



## Reports of Cases

### JUDGMENT OF THE COURT (Fifth Chamber)

17 June 2021 \*

(Appeal – European Social Fund (ESF) – European Regional Development Fund (ERDF) – Partial cancellation of assistance for operational programmes in the Czech Republic – Directive 2004/18/EC – Article 16(b) – Specific exclusion – Public service contracts relating to programme material intended for broadcasting)

In Case C-862/19 P,

APPEAL under Article 56 of the Statute of the Court of Justice of the European Union, brought on 26 November 2019,

**Czech Republic**, represented by M. Smolek, O. Serdula, J. Vlácil and I. Gavrilová, acting as Agents,

appellant,

the other parties to the proceedings being:

**European Commission**, represented by P. Ondrůšek and P. Arenas, acting as Agents,

defendant at first instance,

**Republic of Poland**,

intervener at first instance,

THE COURT (Fifth Chamber),

composed of E. Regan, President of the Chamber, M. Ilešič, E. Juhász (Rapporteur), C. Lycourgos and I. Jarukaitis, Judges,

Advocate General: M. Campos Sánchez-Bordona,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after hearing the Opinion of the Advocate General at the sitting on 29 October 2020,

\* Language of the case: Czech.

gives the following

### Judgment

- 1 By its appeal, the Czech Republic seeks to have set aside the judgment of the General Court of the European Union of 12 September 2019, *Czech Republic v Commission* (T-629/17, not published, EU:T:2019:596; ‘the judgment under appeal’), by which the General Court dismissed its action for annulment of Commission Implementing Decision C(2017) 4682 final of 6 July 2017 cancelling part of the European Social Fund assistance for the operational programme ‘Education for Competitiveness’ under the ‘Convergence’ and ‘Regional Competitiveness and Employment’ objectives in the Czech Republic and part of the European Regional Development Fund assistance for the operational programmes ‘Research and Development for Innovations’ under the ‘Convergence’ objective in the Czech Republic and ‘Technical Assistance’ under the ‘Convergence’ and ‘Regional Competitiveness and Employment’ objectives in the Czech Republic (‘the decision at issue’).

### Legal context

#### *Directive 92/50/EEC*

- 2 Article 1(a)(iv) of Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts (OJ 1992 L 209, p. 1), which was repealed by Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works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), provided:

‘For the purposes of this Directive:

- (a) *public service contracts* shall mean contracts for pecuniary interest concluded in writing between a service provider and a contracting authority, to the exclusion of:

...

- (iv) contracts for the acquisition, development, production or co-production of programme material by broadcasters and contracts for broadcasting time’.

#### *Directive 2004/18*

- 3 Recital 25 of Directive 2004/18, repealed by Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18 (OJ 2014 L 94, p. 65), but which is, in the present case, applicable *ratione temporis*, stated:

‘The awarding of public contracts for certain audiovisual services in the field of broadcasting should allow aspects of cultural or social significance to be taken into account which render application of procurement rules inappropriate. For these reasons, an exception must therefore be made for public service contracts for the purchase, development, production or co-production of off-the-shelf programmes and other preparatory services, such as those relating to scripts or artistic performances necessary for the production of the programme and contracts concerning

broadcasting times. However, this exclusion should not apply to the supply of technical equipment necessary for the production, co-production and broadcasting of such programmes. A broadcast should be defined as transmission and distribution using any form of electronic network.'

4 Article 16(b) of Directive 2004/18 provided:

'This Directive shall not apply to public service contracts for:

...

(b) the acquisition, development, production or co-production of programme material intended for broadcasting by broadcasters and contracts for broadcasting time'.

### ***Directive 2014/24***

5 Article 10(b) of Directive 2014/24 provides:

'This Directive shall not apply to public service contracts for:

...

(b) the acquisition, development, production or co-production of programme material intended for audiovisual media services or radio media services, that are awarded by audiovisual or radio media service providers, or contracts for broadcasting time or programme provision that are awarded to audiovisual or radio media service providers. ...'

### **Background to the dispute and the decision at issue**

6 The background to the dispute is set out in paragraphs 1 to 6 of the judgment under appeal. For the purposes of the present proceedings, it may be summarised as follows.

7 By Decisions C(2007) 5113 of 12 October 2007, C(2007) 6920 of 27 December 2007 and C(2008) 5344 of 25 September 2008, the European Commission adopted, respectively, the operational programme 'Education for Competitiveness', the operational programme 'Research and Development for Innovations' and the operational programme 'Technical Assistance', submitted by the Czech Republic pursuant to Article 32 of Council Regulation (EC) No 1083/2006 of 11 July 2006 laying down general provisions on the European Regional Development Fund, the European Social Fund and the Cohesion Fund and repealing Regulation (EC) No 1260/1999 (OJ 2006 L 210, p. 25).

8 From 14 to 16 April 2014, the Commission carried out an audit of public contracts for broadcasting services co-financed by the Czech Republic using resources of the European Regional Development Fund (ERDF) and the European Social Fund (ESF), in the context of, inter alia, those operational programmes. In the audit report, the Commission noted that four of those public contracts had been awarded directly, without publication of a contract notice. The Commission took the view that such a direct award was not permitted, since those contracts could not be covered by the exclusion relating to contracts for 'the acquisition, development, production or co-production of programme material intended for broadcasting by broadcasters'

provided for in Article 16(b) of Directive 2004/18 ('the exclusion at issue'). In particular, the four contracts at issue had been awarded by the Ministry of Regional Development and by the Ministry of Education, Youth and Sport, whereas, according to the Commission, that exclusion applied only to contracting authorities which were broadcasters.

- 9 Following a financial correction procedure initiated by the Commission on 17 June 2016, in the context of which the Czech Republic argued that the exclusion at issue applied not only to broadcasters but also to all contracting authorities, the Commission adopted the decision at issue, cancelling part of the ESF assistance for the operational programme 'Education for Competitiveness' under the 'Convergence' and 'Regional competitiveness and employment' objectives in the Czech Republic and part of the ERDF assistance for the operational programmes 'Research and Development for Innovations' under the 'Convergence' objective in the Czech Republic and 'Technical Assistance' under the 'Convergence' and 'Regional Competitiveness and Employment' objectives in the Czech Republic. By the decision at issue, the Commission adopted financial corrections with regard to the Czech Republic.

### **The procedure before the General Court and the judgment under appeal**

- 10 By application lodged at the Registry of the General Court on 18 September 2017, the Czech Republic brought an action for annulment of the decision at issue. The Commission contended that the General Court should dismiss that action as unfounded. In the proceedings before the General Court, the Republic of Poland intervened in support of the form of order sought by the Czech Republic.
- 11 In support of its action at first instance, the Czech Republic raised a single plea in law, alleging infringement of Article 99(1)(a) of Regulation No 1083/2006, read in conjunction with Article 16(b) of Directive 2004/18. In particular, the Czech Republic claimed that the direct award of the public contracts at issue was compliant with Article 16(b) of Directive 2004/18 and that, as a result, the financial corrections adopted by the Commission were not justified. By the judgment under appeal, the General Court rejected that single plea in law and, consequently, dismissed the action brought by that Member State.

### **Forms of order sought by the parties before the Court of Justice**

- 12 The Czech Republic claims that the Court should:
- set aside the judgment under appeal;
  - annul the decision at issue; and
  - order the Commission to pay the costs.
- 13 The Commission contends that the Court should:
- dismiss the appeal; and
  - order the Czech Republic to pay the costs.

## The appeal

### *Arguments of the parties*

- 14 The Czech Republic raises a single ground in support of its appeal, alleging infringement of Article 16(b) of Directive 2004/18. That ground seeks to demonstrate that the exclusion at issue set out in that provision is not limited to public service contracts awarded by broadcasters in the capacity of contracting authorities.
- 15 The single ground of appeal put forward by the Czech Republic comprises four sets of arguments relating to the origin of that provision and to its literal, teleological and systematic interpretation, respectively.
- 16 By the series of arguments relating to the origin of Article 16(b) of Directive 2004/18, the Czech Republic claims, first of all, that, although the Commission's proposal for a directive relating to the coordination of procedures on the award of public service contracts of 13 December 1990 (COM (1990) 372 final), which led to the adoption of Directive 92/50, had referred to an exclusion concerning only the purchase of programmes by broadcasters, the legislative process nevertheless extended the scope of that exclusion to include also the development, production or co-production of programmes by broadcasters. In such cases, the broadcaster provides the service of developing, producing or co-producing programme material. Consequently, Article 1(a)(iv) of Directive 92/50 was intended to apply also to public contracts in which the broadcaster was not the contracting authority but the contracting partner of that contracting authority.
- 17 Next, the Czech Republic submits that the legislative process which led to the adoption of Directive 2004/18, initiated by the Commission's submission of the proposal for a directive of the European Parliament and of the Council on the coordination of procedures for the award of public supply contracts, public service contracts and public works contracts of 11 July 2000 (COM (2000) 275 final), shows that, when defining the exclusion at issue, the EU legislature introduced the concept of programme material 'intended for broadcasting'. Thus, the emphasis was placed on the subject matter of the contract and its use, and not on the person performing the function of contracting authority in respect of that contract.
- 18 Lastly, the Czech Republic submits that, by the proposal for a directive of the European Parliament and of the Council on public procurement of 20 December 2011 (COM (2011) 896 final), which led to the adoption of Directive 2014/24, the Commission suggested limiting the exclusion at issue to contracting authorities which are broadcasters. According to that Member State, the Commission failed once again in that regard, since Article 10(b) of Directive 2014/24, as adopted by the EU legislature, provides for a broader exclusion than that proposed by the Commission and that exclusion is not linked to the person performing the function of contracting authority. In addition, the Czech Republic submits that the General Court's interpretation of Article 10(b) of Directive 2014/24 in paragraph 73 of the judgment under appeal is incorrect.
- 19 The Czech Republic concludes that, having been in force for almost 30 years, the exclusion under Article 16(b) of Directive 2004/18 has never been limited solely to public contracts concluded by broadcasters in the capacity of contracting authorities. According to that Member State, the interpretation of Article 16(b) adopted by the General Court in the judgment under appeal consequently runs counter to what is clear from the legislative process which led to the adoption of that directive and from the other legislative processes on that matter, and to the intention of the EU legislature expressed in the context of those processes.

- 20 By the series of arguments relating to the literal interpretation of Article 16(b) of Directive 2004/18, the Czech Republic claims that the General Court erred in law by refusing to accept that the scope of that provision is not limited to public contracts concluded by broadcasters acting as contracting authorities.
- 21 First, while noting that it was accepted, in paragraph 41 of the judgment under appeal, that the expression ‘by broadcasters’ may concern both the contracting authority and the subject matter of the contract and the broadcast, that Member State criticises the General Court for having held, in paragraphs 55 and 56 of that judgment, that there is a link between the word ‘broadcaster’ and the words ‘programme material intended for broadcasting’ only in the German-language version, the other language versions being equivocal, and that a single language version cannot serve as the basis for the interpretation of the provision concerned. According to the Czech Republic, other versions, namely those in Czech, Greek, English, French, Croatian, Lithuanian, Hungarian, Dutch, Polish, Romanian and Slovak, also confirm the existence of that link.
- 22 Second, even if in Article 16(b) of Directive 2004/18 the expression ‘by broadcasters’ was actually linked to the words ‘the acquisition, development, production or co-production of programme material’, the exclusion at issue would nevertheless not be limited to public contracts concluded by broadcasters acting as contracting authorities. That provision, it is submitted, does not state expressly that the broadcaster must be the contracting authority for the public contract concerned. Indeed, if a broadcaster develops, produces or co-produces programme material and therefore provides the service, it cannot, according to the Czech Republic, be the contracting authority for the public contract. Consequently, it submits that the General Court was wrong, in paragraph 64 of the judgment under appeal, to reject its argument, to which that paragraph refers.
- 23 By the series of arguments relating to the teleological interpretation of Article 16(b) of Directive 2004/18, the Czech Republic claims, first, that, in paragraph 57 of the judgment under appeal, the General Court wrongly found that its line of argument, according to which the exclusion at issue concerns only public service contracts relating to programme material intended to be broadcast by broadcasters no matter who the contracting authority is, was not supported by recital 25 of Directive 2004/18. The Czech Republic states that that recital defines the scope of the exclusion at issue with regard to the subject matter of the contract, and not with regard to the identity of the contracting authority, and it takes the view that that conclusion is true because broadcasters are not mentioned in that recital.
- 24 Second, according to the Czech Republic, the General Court was wrong to find, in paragraph 49 of the judgment under appeal, that the insertion of the words ‘intended for broadcasting’ in Article 16(b) of Directive 2004/18 corresponds to the intention of the EU legislature to ‘refer explicitly to public service contracts awarded by broadcasters in relation to programme material intended for broadcasting on any electronic communications network, including the Internet’. It submits that, even without the addition of the words ‘intended for broadcasting’, that provision leaves no doubt as to the fact that programmes can be broadcast via any electronic network, and it takes the view that the General Court wrongly held that that conclusion is consistent with the spirit of the last sentence of recital 25 of Directive 2004/18, which states that ‘a broadcast should be defined as transmission and distribution using any form of electronic network’.
- 25 Third, the Czech Republic considers that the General Court wrongly deduced the objective of the exclusion at issue from the judgment of 13 December 2007, *Bayerischer Rundfunk and Others* (C-337/06, EU:C:2007:786). The case which gave rise to that judgment, as is apparent from

paragraphs 2, 23 and 29 thereof, concerned whether the German public broadcasting bodies, given their method of financing, constituted contracting authorities within the meaning of Directive 2004/18 and whether the exclusion concerning programme materials also covered cleaning services. The Czech Republic submits that the considerations set out in paragraph 62 of that judgment, according to which the exclusion at issue concerned public contracts for services falling within the essential function of public broadcasting bodies, followed logically from the fact that the Court distinguished cleaning work from the creation of programmes and that the Court referred to public capacity without intending to create a new condition for the application of that exclusion.

- 26 Moreover, the Czech Republic submits that the explanations provided by the General Court in paragraphs 38 and 39 of the judgment under appeal, according to which the exclusion at issue is based on the public-service remit of public broadcasting bodies and contracting authorities that do not perform such a public-service task are not covered by that exclusion, are not supported by the judgment of 13 December 2007, *Bayerischer Rundfunk and Others* (C-337/06, EU:C:2007:786), even though the conclusions of that judgment should be relied on. Indeed, it does not follow that the public-service remit of the public broadcasting bodies, which justifies the exclusion at issue, should be protected only where the broadcaster is the contracting authority. The exclusion at issue therefore also applies to an operation of a broadcaster acting as programme provider without being the contracting authority in that operation.
- 27 By the series of arguments relating to the systematic interpretation of Article 16(b) of Directive 2004/18, the Czech Republic submits that the erroneous nature of the General Court's interpretation of that provision is supported by the fact that that provision also includes another exclusion for contracts relating to broadcasting time. As regards those contracts, there can be no doubt that the broadcaster must have the status not of contracting authority but of provider of the particular service, that is, its own broadcasting time. That Member State claims that that fact is not disputed by the General Court and refers, in that regard, to paragraph 61 of the judgment under appeal.
- 28 According to the Commission, the arguments put forward by the Czech Republic in its appeal must be rejected in their entirety and the appeal must be dismissed.

### ***Findings of the Court***

- 29 By the series of arguments relating to the literal interpretation of Article 16(b) of Directive 2004/18, which it is appropriate to examine first, the Czech Republic claims that the General Court erred in law by refusing to accept that the wording of that provision does not limit the exclusion at issue to public contracts concluded by broadcasters acting as contracting authorities.
- 30 As regards, first, the arguments put forward in paragraph 21 above, it should be noted that, even if certain language versions of Article 16(b) of Directive 2004/18, referred to by the Czech Republic, are capable of supporting the literal interpretation of that provision which it has advocated, the fact nonetheless remains that that Member State does not succeed in showing that there are no divergences between the language versions of that provision, or in refuting the finding in paragraph 41 of the judgment under appeal, according to which the expression 'by broadcasters' may refer both to 'the acquisition, development, production or co-production of programme material' and to 'broadcasting'.

- 31 Similarly, it appears that the insertion of the expression ‘intended for broadcasting’ by the EU legislature in the wording of Article 16(b) of Directive 2004/18, which is a source of grammatical ambiguity, has given rise to divergent language versions of that provision. None of the arguments put forward by the Czech Republic in that regard undermines the fact that the use of that expression did not make the majority of the language versions of Article 16(b) of Directive 2004/18 unequivocal, from a grammatical point of view, as the General Court noted in paragraphs 41 and 52 to 54 of the judgment under appeal.
- 32 Moreover, as the Advocate General noted, in essence, in points 77 to 79 of his Opinion, that expression does not appear in the Bulgarian and Slovenian versions of that provision and that omission accentuates the divergences which exist between the versions of that provision.
- 33 The General Court was therefore right to point out, in paragraph 55 of the judgment under appeal, that provisions of EU law must be interpreted and applied uniformly in the light of the versions existing in all EU languages (judgment of 6 June 2018, *Tarragó da Silveira*, C-250/17, EU:C:2018:398, paragraph 20 and the case-law cited), and that, where there is a divergence between its various language versions, a provision of EU law must be interpreted by reference to the general scheme and the purpose of the rules of which it forms part (see, to that effect, judgment of 7 July 2016, *Ambisig*, C-46/15, EU:C:2016:530, paragraph 48 and the case-law cited).
- 34 In those circumstances, the General Court cannot be criticised for having held, in paragraph 41 of the judgment under appeal, that it was necessary to take into account, for the purposes of interpreting that provision, the objectives pursued by the rules of which that provision forms part as well as its context, or for having reached the conclusion, in paragraph 56 of the judgment under appeal, that, in the light of the ambiguous nature of the various language versions of the provision at issue, the Czech Republic’s arguments based on the wording of that provision had to be rejected as unfounded.
- 35 Second, for the same reasons, it must be observed that the Czech Republic’s line of argument referred to in paragraph 22 above, in so far as it is based on one of the possible readings of the wording of Article 16(b) of Directive 2004/18, is not in itself capable of calling into question the findings made by the General Court in paragraph 64 of the judgment under appeal, which led it to reject the interpretation of that provision suggested by that Member State.
- 36 In any event, the possibility that broadcasters may assume the role of service provider has no bearing whatsoever on the question whether, as regards contracting authorities, the exclusion at issue is applicable only to broadcasters.
- 37 It is necessary to examine, in the second place, the series of arguments put forward by the Czech Republic concerning the origin of Article 16(b) of Directive 2004/18.
- 38 As regards the argument referred to in paragraph 16 above, the Czech Republic does not dispute that, in so far as it envisaged an exclusion concerning the purchase of programmes by broadcasters, the Commission’s initial proposal which led to Directive 92/50 provided for that exclusion to be limited solely to contracts in respect of which the contracting authority was a broadcaster.

- 39 As the Commission rightly points out, the amendments made during that legislative procedure in order to amend the Commission's initial proposal, which are relied on by the Czech Republic, specified and supplemented the types of services covered by the exclusion at issue. However, it cannot be inferred from such a change of the material scope of that exclusion that those amendments extended the entities that may benefit from that exclusion.
- 40 As regards the argument referred to in paragraph 17 above, relating to the legislative process which led to the adoption of Directive 2004/18, it should be noted that the amendments to the definition of the exclusion at issue were not made in order to highlight the criterion relating to the subject matter of the contract, to the detriment of the criterion based on the identity of the contracting authority. The reason for the introduction by the EU legislature of the expression 'intended for broadcasting' in the wording of that exclusion was the need to adapt to technological developments, namely the expansion of Internet broadcasting, as evidenced, in particular, by the last sentence of recital 25 of Directive 2004/18.
- 41 In that regard, it should be borne in mind that reference was made to the insertion in Article 16(b) of Directive 2004/18, of the words 'intended for broadcasting' in the recommendation for second reading, issued by the European Parliament, on the Council common position for adopting a directive of the European Parliament and of the Council on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts of 19 June 2003 (A5-0242/2003 final). That document sets out, on page 23, as regards amendment 25, the 'justification' for that insertion as follows: 'the common position already excludes the acquisition, development, production or co-production of programmes by broadcasters and contracts for broadcasting time from the scope of the Directive for editorial and creative reasons. This amendment seeks to clarify that this exception would also extend to broadcasters' Internet content activities for the same creative and editorial reasons.'
- 42 Similarly, reference was made to that insertion in the opinion of the Commission on the European Parliament's amendments to the Council's common position of 14 August 2003 (COM(2003) 503 final). That document states, on page 4, as regards amendment 25, that, 'according to the justification given, this amendment changes Article 16(b) in order to make clear that the exception must also apply to broadcasting bodies in the field of the Internet'.
- 43 Consequently, the General Court was correct to hold, in paragraph 49 of the judgment under appeal, that the addition of the words 'intended for broadcasting' in Article 16(b) of Directive 2004/18 does not reflect an intention to extend the scope of the exclusion at issue to contracts awarded by any contracting authority concerning programmes intended to be broadcast by broadcasters.
- 44 In the third place, as regards the series of arguments relating to the teleological interpretation of Article 16(b) of Directive 2004/18, it should be noted that, for the reasons set out in paragraphs 40 to 43 above, the Czech Republic's argument referred to in paragraph 24 above must be rejected.
- 45 The arguments put forward by that Member State and referred to in paragraphs 23, 25 and 26 above also cannot succeed.
- 46 It must be noted that, in paragraph 31 of the judgment under appeal, the General Court stated that Article 16(b) of Directive 2004/18 excludes the application of public procurement rules for certain audiovisual services in the field of broadcasting in order, according to recital 25 of that directive, to take account of aspects of cultural or social significance which render application of

procurement rules inappropriate. While it is true, as the Czech Republic points out, that that recital 25 does not mention broadcasters, that fact is nevertheless incapable of either invalidating or confirming the General Court's interpretation.

- 47 Moreover, even though the circumstances of the present case differ from those which gave rise to the judgment of 13 December 2007, *Bayerischer Rundfunk and Others* (C-337/06, EU:C:2007:786), the General Court rightly pointed out, in paragraphs 35 to 38 of the judgment under appeal, that it is apparent from that judgment, in particular from paragraphs 62 and 64 thereof, that the Court of Justice stated that, having regard in particular to recital 25 of Directive 2004/18, the exclusion of the application of the directive to public service contracts covers only public contracts for services which fall within the essential function of public broadcasting bodies. By contrast, EU rules apply in full to public contracts for services which have no connection to the activities which form part of the performance of the public-service remit, in the proper sense, of the public broadcasting bodies.
- 48 It should be noted that, in view of its nature as a derogation, Article 16(b) of Directive 2004/18 must be interpreted strictly (see, to that effect, judgment of 6 December 2017, *Compania Națională de Administrare a Infrastructurii Rutiere*, C-408/16, EU:C:2017:940, paragraph 45 and the case-law cited). The exclusion at issue must therefore be interpreted as applying only to contracts awarded by broadcasters, as contracting authorities, in order to perform their own public-service remit.
- 49 It follows that the General Court did not err in law in stating, in paragraph 39 of the judgment under appeal, that the exclusion at issue applies only to contracting authorities which are broadcasters and in rejecting, in paragraph 57 of that judgment, the Czech Republic's argument to the contrary.
- 50 In the fourth and last place, as regards the series of arguments put forward by the Czech Republic and referred to in paragraph 27 above, by which it disputes the systematic interpretation of Article 16(b) of Directive 2004/18 adopted by the General Court, it must be held that that series of arguments cannot succeed.
- 51 First of all, in paragraph 59 of the judgment under appeal, the General Court found, without being challenged on that point by the Czech Republic, that the exclusions provided for in Article 16 could be defined in relation to the subject matter of the contracts concerned, the identity of their service provider or in relation to both their subject matter and conditions attaching to the contracting authority. Accordingly, the General Court was right to hold, in paragraph 61 of the judgment under appeal, that 'there is nothing to prevent several contracts covered by the same letter under Article 16 of [that] directive from being defined differently, in particular, in relation to their subject matter, their contracting authority or their service provider'. It is therefore conceivable, according to a systematic interpretation, that, for the purposes of applying Article 16(b) of Directive 2004/18, contracts which have as their subject matter broadcasting time may be awarded both by broadcasters and by other contracting authorities, whereas contracts having as their subject matter programme material, in accordance with the objective pursued by the exclusion at issue, can be awarded only by broadcasters.
- 52 Next, it should be noted that, as the Commission states, the Czech Republic does not take issue with paragraphs 50 and 51 of the judgment under appeal, which relate to another factor to be taken into consideration in the context of a systematic interpretation of Article 16(b) of Directive 2004/18. According to those paragraphs, the services forming the subject matter of the contracts

covered by that provision are also covered by the exception set out in footnote 3 of Annex II B to that directive, as amended by Commission Regulation (EC) No 213/2008 of 28 November 2007 (OJ 2008 L 74, p. 1), which relates to ‘contracts for the acquisition, development, production or co-production of programmes by broadcasting organisations and contracts for broadcasting time’. For reasons of internal consistency of Directive 2004/18, the exclusion at issue and that provided for in footnote 3 must be considered to have the same scope. The wording of footnote 3 confirms that, whereas contracts for broadcasting time may be awarded both by broadcasting organisations and by other contracting authorities, broadcasters alone are covered as regards contracts for programme material.

- 53 Lastly, given that none of the parties calls into question the finding, in the last sentence of paragraph 73 of the judgment under appeal, that Directive 2014/24 was not applicable *ratione temporis* to the facts at issue in the dispute, as the Czech Republic itself noted before the General Court, it must be held that arguments based on the provisions of that directive and on the legislative procedure which led to its adoption, such as those mentioned in paragraph 18 above, cannot invalidate the interpretation of Article 16(b) of Directive 2004/18 adopted in the present case by the General Court.
- 54 Since all of the arguments raised in support of the single ground of appeal have been rejected, that ground of appeal must be rejected as unfounded and the appeal must be dismissed.

### **Costs**

- 55 Under Article 138(1) of the Rules of Procedure of the Court of Justice, which applies to appeal proceedings by virtue of Article 184(1) thereof, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party’s pleadings.
- 56 Since the Commission has applied for costs to be awarded against the Czech Republic, and since the latter has been unsuccessful, the Czech Republic must be ordered to bear its own costs and to pay those incurred by the Commission.

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

**1. Dismisses the appeal;**

**2. Orders the Czech Republic to bear its own costs and to pay those incurred by the European Commission.**

[Signatures]