Directive 90/605, be interpreted as meaning that that legislation precludes a law of a Member State which does not make it a punishable offence for companies to infringe obligations concerning disclosure and the provision of accurate information where the false statements or the fraudulent omissions and, thus, the disclosures and statements which do not give a true and fair view of the company's assets and liabilities and financial position do not distort 'to an appreciable extent' the company's assets, liabilities and financial position (even though it is for the national legislature to define the concept of 'appreciable distortion'?

5. Must those directives and, in particular, Article 44(3)(g) of the EC Treaty, Articles 2(1)(f) and 6 of the first directive (Directive 68/151/EEC) and Article 2(2), (3) and (4) of the fourth directive (Directive 78/660/EEC), as consolidated by Directive 83/349 and Directive 90/605, be interpreted as meaning that that legislation precludes a law of a Member State which, in response to an infringement by companies of those obligations concerning disclosure and the provision of accurate information imposed on them in order to safeguard 'the interests of both members and third parties', allows only members and creditors to seek imposition of a penalty, thereby excluding third parties from any general and effective protection?
6. Must those directives and, in particular, Article 44(3)(g) of the EC Treaty, Articles 2(1)(f) and 6 of the first directive (Directive 68/151/EEC) and Article 2(2), (3) and (4) of the fourth directive (Directive 78/660/EEC), as consolidated by Directive 83/349 and Directive 90/605, be interpreted as meaning that that legislation precludes a law of a Member State which, in response to the infringement by companies of those obligations concerning disclosure and the provision of accurate information imposed on them in order to safeguard 'the interests of both members and third parties', provides for prosecution machinery and a sanctionative system which are markedly differentiated, whereby the possibility of the imposition of a punishment upon complaint being made, together with more serious and effective penalties, is reserved solely for infringements occasioning loss to members and creditors?

- (1) First Council Directive 68/151/EEC of 9 March 1968 on co-ordination of safeguards which, for the protection of the interests of members and others, are required by Member States of companies within the meaning of the second paragraph of Article 58 of the Treaty, with a view to making such safeguards equivalent throughout the Community (English special edition...: Series-I I Chapter 1968(I), p. 41).
- (2) Fourth Council Directive 78/660/EEC of 25 July 1978 based on Article 54 (3) (g) of the Treaty on the annual accounts of certain types of companies (OJ L 222, 14.08.1978, p. 11).
- (3) Seventh Council Directive 83/349/EEC of 13 June 1983 based on the Article 54 (3) (g) of the Treaty on consolidated accounts (OJ L 193, 18.07.1983, p. 1).
- (4) Council Directive 90/605/EEC of 8 November 1990 amending Directive 78/660/EEC on annual accounts and Directive 83/349/EEC on consolidated accounts as regards the scope of those Directives (OJ L 317, 16.11.1990, p. 60).

Action brought on 8 November 2002 by the Commission of the European Communities against the Hellenic Republic

(Case C-394/02)

(2003/C 19/22)

An action against the Hellenic Republic was brought before the Court of Justice of the European Communities on 8 November

2002 by the Commission of the European Communities, represented by Michel Nolin and Minas Konstantinidis, of its Legal Service, with an address for service in Luxembourg.

The Commission claims that the Court should:

- a) declare that, as a result of the award by the Dimosia Epikhirisi Ilektrismou (DEI) of work for the construction of a conveyor system at the steam-generated electricity station at Megalopolis by a procedure of negotiation without a competition first being called, the Hellenic Republic has failed to fulfil its obligations under Council Directive 93/38/EEC⁽¹⁾ of 14 June 1993 coordinating the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors and, in particular, under Article 20 et seq. of the directive;
- b) order the Hellenic Republic to pay the costs.

Pleas in law and main arguments

Directive 93/38 governs the choice of procurement procedures in the water, energy, transport and telecommunications sectors and applies to contracts whose estimated value is not less than EUR 5 000 000.

According to the Commission, the contract at issue, by reason of its value and type, is covered by the directive. Consequently, the contracting entity (Dimosia Epikhirisi Ilektrismou (DEI); the State Electricity Undertaking) had to follow the procedures under Article 20(1) of the directive and call a competition in accordance with Article 21 of the directive. However, the contract was not put out to tender but was awarded following private negotiation.

The Commission maintains that in the present case neither Article 20(2)(c) of the directive (technical or artistic reasons rendering it absolutely essential to place the contract with a particular contractor) nor Article 20(2)(d) (extreme urgency brought about by events unforeseeable by the contracting entity) is applicable.

⁽¹⁾ OJ L 199, 9.8.1993, p. 84.