JUDGMENT OF THE COURT (Sixth Chamber)
15 May 2003 *

In Case C-214/00,

Commission of the European Communities, represented by G. Valero Jordana, acting as Agent, 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.

APPLICATION for a declaration that, by failing to adopt the measures needed to comply with the provisions of Articles 1 and 2 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), as amended by 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), and in particular by failing to

— extend the system of review procedures provided for by that directive to decisions adopted by all contracting authorities, within the meaning of Article 1(b) of Directive 92/50, 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), including companies governed by private law established for the specific purpose of meeting needs in the general interest which do not have an industrial or commercial character, have legal personality, and are financed for the most part by public authorities or other entities governed by public law or are subject to supervision by the latter, or have an administrative, managerial or supervisory board more than half of whose members are appointed by public authorities or other entities governed by public law,

— allow review to be sought of all decisions adopted by the contracting authorities, including all procedural measures, during the procedure for the award of public contracts, and

— provide for the possibility of all types of appropriate interim measures being granted in relation to decisions adopted by the contracting authorities, including measures aimed at allowing administrative decisions to be

suspended, removing for that purpose all difficulties and obstacles and in particular the need first to appeal against the decision of the contracting authority,

the Kingdom of Spain has failed to fulfil its obligations under that directive,

THE COURT (Sixth Chamber),

composed of: R. Schintgen, acting for the President of the Sixth Chamber, V. Skouris (Rapporteur), F. Macken, N. Colneric and J.N. Cunha Rodrigues, Judges,

Advocate General: P. Léger,
Registrar: L. Hewlett, Principal Administrator,

having regard to the Report for the Hearing,

after hearing oral argument from the parties at the hearing on 14 March 2002,

after hearing the Opinion of the Advocate General at the sitting on 13 June 2002,

gives the following

Judgment

1 By application lodged at the Court Registry on 30 May 2000, the Commission of the European Communities brought an action under Article 226 EC for a declaration that, by failing to adopt the measures needed to comply with the provisions of Articles 1 and 2 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), as amended by 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) ('Directive 89/665'), and in particular by failing to

— extend the system of review procedures provided for by that directive to decisions adopted by all contracting authorities, within the meaning of Article 1(b) of Directive 92/50, 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), including companies governed by private law established for the specific purpose of meeting needs in the general interest which do not have an industrial or commercial character, have legal personality, and are financed for the most part by public authorities or other entities governed by public law or are subject to supervision by the latter, or have an administrative, managerial or supervisory board more than half of whose members are appointed by public authorities or other entities governed by public law,

— allow review to be sought of all decisions adopted by the contracting authorities, including all procedural measures, during the procedure for the award of public contracts, and

— provide for the possibility of all types of appropriate interim measures being granted in relation to decisions adopted by the contracting authorities, including measures aimed at allowing administrative decisions to be suspended, removing for that purpose all difficulties and obstacles and in particular the need first to appeal against the decision of the contracting authority,

the Kingdom of Spain has failed to fulfil its obligations under that directive.

Legal context

Community provisions

2 It is apparent from the first and second recitals in the preamble to Directive 89/665 that the arrangements existing at the time of its adoption at both national and Community levels to ensure the effective application of Community Directives on public procurement, in particular Council Directive 71/305/EEC of 26 July 1971 concerning the coordination of procedures for the award of public works contracts (OJ, English Special Edition 1971(II), p. 682) and Council Directive 77/62/EEC of 21 December 1976 coordinating procedures for the award of public supply contracts (OJ 1977 L 13, p. 1), were not always adequate to ensure compliance with the relevant Community provisions, particularly at a stage when infringements could be corrected.

3 The third recital of Directive 89/665 states that 'the opening-up of public procurement to Community competition necessitates a substantial increase in the guarantees of transparency and non-discrimination;... for it to have tangible effects, effective and rapid remedies must be available in the case of infringements of Community law in the field of public procurement or national rules implementing that law'.

4 According to the fifth recital of the directive, 'since procedures for the award of public contracts are of such short duration, competent review bodies must, among other things, be authorised to take interim measures aimed at suspending such a procedure or the implementation of any decisions which may be taken by the contracting authority' and 'the short duration of the procedures means that the aforementioned infringements need to be dealt with urgently'.

5 Article 1(1) and (3) of Directive 89/665 provides:

'1. The Member States shall take the measures necessary to ensure that, as regards contract award procedures falling within the scope of Directives 71/305/EEC, 77/62/EEC and 92/50/EEC... decisions taken by the contracting authorities may be reviewed effectively and, in particular, as rapidly as possible in accordance with the provisions set out in the following Articles and, in particular, Article 2(7), on the grounds that such decisions have infringed Community law in the field of public procurement or national rules implementing that law.

...

3. The Member States shall ensure that the review procedures are available, under detailed rules which the Member States may establish, at least to any

person having or having had an interest in obtaining a particular public supply or public works contract and who has been or risks being harmed by an alleged infringement...'

6 Under Article 2(1)(a), (3) and (4) of Directive 89/665:

'1. The Member States shall ensure that the measures taken concerning the review procedures specified in Article 1 include provision for the powers to:

(a) take, at the earliest opportunity and by way of interlocutory procedures, interim measures with the aim of correcting the alleged infringement or preventing further damage to the interests concerned, including measures to suspend or to ensure the suspension of the procedure for the award of a public contract or the implementation of any decision taken by the contracting authority;

...

3. Review procedures need not in themselves have an automatic suspensive effect on the contract award procedures to which they relate.

4. The Member States may provide that, when considering whether to order interim measures, the body responsible may take into account the probable consequences of the measures for all interests likely to be harmed, as well as the public interest, and may decide not to grant such measures where their negative consequences could exceed their benefits. A decision not to grant interim

measures shall not prejudice any other claim of the person seeking these measures.'

7 Directive 71/305 and Directive 77/62 were repealed by Directive 93/37 and Directive 93/36 respectively. The references in the first recital in the preamble to and Article 1(1) of Directive 89/665 to the repealed directives must be understood as made to Directives 93/37 and 93/36.

8 Under Article 1(b) of Directive 92/50, which is in essence identical in content to Article 1(b) of Directives 93/36 and 93/37:

'*contracting authorities* shall mean the State, regional or local authorities, bodies governed by public law, associations formed by one or more of such authorities or bodies governed by public law.

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 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.

...'

9 Article 1(1) and (2) of 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) reads as follows:

'For the purpose of this Directive:

1. "public authorities" shall mean the State, regional or local authorities, bodies governed by public law, or associations formed by one or more of such authorities or bodies governed by public law.

A body is considered to be governed by public law where it:

— is established for the specific purpose of meeting needs in the general interest, not being of an industrial or commercial nature,

— has legal personality, and

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

2. "public undertaking" shall mean any undertaking over which the public authorities may exercise directly or indirectly a dominant influence by virtue of their ownership of it, their financial participation therein, or the rules which govern it. A dominant influence on the part of the public authorities shall be presumed when these authorities, directly or indirectly, in relation to an undertaking:

— hold the majority of the undertaking's subscribed capital, or

— control the majority of the votes attaching to shares issued by the undertaking, or

— can appoint more than half of the members of the undertaking's administrative, managerial or supervisory body'.

10 The review procedures initiated against decisions taken by contracting authorities under Directive 93/38 are governed by Council Directive 92/13/EEC of 25 February 1992 coordinating the laws, regulations and administrative decisions relating to the application of Community rules on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors (OJ 1992 L 76, p. 14), the fourth recital of which states that Directive 89/665 is limited to contract award procedures within the scope of Directives 71/305 and 77/62.

National provisions

11 The scope *ratione personae* of the Spanish legislation on public procurement is defined in Article 1 of Ley 13/1995 de Contratos de las Administraciones Públicas (Law on public procurement) of 18 May 1995 (BOE No 119 of 19 May 1995, p. 14601, hereinafter 'Law 13/1995'), which includes all public authorities,

whether State authorities or authorities of the Autonomous Communities and regional or local authorities. Article 1(3) provides:

'This law shall also apply in every case to the awarding of contracts by autonomous bodies and by 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.'

12 The sixth additional provision of Law 13/1995, entitled 'Rules applicable to the award of contracts in the public sector', reads as follows:

'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.'

13 It should be pointed out that, since the present action was lodged, the Kingdom of Spain, by Real Decreto Legislativo 2/2000 por el que se aprueba el texto refundido de la Ley de Contratos de las Administraciones Públicas (Royal Decree-Law approving the codified text of the Law on public procurement) of 16 June 2000 (BOE No 148 of 21 June 2000, p. 21775), has adopted a new consolidated version of the aforementioned law; this, however, merely brings together and organises the previous provisions, without amending their substance.

14 As regards administrative appeals, Article 107 of Ley 30/1992 de Régimen Jurídico de las Administraciones Públicas y del Procedimiento Administrativo Común (Law on the legal provisions governing public authorities and ordinary administrative procedure) of 26 November 1992, as amended by Ley 4/1999 of 13 January 1999 (BOE No 12 of 14 January 1999, p. 1739, hereinafter 'Law 30/1992'), classifies as subject to direct appeal 'procedural measures, if they decide, directly or indirectly, the substantive issues, render it impossible to continue the procedure, render it impossible to conduct a defence, or cause irreparable harm to legitimate rights or interests.'

15 So far as concerns administrative appeal proceedings, Article 25(1) of Ley 29/1998 reguladora de la Jurisdicción Contencioso-administrativa (Law governing administrative courts) of 13 July 1998 (BOE No 167 of 14 July 1998, p. 23516, hereinafter 'Law 29/1998'), using the same wording as Law 30/1992, provides:

'Administrative appeal proceedings are admissible in respect of provisions of a general nature and express and implicit measures, whether definitive or procedural, adopted by the public authority which bring an end to the administrative procedure, if they decide, directly or indirectly, the substantive issues, render it impossible to continue the procedure, render it impossible to conduct a defence, or cause irreparable harm to legitimate rights or interests.'

16 Article 111 of Law 30/1992, entitled 'Suspension of operation', provides:

'1. Unless otherwise provided, the lodging of an appeal will not suspend the operation of the contested measure.

2. Notwithstanding the provisions of the previous paragraph, the body responsible for carrying out review may, having weighed up the harm which suspension would cause to the public interest or third parties as against the harm caused to the applicant by the immediate implementation of the contested measure, and given adequate reasons, suspend operation of the contested measure, on its own initiative or at the request of the applicant, in one of the following circumstances:

(a) Operation is likely to cause harm which is irreparable or reparable only with difficulty.

(b) The dispute is based on one of the legal grounds for automatic invalidity... .

...

3. If the competent body has not given an express decision on the application for suspension of operation of the contested measure within a period of thirty days from the date on which the application was entered in the case-list, suspension will be deemed to have been granted.'

17 According to the statement of reasons for Law 29/1998, '[i]n the light of the experience gained in recent years and of the increasing importance which the subject-matter of administrative appeal proceedings now has, suspension of the contested provision or measure should no longer be the only possible protective measure' and '[t]he Law therefore provides for the possibility of adopting any protective measure, including positive measures'.

18 Under Article 129(1) of Law 29/1998:

'The parties concerned may request, at any stage of the proceedings, the adoption of any measures to ensure the effectiveness of the judgment to be given.'

19 Article 136 of that Law provides:

'1. In the circumstances referred to in Articles 29 and 30, a protective measure shall be adopted, unless it is evident that the criteria laid down in those articles are not fulfilled or that the measure will seriously affect the general interest or the interests of third parties, which the court shall assess in detail.

2. In the circumstances mentioned in the previous paragraph, measures may also be applied for before the appeal is lodged, and the application shall be examined in accordance with the provisions of the previous article. In that event, the party concerned shall request confirmation of the measures when he lodges the appeal, which he is required to do within ten days from the date of notification of the adoption of the protective measures....

If no appeal ensues, the measures granted will be automatically void, and the applicant will be required to pay compensation for the damage caused by the protective measure.'

20 It should be added that Articles 29 and 30 of Law 29/1998 apply, first, to cases in which the authority is required, pursuant to a provision, a contract or a measure, to provide a particular service to one or more specific persons; secondly, to cases in which the authority does not implement its definitive measures; and, thirdly, to blatantly unlawful conduct.

Pre-litigation procedure

21 By letter of 18 December 1991, the Spanish Government notified the Commission of the legislation in force at that time which it considered transposed Directive 89/665 into national law, namely the Ley reguladora de la Jurisdicción Contencioso-Administrativa (Law governing administrative courts) of 27 December 1956, the Ley de Procedimiento Administrativo (Law governing administrative procedure) of 18 July 1958, the Ley de Contratos del Estado (Law on public procurement) and the Spanish Constitution.

22 On 21 June 1994, the Commission sent its preliminary observations on the content of the national implementing measures to Spain's Permanent Representative to the European Union.

23 The Commission considered that the reply given by the Spanish authorities on 13 September 1994 was unsatisfactory and therefore, on 29 May 1996, sent the Spanish Government a letter of formal notice in which it stated, first, that the scope of the national measures was not the same as that of Directive 89/665;

secondly, that, according to those measures, 'procedural' acts were subject to direct appeal only in exceptional circumstances, and, thirdly, that an appeal must first be brought against an administrative measure before suspension could be granted.

24 In its reply, dated 9 October 1996, the Spanish Government pointed out, with regard to the first point, that Law 13/1995 contained a literal transcription of the term 'body governed by public law' referred to in Directives 92/50, 93/36 and 93/37. As regards the two other points, it reiterated the circumstances in which a procedural act may be subject to direct appeal and stressed the legal requirement that an appeal must be brought before an act may be suspended.

25 Following a meeting held in October 1997 between the competent Spanish authorities and the Commission's staff, the former sent the Commission another letter, dated 30 January 1998, in which they affirmed all the views expressed in their reply of 9 October 1996.

26 During a meeting held in October 1998 and in a letter dated 14 January 1999, the Spanish authorities maintained their position in respect of scope of application and interim measures. As regards the question of reviewable measures, it referred to Law 29/1998, which had partly amended the rules applicable to procedural measures.

27 Finally, on 2 February 1999, the Spanish authorities sent the Commission official notification of Laws 29/1998 and 4/1999. After examining these new texts the Commission concluded that the Kingdom of Spain had not put an end to the infringements of Directive 89/665 and, on 25 August 1999, sent it a reasoned opinion calling upon it to adopt the measures necessary to comply with that reasoned opinion within two months of its notification.

28 The Spanish Government replied to that reasoned opinion by letter of 8 November 1999, in which it refuted the Commission's assessment.

29 It was in those circumstances that the Commission decided to bring the present action.

Substance

Transposition of the scope ratione personae *of Directive 89/665*

Arguments of the parties

30 The Commission points out first of all that, when transposing Community Directives into national law, the Member States are required to respect the meaning of the terms and definitions contained in them, in order to ensure uniform interpretation and implementation of the Community legislation in the different Member States. Consequently, the Spanish authorities are required to give the term 'body governed by public law', used in Directives 92/50, 93/36 and 93/37, the meaning that it has in Community law.

31 In that regard, the Commission points out that those directives make no mention of the regime, public or private, under which the bodies governed by public law were set up, nor the legal form adopted, but focus rather on other criteria, amongst them the purpose for which the bodies in question were created. It states, in particular, that the functional interpretation of the term 'contracting

authority' and, accordingly, of the term 'body governed by public law' adopted in the settled case-law of the Court of Justice implies that the latter term includes commercial companies under public control, provided, of course, that they fulfil the conditions laid down in the second subparagraph of Article 1(b) of the aforementioned directives; the legal form of the bodies concerned is irrelevant.

32 The Commission maintains that, although the wording of Article 1 of Law 13/1995 reproduces almost verbatim the content of the corresponding provisions of Directives 92/50, 93/36 and 93/37, it nevertheless contains one essential difference, since it excludes entities governed by private law from the scope of application of that law. Law 13/1995 adds a prerequisite linked to the method by which the entities concerned are set up, which is not provided for in the Community legislation, namely that the entity must be governed by public law.

33 The Commission considers that the exclusion contained in Article 1(3) of Law 13/1995 is confirmed by the sixth additional provision of that Law, whose sole *raison d'être* lies in the fact that the contracts to which it refers would otherwise be wholly excluded from the scope of application of that law.

34 Since bodies governed by private law are excluded from the scope *ratione personae* of the Spanish legislation on public procurement, they likewise fall outside the scope of the provisions governing the procedures for awarding public contracts and, therefore, of the review procedures relating to public contracts. That exclusion thus infringes the provisions of Directives 92/50, 93/36 and 93/37 which define their scope, and also the provisions of Directive 89/665, since it precludes the application of the procedural safeguards provided by that directive. The Commission therefore concludes that Directive 89/665 has not been correctly transposed into the Spanish legal system, since the latter does not ensure that the review procedures established by the Directive are coextensive with its scope *ratione personae*.

35 As its principal argument, the Spanish Government claims that that complaint is manifestly unfounded. It points out that, although the Commission alleges that it has infringed Directive 89/665, it makes no reference to that directive, but to the scope *ratione personae* of other directives, namely the substantive directives relating to the award of public contracts. It concludes that, in actual fact, what the Commission is putting in issue in the present case is the transposition of Article 1 of Directives 92/50, 93/36 and 93/37, not the incorrect transposition of Directive 89/665, which it alleges has been infringed.

36 Firstly, Directive 89/665 does not contain rules governing the procedure for awarding public contracts and therefore does not define the scope *ratione personae* of the procedural rules set out in Directives 92/50, 93/36 and 93/37. Secondly, it comes into play at a later stage, since it requires the Member States to arrange for effective and rapid review procedures if the rules laid down by the directives governing the procedures for the award of public contracts are infringed. Therefore, according to the Spanish Government, if the Court were to uphold that plea, it would be necessary, in the present case, to examine whether Directive 89/665 was correctly transposed, even though it does not govern the subject-matter which the Commission claims has been incorrectly transposed. In the opinion of the Spanish Government, the Commission should have brought different proceedings in order to establish whether the Kingdom of Spain correctly transposed Directives 92/50, 93/36 and 93/37, which do contain specific information and rules which define their scope *ratione personae*.

37 Alternatively, the Spanish Government contends that the scope *ratione personae* of Directives 92/50, 93/36 and 93/37 was correctly transposed.

38 The Spanish Government states that the term 'body governed by public law' is not interpreted in a uniform way in the different Member States and that it is therefore not possible to find a general definitive solution. It therefore considers that, in order to determine whether or not a body fulfils the conditions which would bring it within the scope *ratione personae* of the directives in question, it is necessary to carry out a detailed case-by-case examination.

39 The Spanish Government states in that regard, first, that the expression 'body governed by public law' used in the aforementioned directives refers to an entity governed by public law and that, in the Spanish legal system, the expressions 'entity governed by public law' and 'body governed by public law' are used indiscriminately.

40 It also maintains that, in Directives 92/50, 93/36 and 93/37, the term 'body governed by public law' does not include commercial companies under public control and that the fact that Directive 93/38 makes a distinction between that term, which is the same in the four directives, and the term 'public undertaking', the definition of which corresponds to that of 'public commercial company', shows that they are two distinct concepts.

41 The Spanish Government also considers that, in order to define the term 'body governed by public law', it is first necessary to specify the commercial or industrial nature of the 'need in the general interest' which it is designed to meet. In that respect, it points out that, in the Spanish legal system, public commercial companies have, in principle, the task of meeting needs in the general interest, which explains why they are under public control. However, those needs are of a commercial and industrial nature because, if that were not the case, they would not be the subject of a commercial company.

42 The Spanish Government maintains that it is difficult to dispute that commercial or industrial companies or the needs they meet are commercial or industrial in nature, because they are so in every respect. In that regard, it refers to their legal form, which is private, to the legal rules applicable to their activities, which are the commercial rules, to the fact that the object of those companies is always a commercial activity, and to their aim, which is to make a profit unrelated to the general interest served by associations, foundations and bodies governed by public law, which never affects the private interests of the members.

43 In response to the Spanish Government's argument that the Commission's first complaint is manifestly unfounded, the Commission points out that Directive 89/665 itself defines — in Article 1(1) — its scope by reference to that of Directives 92/50, 93/36 and 93/37. It adds that, in order to define the scope of Directive 89/665, the Community legislature could have reproduced in that directive the necessary provisions of the other three directives. The fact that it did not do so, but used another device in order not needlessly to overload the content of Directive 89/665, cannot be relied on in order to prevent the Court reviewing the transposition of that directive into the Spanish legal system.

44 As regards the alleged distinction drawn by Directive 93/38 between the terms 'body governed by public law' and 'public undertaking', the Commission states that that directive does not clarify the term 'body governed by public law', which is defined in the same way in the four directives in question, but extends the scope of the Community provisions on public procurement to certain sectors (water, energy, transport and telecommunications) excluded from Directives 92/50, 93/36 and 93/37, in order to include certain entities having a significant activity in those sectors, namely public undertakings and those which enjoy special or exclusive rights granted by the authorities. It should also be pointed out that the concept of public undertaking has always been different from that of body governed by public law, since bodies governed by public law are created specifically to meet needs in the general interest not having any industrial or commercial character, whereas public undertakings work to meet industrial or commercial needs.

45 Finally, as regards the Spanish Government's argument that each case needs to be examined individually, in order to determine whether or not a body fulfils the conditions for being subject to Directives 92/50, 93/36 and 93/37, the Commission maintains that it is not possible to exclude a priori, as the Spanish legislation does, a whole group of bodies, that it to say, entities governed by private law which meet the three conditions stated in the aforementioned directives, from the field of application of Directive 89/665, even if that exclusion is subject to review on a case-by-case basis.

46 Furthermore, that interpretation is in accordance with the broad logic of the provisions in question. According to the Commission, if the Community legislature had wanted to link the absence of an industrial or commercial nature to a body's legal regime rather than to the interests it pursued, the words 'not having an industrial or commercial character' would not have been inserted in the indent relating to the needs to be met, but in the preceding line in order to characterise the body directly.

Findings of the Court

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47 The parties agree that, under Article 1(3) of Law 13/1995, read in conjunction with the sixth additional provision of that Law, public bodies constituted under private law — a category composed, in the Spanish legal system, of commercial companies under public control — are excluded from the scope *ratione personae* of the Spanish rules governing procedures for awarding public contracts and, accordingly, of the rules governing the review of public contracts.

48 It follows that, in order to determine whether that exclusion constitutes a correct transposition of Article 1(1) of Directive 89/665, it is necessary to ascertain whether the term 'contracting authority' which appears in that provision refers only to bodies governed by public law, as the Spanish Government maintains, or whether bodies constituted under private law may also be covered by that term.

49 In that regard, it should be pointed out that, as is apparent from the first and second recitals, Directive 89/665 is designed to strengthen the existing arrangements, at both national and Community levels, in order to ensure the effective application of the directives relating to the award of public service contracts, supply contracts and works contracts, particularly at a stage when infringements could be corrected. To that end, Article 1(1) of the directive

imposes on Member States the duty to ensure that unlawful decisions taken by contracting authorities in connection with contract award procedures falling within the scope of Directives 92/50, 93/36 and 93/37 may be reviewed effectively and as rapidly as possible.

50 Since Directive 89/665 applies to review procedures brought against decisions taken by contracting authorities under Directives 92/50, 93/36 and 93/37, its scope *ratione personae* is bound to coincide with that of those directives.

51 It follows that, in order to determine whether the Spanish legislation adopted to implement Article 1(1) of Directive 89/665 provides a correct transposition of the term 'contracting authority' which appears in that article, it is necessary to refer to the definition of that term and, more particularly, to that of 'body governed by public law' used, in essentially identical wording, in the second subparagraph of Article 1(b) of Directives 92/50, 93/36 and 93/37.

52 The Court has already stated, in connection with the second subparagraph of Article 1(b) of Directive 93/37, that, in order to be defined as a body governed by public law within the meaning of that provision, an entity must satisfy the three cumulative conditions set out therein, according to which it must be a body established for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character, which has legal personality and is closely dependent on the State, regional or local authorities or other bodies governed by public law (Case C-44/96 *Mannesmann Anlagenbau Austria and Others* [1998] ECR I-73, paragraphs 20 and 21).

53 Moreover, the Court has repeatedly held that, in the light of the dual objective of opening up competition and transparency pursued by the directives on the coordination of the procedures for the award of public contracts, the term

'contracting authority' must be interpreted in functional terms (see, in particular, Case C-237/99 *Commission* v *France* [2001] ECR I-939, paragraphs 41 to 43, and Case C-470/99 *Universale-Bau and Others* [2002] ECR I-11617, paragraphs 51 to 53). The Court has also stated that, in the light of that dual purpose, the term 'body governed by public law' must be interpreted broadly (Case C-373/00 *Adolf Truley* [2003] ECR-1931, paragraph 43).

54 It is from that point of view that the Court, for the purposes of settling the question whether various private law entities could be classified as bodies governed by public law, has proceeded in accordance with settled case-law and merely ascertained whether those entities fulfilled the three cumulative conditions set out in the second subparagraph of Article 1(b) of Directives 92/50, 93/36 and 93/37, considering that the method in which the entity concerned has been set up was irrelevant in that regard (see to this effect, in particular, *Mannesmann Anglagenbau Austria and Others*, cited above, paragraphs 6 and 29; Case C-360/96 *BFI Holding* [1998] ECR I-6821, paragraphs 61 and 62; and *Commission* v *France*, cited above, paragraphs 50 and 60).

55 It is apparent from the rules thus identified in the case-law of the Court that an entity's private law status does not constitute a criterion for precluding it from being classified as a contracting authority within the meaning of Article 1(b) of Directives 92/50, 93/36 and 93/37 and, accordingly, of Article 1(1) of Directive 89/665.

56 Furthermore, it should be pointed out that the effectiveness of Directives 92/50, 93/36 and 93/37 as well as of Directive 89/665 would not be fully preserved if the application of those directives to an entity which fulfils the three aforementioned conditions could be excluded solely on the basis of the fact that, under the national law to which it is subject, its legal form and rules which govern it fall within the scope of private law.

57 In the light of those considerations, it is not possible to interpret the term 'body governed by public law' used in the second subparagraph of Article 1(b) of Directives 92/50, 93/36 and 93/37 as meaning that Member States may automatically exclude commercial companies under public control from the scope *ratione personae* of those directives and, accordingly, of Directive 89/665.

58 Furthermore, it cannot be maintained that to reach that conclusion is to disregard the industrial or commercial character of the needs in the general interest which those companies meet, because that aspect is necessarily taken into consideration for the purpose of determining whether or not the entity concerned meets the condition set out in the first indent of the second subparagraph of Article 1(b) of Directives 92/50, 93/36 and 93/37.

59 Nor is that conclusion invalidated by the lack of an express reference, in Directives 92/50, 93/36 and 93/37, to the specific category of 'public undertakings' which is nevertheless used in Directive 93/38. In that regard, it need only be pointed out that the review procedures initiated against decisions taken by contracting authorities under Directive 93/38 are governed by Directive 92/13, not by Directive 89/665.

60 It therefore follows from the above that, to the extent that it automatically excludes companies governed by private law from the scope *ratione personae* of Directive 89/665, the Spanish legislation at issue in the present case is not a correct transposition of the term 'contracting authority' appearing in Article 1(1) of that directive, as defined in Article 1(b) of Directives 92/50, 93/36 and 93/37.

61 In those circumstances, the Commission's first complaint should be upheld.

The transposition of the scope ratione materiae of Directive 89/665

Arguments of the parties

62 The Commission claims that the scope *ratione materiae* of Directive 89/665 has been improperly reduced since the Spanish review provisions, namely Article 107 of Law 30/1992 and Article 25(1) of Law 29/1998, preclude a challenge to certain unlawful decisions taken by contracting authorities. In particular, they limit the possibility of appealing against procedural acts, that is to say, administrative measures which do not bring administrative proceedings to an end. As the Court stated in Case C-81/98 *Alcatel Austria and Others* [1999] ECR I-7671, that directive does not provide for any derogation in that regard.

63 In support of its argument, the Commission refers to Articles 1(1), 2(1)(b) and 8 of Directive 89/665, from which it follows that it must be ensured that any allegedly illegal measure may be reviewed effectively and, in particular, as rapidly as possible.

64 The Commission claims that the first part of the proposition ('any allegedly illegal measure') must be understood as referring to all types of act alleged to be illegal, not only to definitive acts. Furthermore, the second part of the proposition ('reviewed effectively and... as rapidly as possible') leads to the conclusion that the possibility of seeking review of procedural acts is one of the best means of ensuring the effectiveness and rapidity of review procedures, since to wait for the outcome of the contract award procedure is the best way of weakening, or even wholly undermining, the effectiveness and rapidity of the review procedures imposed by Directive 89/665.

65 By way of example, the Commission cites a judgment of the Tribunal Supremo (Supreme Court, Spain) of 28 November 1994, concerning a negotiated procedure, in which the Spanish court held that a contracting authority's decision to ask the undertakings which had submitted tenders to provide additional documents to regularise their situation was not subject to review, because its validity could be called in question only in connection with the procedure to review the definitive act putting an end to the negotiated procedure. The consequence of classifying the request to produce documents as a procedural act was, therefore, that it could be challenged only if the undertaking concerned was excluded from the procedure because it failed to produce the additional documents requested. However, the Commission considers that that undertaking, although it was not excluded from the procedure, could nevertheless find itself in a weak position in relation to the other competing undertakings, and that it should therefore be able to appeal against the request to produce additional documents.

66 The Spanish Government refutes that claim, stating that the Commission has not demonstrated the existence of an infringement. Indeed, it has merely demanded the removal of the distinction between definitive acts and procedural acts without giving the least example to show how that distinction thwarts the objective of Directive 89/665 and, accordingly, without demonstrating that the Spanish legislation might prevent that directive from achieving its objective.

67 The Spanish Government contends that the Commission's position is based on a misinterpretation of the term 'procedural act'. It considers that a procedural act, by definition, does not cause any harm to the interested party but is at most a step preparatory to a decision which will be favourable or unfavourable to him. Thus, a procedural act does not imply the adoption of a position but is part of a procedure initiated in order to reach a decision. In that regard, the Spanish Government states that, if an act which appears to be a procedural act entailed *per se* the adoption of a position, it would cease to be a procedural act in the strict sense and would be reviewable.

68 The Spanish Government adds that the Spanish legal provisions cited by the Commission concerning the possibility of challenging procedural acts are not specific to the award of public contracts, but apply equally to all procedures. The Government points out that that device, which seeks to avoid procedures being paralysed by successive claims and appeals at the stage of preparatory measures which do not yet definitively affect the rights of those concerned, is not only deeply-rooted in the Spanish legal system but also common to all the legal systems of the Member States.

69 Referring *inter alia* to Case C-282/95 P *Guérin automobiles* v *Commission* [1997] ECR I-1503, the Spanish Government points out that that conception is referred to in Community case-law itself. The Court has also held that the preparatory nature of the act against which the action is brought is one of the grounds of inadmissibility of an action for annulment, and that that is a ground which the Court may examine of its own motion (Case 346/87 *Bossi* v *Commission* [1989] ECR 303).

70 Taking as an example the subject of State aid, the Spanish Government points out in addition that neither the provisions relating to State aid in the Treaty nor Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty (OJ 1999 L 83, p. 1), expressly provide that acts which are merely procedural and do not have any definitive consequences for the parties concerned may not be the subject of a separate action. Nevertheless, in principle, no action is admissible against the Commission's decision to initiate the Article 88(2) EC procedure, without prejudice to the pleas which may be raised against that decision, which is a procedural act, when the time comes to bring an action against the final decision. The Spanish Government therefore concludes that there was no reason to include in Directive 89/665 that elementary distinction enabling all administrative or legal review systems to operate.

71 Furthermore, it considers that the Commission likewise has not put forward the slightest reason to show how the criteria applied by the Tribunal Supremo in the

judgment it has cited are contrary to the objectives of Directive 89/665. In that judgment, the Tribunal Supremo held that the request to produce additional documents was a procedural act, since it did not put an end to the tendering procedure, but was merely a preliminary to the award decision. The Spanish Government also states that the final award of the contract was challenged because the successful undertaking had not provided the documentation requested by the authority. However, the authority maintained that the missing documents were not essential and their absence was a defect which could be corrected. The Spanish Government adds that, in a negotiated procedure, which is not public and does not involve an exclusion stage, only the final award is relevant for the purposes of a possible action, owing to the very nature of the procedure, and that there is therefore no reason to distinguish between procedural acts and definitive acts.

72 The Commission replies that the Spanish Government's argument that the fact that an action may not be brought against procedural acts is a device which is deeply rooted in the Spanish legal system and common to all the legal systems of the Member States cannot be accepted, in so far as it seeks to interpret the wording of a directive using national legislation. The scope *ratione materiae* of the actions to which Directive 89/665 refers is determined by the directive itself, not by national provisions. If that were not the case, the directive would not be applied uniformly in the different Member States, which would risk negating the effectiveness of the harmonisation sought at Community level.

73 As regards the Spanish Government's arguments regarding the Community case-law on challenges to decisions taken by the Commission in the context of competition law and State aid, the Commission points out that these are judgments and provisions which are wholly unrelated to Directive 89/665 and which therefore cannot be used to show that the Spanish legal system is consistent with the directive. In that regard, it stresses the fact that a legal system contains a multiplicity of rules whereby different solutions are found to problems raised depending on the sector they govern and that the coherence of a legal system may not have the effect that it is uniform, or that the intention of the person interpreting it supplants the legislature's intention.

Findings of the Court

74 It should be noted at the outset that, under the Article 107 of Law 30/1992 and Article 25(1) of Law 29/1998, procedural acts are not open to administrative appeal or administrative appeal proceedings unless they decide, directly or indirectly, the substance of the case, make it impossible to continue the procedure, make it impossible to put up a defence, or cause irreparable harm to legitimate rights or interests.

75 The parties agree that those provisions therefore have the effect of excluding procedural acts from the scope *ratione materiae* of Directive 89/665, unless they fulfil one of the abovementioned conditions.

76 Since Directive 89/665 does not expressly define the scope of the term 'decisions taken by the contracting authorities' which appears in Article 1(1), the question whether procedural acts which do not fulfil one of the abovementioned conditions constitute decisions in respect of which the Member States must provide review procedures within the meaning of Directive 89/665 must be examined in the light of the aims of the directive, while ensuring that its effectiveness is not compromised.

77 In that regard, it should be pointed out that Directive 89/665, according to the sixth recital in its preamble and Article 1(1), seeks to ensure that adequate procedures exist in all the Member States to permit the setting aside of decisions taken by contracting authorities in infringement of Community law on the award of public contracts or of national rules transposing that law, and also the compensating of persons harmed by such an infringement.

78 As is apparent from Article 1(1) and (3) of the directive, the review procedures to which it refers must be conducted effectively and as rapidly as possible and must be available to any person having or having had an interest in obtaining a particular public contract and who has been or risks being harmed by an alleged infringement.

79 In that regard, it should be pointed out, first, that, as has been stated in paragraph 74 of this judgment, the Spanish legislation enables interested parties to bring actions against not only definitive acts but also procedural acts, if they decide, directly or indirectly, the substance of the case, make it impossible to continue the procedure or to put up a defence, or cause irreparable harm to legitimate rights or interests.

80 Secondly, the Commission has not established that that legislation does not provide adequate judicial protection for individuals harmed by infringements of the relevant rules of Community law or of the national rules transposing that law.

81 It follows from the above that the Commission's second complaint must be rejected.

The transposition of the system of interim measures provided for in Directive 89/665

Arguments of the parties

82 The Commission argues that the national provisions which transpose Article 2(1)(a) of Directive 89/665 into Spanish law, namely Articles 111 of

Law 30/1992 and 129 to 136 of Law 29/1998, do not ensure the existence of an urgent procedure independent of the lodging of an appeal, designed to suspend the procedure for the award of a public contract or the implementation of any decision adopted by the contracting authorities.

83 More particularly, the Commission claims that, except in the exceptional case of Article 136(2) of Law 29/1998, the Spanish legislation does not provide any opportunity for adopting interim measures in the absence of an appeal on the merits. However, as is apparent from paragraph 11 of the judgment in Case C-236/95 *Commission* v *Greece* [1996] ECR I-4459, it must be possible to adopt, independently of any prior action, any interim measures.

84 The Commission also points out, first, that, in administrative appeals, the only interim measure which may be adopted is suspension of operation. Secondly, in administrative appeal proceedings, the court hearing the application for interim relief tends not to adopt measures other than suspension of operation. The Commission states that the settled case-law of the Tribunal Supremo shows that interim measures cannot relate to the substance, because they must not anticipate the outcome of the main proceedings. However, the rule that interim measures must be neutral as regards the substance of the main proceedings has the consequence that, contrary to the requirements of Article 2(1)(a) of Directive 89/665, the court hearing the application for interim relief cannot take all the measures necessary to correct an infringement.

85 The Spanish Government does not dispute that both the rules of administrative procedure and the rules governing administrative appeal proceedings have the effect that the adoption of an interim measure is linked to the prior lodging of an appeal and cannot, under any circumstances, be requested separately.

86 In respect of Article 136 of Law 29/1998, the Spanish Government states that, although, in the cases referred to therein, interim measures may be requested and granted even before an appeal is lodged, that provision does not imply that those measures are independent of the latter, since the person concerned is required to lodge such an appeal against the act he considers unlawful within a period of 10 days of notification of the decision granting the measures requested. He must then request confirmation of those measures and, if he does not lodge the appeal within the time-limit, the interim measures will automatically lapse.

87 As regards suspension by way of legal proceedings, the Spanish Government points out that administrative appeal proceedings are not initiated by application, but by a simple written document which must indicate the act challenged or allege inertia on the part of the authority, and in which the interested party may request suspension of the operation of the contested act without necessarily having to formulate his application. The Spanish Government states that, once an appeal is lodged, the court hearing it will ask the authority to forward the administrative file and that it is only after the applicant for review is in possession of the file that the time-limit within which he must formulate his application and set out the grounds for review will begin to run.

88 As for the lack of such a possibility in the legislation governing suspension by way of an administrative procedure, the Spanish Government points out that it is quite exceptional for it to be necessary to lodge an administrative appeal in respect of the award of public contracts and that in the unlikely case that it should be necessary to exhaust the administrative remedies, the time-limit laid down in Article 111(3) of Law 30/1992 is extremely short. Indeed, it considers that that provision contains rules which are particularly advanced in the field, because it provides that if the administrative authority has not adopted an express decision on the application for suspension within a period of 30 days, the suspension is deemed to be granted.

89 So far as concerns the question whether the requirement that an appeal be lodged against the act the illegality of which has given rise to the application for suspension of operation is justified, the Spanish Government points out that the

interim measures mentioned in Article 2(1)(a) of Directive 89/665 are referred to as 'interim' specifically because they are designed to secure the results of a case by creating a provisional situation until the outcome of the case and that that directive always presupposes that the interim measures are being sought by the person challenging the validity of the act. It follows that to demand that interim measures are as wholly independent as the Commission requires makes no sense since, by definition, any interim measure is an ancillary measure.

90 Furthermore, in the light of the fact that administrative appeal proceedings are initiated merely by letter, it would be inconceivable, on a teleological interpretation of Directive 89/665, for such a means of bringing those proceedings to be regarded as a hindrance or obstacle since the person concerned may request and obtain the interim measure which he seeks before specifying the grounds of the appeal he is bringing against the act considered unlawful.

91 The Spanish Government also refers to Articles 242 EC and 243 EC, and to Article 83 of the Rules of Procedure of the Court of Justice, from which it is apparent that, in the Community legal system, an application for interim measures is not an independent legal remedy, but rather an application ancillary to an action for annulment.

92 As regards the conclusion drawn by the Commission from the judgment in *Commission* v *Greece*, cited above, the Spanish Government considers that, if the isolated statement made by the Court in paragraph 11 of that judgment were to have the consequence attributed to it by the Commission, Directive 89/665 would require a court to be able to adopt interim measures without anyone having requested it to do so. Furthermore, it maintains that, even if the word 'action' used by the Court was employed in a technical sense denoting a procedural act, that does not mean that the judgment confirms the Commission's argument. The independent measures called for by the Commission would also involve taking action before a court. In any event, the Spanish Government states that in that judgment the Court did not have to give a ruling on the merits of the alleged infringement, because the defendant State had conceded that it had not transposed the provisions of Directive 89/665 into its national legal system within the period laid down in the reasoned opinion.

93 As for the possibility of adopting positive measures, the Spanish Government claims that, as is apparent from the statement of grounds and Article 129 of Law 29/1998, that Law made it possible to seek and obtain any interim measure, including positive measures, and that it is for the court hearing the case to determine which measures are appropriate depending on the circumstances. It adds in that regard that the Spanish Tribunal Constitucional (Constitutional Court) has held that the right to obtain interim measures arises from the fundamental right to effective judicial protection. More particularly, in a judgment of 29 April 1993, which concerned an administrative order against which an action had been brought because it provided for more extensive minimum services than was necessary, that court held that Article 24 of the Spanish Constitution, which lays down the right to effective judicial protection, allows the court, as a protective measure, to reformulate any decision adopted in order to ensure minimum services in the event of a general strike.

94 Finally, the Spanish Government states that it does not understand the Commission's argument that the obligation to challenge the legality of an act of a contracting authority on the merits at the same time as bringing an application for interim measures negates the effectiveness of the system, since, in its view, any application for interim measures involves an examination of the merits, even if it is restricted to a prima facie assessment of the problem.

Findings of the Court

95 It is not disputed that, with the exception of the cases referred to in Article 136(2) of Law 29/1998, the Spanish legislation makes it a condition for the grant of interim measures that an appeal on the merits must be brought beforehand.

96 In order to ascertain whether that legislation is consistent with Directive 89/665, it should be noted at the outset that, as is apparent from the fifth recital in the preamble to the directive, the short duration of the procedures for the award of

public contracts means that infringements of the relevant rules of Community law or national rules transposing that law which mar those procedures need to be dealt with urgently.

97 For that purpose, Article 2(1)(a) of that directive requires Member States to empower the review bodies to take, at the earliest opportunity and by way of interlocutory procedures, interim measures with the aim of correcting the alleged infringement or preventing further damage to the interests concerned, including measures to suspend or to ensure the suspension of the procedure for the award of a public contract or the implementation of any decision taken by the contracting authorities.

98 In the judgment in *Commission* v *Greece*, cited above, which concerned the compliance with Directive 89/665 of national legislation which restricted interim judicial protection to proceedings for suspension of the operation of an administrative act and made the suspension conditional on bringing an action for the annulment of the contested act, the Court had the opportunity to define the scope of the obligations arising in that regard under that directive. In particular, it found that, under Article 2 of Directive 89/665, the Member States are under a duty more generally to empower their review bodies to take, independently of any prior action, any interim measures, including measures to suspend or to ensure the suspension of the procedure for the award of the public contract in question (*Commission* v *Greece*, cited above, paragraph 11).

99 In that regard, it should be pointed out that, although the Spanish legislation provides for the possibility of adopting positive interim measures, it nevertheless cannot be regarded as a system of interim judicial protection which is adequate to remedy effectively any infringements that might have been committed by the contracting authorities, since, as a general rule, it requires proceedings on the

merits to be brought beforehand as a condition for the adoption of an interim measure against a decision of a contracting authority.

100 That finding is not affected by the fact that, where suspension is sought by way of legal proceedings, that may be done merely by a written document and the application initiating the proceedings may be formulated after the request for grant of the interim measure, since the requirement that that formality be completed beforehand likewise cannot be regarded as consistent with the requirements of Directive 89/665, as set out in the judgment in *Commission* v *Greece*.

101 It follows that the Commission's third complaint must be upheld.

102 In the light of all the foregoing considerations, it must be declared that, by failing to adopt the measures needed to comply with the provisions of Articles 1 and 2 of Directive 89/665, and in particular:

— by failing to extend the system of review procedures provided for by that directive to decisions adopted by companies governed by private law established for the specific purpose of meeting needs in the general interest which do not have an industrial or commercial character, have legal personality, and are financed for the most part by public authorities or other entities governed by public law or are subject to supervision by the latter, or have an administrative, managerial or supervisory board more than half of whose members are appointed by public authorities or other entities governed by public law, and

— by making the possibility of interim measures being granted in relation to decisions adopted by the contracting authorities subject, as a general rule, to the need first to appeal against the decision of the contracting authority,

the Kingdom of Spain has failed to fulfil its obligations under that directive.

103 The remainder of the application is dismissed.

Costs

104 Under Article 69(2) of the Rules of Procedure of the Court of Justice, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the other party's pleadings. Under Article 69(3) of the Rules of Procedure, the Court may order that the costs be shared where each party succeeds on some and fails on other heads. Since the Commission has failed on one head, it must be ordered to pay one third of the costs and the Kingdom of Spain two thirds of the costs.

On those grounds,

THE COURT (Sixth Chamber)

hereby:

1. Declares that, by failing to adopt the measures needed to comply with the provisions of Articles 1 and 2 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, as amended by Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts, and in particular:

   — by failing to extend the system of review procedures provided for by that directive to decisions adopted by companies governed by private law established for the specific purpose of meeting needs in the general interest which do not have an industrial or commercial character, have legal personality, and are financed for the most part by public authorities or other entities governed by public law or are subject to supervision by the latter, or have an administrative, managerial or supervisory board more than half of whose members are appointed by public authorities or other entities governed by public law, and

— by making the possibility of interim measures being granted in relation to decisions adopted by the contracting authorities subject, as a general rule, to the need first to appeal against the decision of the contracting authority,

the Kingdom of Spain has failed to fulfil its obligations under that directive;

2. Dismisses the remainder of the application;

3. Orders the Commission of the European Communities to pay one third of the costs and the Kingdom of Spain to pay two thirds of the costs.

Schintgen Skouris Macken

Colneric Cunha Rodrigues

Delivered in open court in Luxembourg on 15 May 2003.

R. Grass J.-P. Puissochet

Registrar President of the Sixth Chamber