

P. J. G. Kapteyn (Presidents of Chambers), C. N. Kakouris, J. C. Moitinho de Almeida, G. C. Rodríguez Iglesias, M. Díez de Velasco and M. Zuleeg, Judges; F. G. Jacobs, Advocate-General; H. A. Rühl, Principal Administrator, acting for the Registrar, gave a judgment on 7 April 1992, the operative part of which is as follows:

1. *by failing to take the necessary measures to ensure that in the district of Khamia dangerous waste is disposed of without endangering human health and without harming the environment, and by failing to draw up for that district plans for the disposal of waste and of toxic and dangerous waste, the Hellenic Republic has failed to fulfil its obligations under Articles 4 and 6 of Council Directive 75/442/EEC of 15 July 1975 on waste, and Articles 5 and 12 of Council Directive 78/319/EEC of 20 March 1978 on toxic and dangerous waste;*

2. *the Hellenic Republic is ordered to pay the costs.*

Brussels Bar, with an address for service in Luxembourg at the Chambers of A. Schmitt, 62 Avenue Guillaume — the President of the Court of Justice made an order on 3 April 1992, the operative part of which is as follows:

1. *the application for interim measures is dismissed;*
2. *costs are reserved.*

**Action brought on 6 March 1992 by the Commission of the European Communities against the Kingdom of Spain**

(Case C-71/92)

(92/C 113/05)

An action against the Kingdom of Spain was brought before the Court of Justice of the European Communities on 6 March 1992 by the Commission of the European Communities, represented by Rafael Pelicer, a Member of its Legal Department, acting as Agent, with an address for service in Luxembourg at the office of Robert Hayder, also a member of its Legal Department, Wagner Centre, Kirchberg.

The applicant claims that the Court should:

(i) declare that:

— by maintaining in force certain provisions constituting an exclusion from the field of application of the legislation on public procurement (Article 2, points 3 and 8 and Article 29a (1), Nos 1 and 3, of the Ley de Contratos del Estado [Law on State contracts — L.C.E.]<sup>(1)</sup> and Article 2, points 3 and 8, and Article 93b of the Reglamento General de Contratación del Estado [General regulations governing the award of State contracts — R.G.C.E.]<sup>(2)</sup>,

— by maintaining in force certain provisions allowing contracts to be awarded directly (Article 37 (1) Nos 1, 2, 7 and 8; Article

# **ORDER OF THE PRESIDENT OF THE COURT** **of 3 April 1992**

**in Case C-35/92 P-R: European Parliament v. Erik Dan Frederiksen<sup>(1)</sup>**

**(Appeal — Suspension of compliance with a judgment of annulment)**

(92/C 113/04)

(Language of the case: French)

In Case C-35/92 P-R: European Parliament (Agents: J. Campinos, assisted by D. Petersheim) — application for suspension of compliance with the Judgment of the Court of First Instance delivered on 11 December 1991 in Case T-169/89, Erik Dan Frederiksen and the European Parliament, the other party to the proceedings being Erik Dan Frederiksen, an official of the European Parliament, represented by G. Vandersanden, of the

<sup>(1)</sup> OJ No C 61, 10. 3. 1992.

<sup>(1)</sup> Ley de Contratos del Estado. Text approved by Decree No 923/1965 of 8 April 1965 (BOE No 97 of 23 April 1965).

<sup>(2)</sup> Reglamento General de Contratación del Estado approved by Decree 3410/1975 of 25 November 1975 (BOE Nos 311 and 312 of 27 and 29 December 1979).

87 (4) points 1, 2 and 5 of the L.C.E.; Articles 177 and 247 of the R.G.C.E. and Article 120 of the Texto Refundido del Régimen Local [Amended Local Regulations],

- by maintaining in force certain provisions relating to the rules of participation and criteria for qualitative selection (Article 24 (1) No 1, Article 25 (1) Nos 1 and 3, Articles 284 (5), 287 (2), 312 (2), 320 (3), No 5, and Article 341 of the R.G.C.E.),
- by maintaining in force certain provisions relating to technical standards (Article 244 of the R.G.C.E.), and
- by maintaining in force certain provisions relating to award criteria (Law of 24 November 1939 for the arrangement and protection of national industry) and Article 11 of Decree 946/78 of 14 April 1978 on the supply of pharmaceutical products),

the Kingdom of Spain has failed to fulfil its obligations under Articles 30 and 59 of the EEC Treaty and under Council Directive 71/305/EEC of 26 July 1971 concerning the coordination of procedures for the award of public works contracts <sup>(1)</sup> and Council Directive 77/62/EEC of 21 December 1976 coordinating procedures for the award of public supply contracts <sup>(2)</sup>, and

(ii) order the Kingdom of Spain to pay the costs.

*Pleas in law and main arguments adduced in support:*

The Commission considers that the Spanish rules governing public procurement do not conform to the aforementioned provisions of Community law. It bases its case on the following arguments:

- the Spanish legislation excludes from the field of application of the aforementioned Community Directives public contracts that relate in general to some of the products subject to, or exempt by, special legislation (such as pharmaceutical products) and certain works contracts (relating to certain industrial or mineral-extraction installations) whereas the only exceptions allowed are those expressly laid down in Article 2 (2) and (3) of Directive 77/62/EEC and in Article 1 (a) of Directive 71/305/EEC,
- the Spanish legislation allows contracts to be awarded directly where it is impossible to promote competition or it is not expedient to promote it and in the event of a 'recognized' pressing need or non-fulfilment by the tenderer of the conditions to be met for the drawing up of the contract or in the event of termination of the contract, whereas the

only permitted justifications are set out exhaustively in Article 9 of Directive 71/305/EEC and Article 6 of Directive 77/62/EEC,

- the Spanish legislation requires from foreign tenderers documentation providing evidence of their legal personality and their capacity to enter into contracts, which is a requirement not laid down in Title IV of the aforementioned Directives, thus entailing the duplication of documentation and constituting an obstacle to the free provisions of services prohibited by Article 59 of the EEC Treaty.

On the other hand, for the purposes of the classification of contractors, the Spanish legislation makes provision for the prior assessment of their means in Spanish territory and requires from all contractors, for the exercise of the right to prove capacity by means other than classification, certification of non-classification, those being requirements which are not provided for in Article 28 of Directive 71/305/EEC and which constitute a barrier to the free provision of services prohibited by Article 59 of the EEC Treaty.

The dispensation from the obligation to provide security, granted to classified contractors, is also contrary to the aforementioned Directives and to Article 59 of the EEC Treaty, since it encourages contractors to obtain classification and thus renders the right to prove capacity without obtaining classification ineffective.

Furthermore, the requirement of accreditation for contractors' technical capacity, to be accomplished through a certification procedure which must necessarily be undertaken by a Spanish body, is contrary to Article 23 (1) (e) of Directive 77/62/EEC and Article 30 of the EEC Treaty as a measure having an effect equivalent to a quantitative restriction,

- the provisions of the law on the arrangement and protection of national industry, which require contract-awarding authorities to give preference to Spanish tenderers, and of the discriminatory Decree 946/78 on the supply of pharmaceutical products, are incompatible with Article 25 of Directive 77/62/EEC, Article 29 of Directive 71/305/EEC and Articles 59 and 30 of the EEC Treaty.

**Action brought on 11 March 1992 by Gao Yao (Hong Kong) Hua Fa Industrial Co Ltd against the Council of the European Communities**

(Case C-75/92)

(92/C 113/06)

An action against the Council of the European Communities was brought before the Court of Justice on 11 March 1982 by Gao Yao (Hong Kong) Hua Fa

<sup>(1)</sup> OJ No L 185, 16. 8. 1971, p. 5.

<sup>(2)</sup> OJ No L 13, 15. 1. 1977, p. 1.