JUDGMENT OF THE COURT (Fourth Chamber)

22 April 2010 *

In Case C-423/07,

ACTION under Article 226 EC for failure to fulfil obligations, brought on 13 September 2007,

European Commission, represented by D. Kukovec and M. Konstantinidis, and by S. Pardo Quintillán, acting as Agents, and by M. Canal Fontcuberta, abogada, with an address for service in Luxembourg,

applicant,

v

Kingdom of Spain, represented by F. Díez Moreno, acting as Agent, with an address for service in Luxembourg,

defendant,

* Language of the case: Spanish.

THE COURT (Fourth Chamber),

composed of K. Lenaerts, President of the Third Chamber, acting as President of the Fourth Chamber, R. Silva de Lapuerta, E. Juhász (Rapporteur), J. Malenovský and T. von Danwitz, Judges,

Advocate General: P. Mengozzi,
Registrar: M. Ferreira, Principal Administrator,

having regard to the written procedure and further to the hearing on 9 September 2009,

after hearing the Opinion of the Advocate General at the sitting on 20 October 2009,

gives the following

Judgment

1 By its application, the Commission of the European Communities asks the Court to declare that, by failing to include, in the works to be awarded by concession in the concession notice and in the tendering specifications relating to the award of a public concession for the construction, maintenance and operation of the link roads from the A-6 motorway to Segovia and Ávila, and for the maintenance and operation from 2018 of the Villalba-Adanero section of the A-6 motorway, certain works which were subsequently awarded with the contract, including works on the toll-free section of

the A-6 motorway, the Kingdom of Spain has failed to fulfil its obligations under Article 3 of 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), and, accordingly, under Article 11(3), (6), (7), (11) and (12) thereof, and has infringed the principles of the EC Treaty, in particular those of equal treatment and non-discrimination.

Community legislation

2 Directive 93/37 states, in the fifth recital in the preamble thereto, that, '... in view of the increasing importance of concession contracts in the public works area and of their specific nature, rules concerning advertising should be included in this Directive'.

3 Pursuant to Article 1(c) of that directive:

'a "work" means the outcome of building or civil engineering ... works taken as a whole that is sufficient of itself to fulfil an economic and technical function'.

4 In accordance with the definition in Article 1(d) of that directive:

'"public works concession" is a contract of the same type as that indicated in (a) [concerning public works contracts] except for the fact that the consideration for the works to be carried out consists either solely in the right to exploit the construction or in this right together with payment'.

5 Article 3 of Directive 93/37 provides:

‘1. Should contracting authorities conclude a public works concession contract, the advertising rules as described in Article 11(3), (6), (7) and (9) to (13), and in Article 15, shall apply to that contract when its value is not less than ECU 5 000 000.

…

4. Member States shall take the necessary steps to ensure that a concessionnaire other than a contracting authority shall apply the advertising rules listed in Article 11(4), (6), (7), and (9) to (13), and in Article 16, in respect of the contracts which it awards to third parties when the value of the contracts is not less than ECU 5 000 000. …

…’

6 Article 11 of Directive 93/37, which forms part of Title III thereof, entitled ‘Common advertising rules’, provides:

‘1. Contracting authorities shall make known, by means of an indicative notice, the essential characteristics of the works contracts which they intend to award and the estimated value of which is not less than the threshold laid down in Article 6(1).

…

3. Contracting authorities who wish to award a works concession contract shall make known their intention by means of a notice.

…

6. The notices referred to in paragraphs 1 to 5 shall be drawn up in accordance with the models given in Annexes IV, V and VI, and shall specify the information requested in those Annexes.

…

7. The contracting authorities shall send the notices referred to in paragraphs 1 to 5 as rapidly as possible and by the most appropriate channels to the Office for Official Publications of the European Communities. …

…

9. The notices referred to in paragraphs 2, 3 and 4 shall be published in full in the *Official Journal of the European Communities* …

10. The Office for Official Publications of the European Communities shall publish the notices not later than 12 days after their dispatch. In the case of the accelerated procedure referred to in Article 14, this period shall be reduced to five days.

11. The notice shall not be published in the official journals or in the press of the country of the contracting authority before the date of dispatch to the Office for Official Publications of the European Communities and it shall mention this date. It shall not contain information other than that published in the *Official Journal of the European Communities*.

12. The contracting authorities must be able to supply evidence of the date of dispatch.

…'

7 The annexes referred to in Article 11(6) of Directive 93/37 contain model notices to be published by the contracting authority in the *Official Journal of the European Communities*. Annex IV to that directive concerns public works contracts, Annex V public works concession contracts and Annex VI contains the model notice where the

concessionnaire wishes to conclude with third parties contracts for performance of work which have been awarded to it.

8 Article 15 of that directive provides:

'Contracting authorities who wish to award a works concession contract shall fix a time limit for receipt of candidatures for the concession, which shall not be less than 52 days from the date of dispatch of the notice.'

9 Article 61 of 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), entitled 'Awarding of additional works to the concessionaire', provides:

'This Directive shall not apply to additional works not included in the concession project initially considered or in the initial contract but which have, through unforeseen circumstances, become necessary for the performance of the work described therein, which the contracting authority has awarded to the concessionaire, on condition that the award is made to the economic operator performing such work:

— when such additional works cannot be technically or economically separated from the initial contract without major inconvenience to the contracting authorities, or

— when such works, although separable from the performance of the initial contract, are strictly necessary for its completion.

However, the aggregate value of contracts awarded for additional works may not exceed 50% of the amount of the original works concession contract.'

10 The Commission interpretative communication on concessions under Community law (OJ 2000 C 121, p. 2) states, in point 3.1.1 thereof, entitled 'Equality of treatment':

'…

[I]n certain cases, the grantor may be unable to specify his requirements in sufficiently precise technical terms and will look for alternative offers likely to provide various solutions to a problem expressed in general terms. In such cases, however, in order to ensure fair and effective competition, the specifications must always state in a non-discriminatory and objective manner what is asked of the candidates and above all the way in which they must draw up their bids. …'

National legislation

11 Law 8 of 10 May 1972 on the construction, maintenance and exploitation of motorways under concession contracts, in the version in force since 1996 ('the Law on motorways'), provides in the second subparagraph of Article 8(2) thereof:

'… the construction of road infrastructure works, other than those included in the contract but affecting it, which are carried out in the area of impact of the motorway or which are necessary to organisation of the traffic, whose project and performance, or merely performance, the concessionaire is obliged to carry out as the consideration for the contract, shall form part of the business object of the concessionaire undertaking, …'

12 Royal Decree 597 of 16 April 1999 fixes as 20 km the area of impact of motorways.

The disputed operation

13 The A-6 motorway links Madrid to La Coruña and constitutes the main road axis linking the centre to the north and north-west of Spain. It is common ground that this is one of the major and busiest road arteries in that country. The section of that motorway between Madrid and Villalba is a toll-free section, approximately 40 km long, and crosses an area which is, in fact, urban. The section between the cities of Villalba and Adanero is a toll section, approximately 70 km long ('the toll section of the A-6

motorway'). It is common ground that those two motorway sections have for a long time had very heavy traffic and serious congestion problems.

14 Since 1968, the toll section of the A-6 motorway has been managed under a concession by the undertaking Ibérica de Autopistas SA ('Iberpistas'). That concession was granted until 29 January 2018.

15 By decree of 26 May 1997, the Spanish Ministry of Public Works announced its intention to include in the 'motorway plan', approved by the Spanish Government in February 1997, the construction of motorways connecting the cities of Segovia and Ávila to the A-6 motorway, since, 'having regard to the large traffic flows which currently exist and which cause traffic congestion …, the construction of the motorways connecting those cities with the current A-6 motorway is of exceptional public interest as regards their development'.

16 By notice published in the *Official Journal of the European Communities* (OJ S 115, 16 June 1999) ('the first notice') and by tender specifications approved by decree of 4 June 1999 (BOE No 136, 8 June 1999; 'the first tender specifications'), the Ministry of Public Works, acting as concession-granting authority, opened a procedure with a view to awarding a public works concession. Paragraph 2 of the first notice and clause No 2, paragraph 4, of the first tender specifications, the content of which was identical, set out the object of the concession to be awarded.

17 That object concerned the following works:

— the construction, maintenance and operation of the link roads on the toll section of the A-6 motorway with the cities of Ávila and Segovia,

— the maintenance and operation, from 30 January 2018, of the toll section of the A-6 motorway, for a period to be determined on the basis of the number of vehicles transiting that section,

— construction of the bypass around the city of Guadarrama, a municipality on the toll section of the A-6 motorway, and

— widening of a part of the toll-free section of the A-6 motorway, that is to say the section between Madrid and Villalba. A fourth lane was to be constructed in both directions with a view to increasing the capacity of the A-6 motorway over that section.

18 By decree of 7 July 1999 (BOE No 163, 9 July 1999), the concession-granting authority published new tender specifications ('the second tender specifications'). A new notice was published in the *Official Journal of the European Communities* (OJ S 137, 17 July 1999; 'the second notice'). The preamble to that second decree stated that, 'it is necessary for technical reasons to amend the [first tender] specifications, in order to redefine the object of the concession to be awarded and to make some changes in the definition of the duration of the concession.'

19 Paragraph 2 of the second notice and clause No 2 of the second tender specifications defined the object of the concession as follows:

'1. The construction, maintenance and operation of the toll section of the A-6 motorway, link with Segovia, …

2. The construction, maintenance and operation of the toll section of the A-6 motorway, link with Ávila. …

3. The maintenance and operation of the A-6 toll motorway, Villalba-Adanero section. …'

20 It follows that the second notice and second tender specifications did not mention in the object of the concession the construction of the Guadarrama bypass or the widening of part of the toll-free section of the A-6 motorway.

21 Clause No 3 of the second tender specifications referred to the 'administrative file'.

22 Paragraphs 13 and 16 of clause No 5 of the second tender specifications, the wording of which was the same in the first tender specifications, provided:

'13. Tenderers shall state expressly in their tenders the measures they intend to adopt in connection with the effects of the concession on the road network as a whole, local tourist interests, and the upkeep of monuments of historical or artistic interest, and in connection with the protection and conservation of the countryside and nature, without prejudice to compliance with the legislation in force in those fields.

…

16. Tenderers shall inform the authorities of the measures they propose to take for adequate traffic management between cities in the area affected by the construction of the sections that are the object of the concession, stating which of these measures they intend to implement at their own expense. The creative character and feasibility of these proposals will carry due weight in the award procedure, having regard to the high level of congestion in the areas where traffic will be affected by the roads that are the object of the concession.'

23 Clause No 10 of the second tender specifications, which was identical to that in the first tender specifications, listed the criteria which were to be taken into consideration in awarding the contract. Those criteria included:

— the viability of the tender submitted and the extent of the resources used (point III),

— the measures proposed for traffic and environmental management (point V).

24 Sub-criterion V.i stated:

'[t]he measures proposed for traffic management between cities, including those relating to the installation of a dynamic toll in the area affected by the construction of the sections which are the object of the concession, can obtain up to 75 points for their creativity, viability and efficiency'.

25 Clause No 29 of the second tender specifications stated that, with regard to the toll sections of the A-6 motorway connecting to Ávila and Segovia, the concessionnaire is required to ensure that traffic does not exceed a certain level, expressed in technical terms, at any point on the motorway and is required to widen the road where necessary at its own expense.

26 Finally, clause No 33 of the second tender specifications provided that the duration of the contract would be neither greater than 37 years nor less than 22 years, and that the exact duration of the contract, calculated in years, would be determined having regard to the actual trends in traffic on each of the different sections, which would be estimated 20 years after the commencement of the contract.

27 By virtue of Royal Decree 1724/1999 of 5 November 1999, the concession-granting authority awarded the concession to Iberpistas. Article 5 of that Royal Decree nevertheless provided for works to be carried out in addition to those listed in the second notice and in the second tender specifications. Thus, in addition to the construction of link roads to the toll section of the A-6 motorway with Ávila and Segovia, and the maintenance and operation of the toll section of the A-6 motorway between Villalba and Adanero, the following works were required:

— the construction of a third lane in each direction on the part of the toll section of the A-6 motorway between Villalba and the Valle de los Caídos junction ('works A'),

— the construction of a third reversible lane on the part of the toll section of the A-6 motorway between the Valle de los Caídos junction and the city of San Rafael, including the construction of a new tunnel ('works B'), and

— the construction of a fourth lane in each direction on the toll-free section of the A-6 motorway between Madrid and Villalba ('works C').

28 Works A, B and C are referred to below as 'additional works'.

29 It follows from the foregoing that works C were mentioned in the first notice and the first tender specifications, but not in the second. Works A and B were not mentioned in either the first or the second. With regard to the construction of a bypass around Guadarrama, which was listed in the first tender specifications but not in the second, it was not included in the object of the concession awarded to Iberpistas and in the end were not carried out.

30 It is apparent from the file that the link road between the toll section of the A-6 motorway and Segovia came into operation in 2003 and that the fourth lane on the toll-free section of the A-6 motorway (works C) came into operation on 1 January 2006. It is also apparent from the file that the other works were carried out in the meantime.

31 It is also apparent from a letter from the Spanish authorities, dated 28 November 2001, that the cost of the works expressly mentioned in the second notice and the second tender specifications, that is to say, the link roads between the toll section of the A-6 motorway and Segovia and Ávila, was EUR 151,76 million. That cost does not include that of the maintenance and operation works on the toll section of the A-6 motorway, the concession for which was granted from 30 January 2018. The cost of the three additional works was EUR 132,03 million.

The pre-litigation procedure

32 Being unsure as to the validity of the procedure which led to the grant of the concessions for the additional works in the light of the rules of Directive 93/37, on 30 April 2001 the Commission sent the Kingdom of Spain a letter of formal notice to which the Spanish authorities replied by letter of 27 June 2001. Since it did not consider the explanations given by that Member State to be satisfactory, on 18 July 2002, the Commission issued a reasoned opinion, to which that State replied by letters of 20 September 2002 and 13 March 2003.

33 On 25 July 2003, the Commission sent an additional letter of formal notice to the Kingdom of Spain concerning infringement of the principles of equal treatment and non-discrimination, to which Spain replied by letter of 28 October 2003. On 22 December 2004, the Commission sent an additional reasoned opinion concerning infringement of those principles, to which that Member State replied by letter of 3 March 2005. Not satisfied with that reply, the Commission instituted the present action.

The action

Admissibility

34 The Kingdom of Spain raises two pleas of inadmissibility. Firstly, it submits that the application does not satisfy the requirements of the Rules of Procedure of the Court, since the Commission has not provided evidence that the lawyer representing it

is qualified to do so. Moreover, that institution has not shown that that lawyer is authorised to appear in the present case, since she is not acting as an agent of the Commission.

35 Secondly, the Kingdom of Spain raises a plea of inadmissibility alleging that the Commission's application lacks clarity, in so far as it refers without distinction to infringement of Articles 3 and 11(3), (6), (7), (11) and (12) of Directive 93/37. The only provision of Article 3 capable of being taken into account in the present case is paragraph 1 thereof. In addition, the concession-granting authority entirely fulfilled its obligations under Article 11(3), (7), (11) and (12) of that directive in the present case. Furthermore, Article 11(6) thereof refers to Annexes IV, V and VI to that directive, although only Annex V is applicable to the present case. Accordingly, the subject-matter of the action is indeterminate.

36 With regard to the first plea of inadmissibility, the Commission was properly represented by three agents assisted by a lawyer. Moreover, the Commission attached to its application a copy of a document certifying that the lawyer in question is authorised to practice, within the meaning of Article 38(2) of the Rules of Procedure of the Court, as a lawyer before a court of a Member State, that is to say, the Kingdom of Spain.

37 In the same way, the second plea of inadmissibility cannot be accepted. It is unequivocally apparent from all the documents lodged before the Court that the action and the complaints of the Commission concern the failure to comply, in the procedure for award of the concession for the works in question, with the advertising obligations imposed on the concession-granting authority by the relevant provisions of Directive 93/37, since not all the works actually awarded and carried out were mentioned in the notice laid down for that purpose by those provisions.

38 Accordingly, in the present case there is no problem of clarity of the subject-matter such as to call into question the admissibility of the action.

39 The possibility that certain of the provisions of Directive 93/37 relied on by the Commission in support of its complaints may prove irrelevant to the present case does not render its action inadmissible.

Substance

Arguments of the parties

40 In essence, the Commission submits that the object of a concession, as described in the notice and in the tender specifications, and the works actually awarded must match. The object of the concession at issue was precisely defined in clause No 2 of the second tender specifications and concerns specific works, that is to say the link roads between the toll section of the A-6 motorway and Segovia and Ávila and the maintenance and operation of that section from 30 January 2018. However, the additional works were not mentioned in either the second notice or the second tender specifications.

41 The Kingdom of Spain's alleged failure to fulfil obligations thus consists, in the view of the Commission, in the fact that the Spanish authorities made a later extension to the object of the concession by awarding to Iberpistas works which had not been advertised and which were outside the geographical area covered by the object of the

concession as advertised. That constitutes a failure to fulfil the obligations imposed on the Member States by virtue of the relevant provisions of Articles 3 and 11 of Directive 93/37.

42 The Commission argues that neither the alteration to the object of the concession in the second notice and the second tender specifications nor the wording of clauses No 5(13) and (16) and No 29 of the second tender specifications could give a reasonably aware and informed tenderer to understand that in fact it was requested by the competent authorities to submit proposals for carrying out works such as the additional works. Were that not the case, it would amount to accepting that tenderers could propose work on all the roads in the provinces of Madrid, Segovia and Ávila, since the traffic on those roads could be affected by the works forming the object of the concession.

43 In the view of the Commission, the fact that the additional works were not included in the object of the concession and that an averagely informed tenderer would not be able to deduce from the tender specifications that it could submit proposals relating to the performance of works of such wide scope favoured only Iberpistas, which was already the concessionaire for the toll section of the A-6 motorway and was aware of the real requirements of the awarding authority. However, neither the other candidates nor the potential tenderers could have known all the factors which were to be taken into consideration for award of the concession, which constitutes infringement of the principle of equal treatment of the tenderers.

44 The Kingdom of Spain submits, firstly, that, as is apparent from the second tender specifications, the invitation to tender was governed not only by those specifications but also by all the legislation applicable to invitation to tender procedures, that is to say, by the Law on motorways and by the general tender specifications approved by Decree No 215 of 25 January 1973. The aim of that legislation was to allow, in accord

with the implementation of the abovementioned motorways plan, broad scope for initiatives from private undertakings both when submitting their tenders and during the performance of their activities after award of the concession.

45 That approach was, furthermore, followed when awarding concessions for the construction of other motorways in Spain and, moreover, was confirmed by Article 8 of the Law on motorways which provides for the tenderers to propose additional works, whether inside the area of impact of motorways, in accordance with the definition of that term in national legislation, or outside that area.

46 In the present case, the second tender specifications no longer expressly mention the construction projects for certain works. That amendment was intended to leave it to the initiative and creativity of the private contractors to propose to the concession-granting authorities that works be carried out which would solve the traffic problems on the A-6 motorway, in particular after construction of the new link roads with Ávila and Segovia. In point of fact, the construction of those two new motorways worsened the traffic situation on the route concerned. Proposing a solution to that problem was left to the initiative of the tenderers, as is also apparent from the wording of clause No 5(13) and (16) and clauses No 28 and 33 of the second tender specifications.

47 Secondly, the Kingdom of Spain submits that, in any event, there can be no question in the present case of a failure to fulfil advertising obligations with regard to the award of the additional works. Iberpistas did not carry out those additional works itself, but opened them to invitation to tender and awarded them to third-party undertakings, in accordance with the requirements of publicity and competition laid down in

Directive 93/37 and by the Spanish legislation. Those additional works were therefore carried out by third-party undertakings independent of the concessionaire Iberpistas.

48 Thirdly, the Kingdom of Spain points out that the complaints were lodged with the Commission not by unsuccessful tenderers nor by third parties actually or potentially interested in the award of the disputed concession, but by persons and bodies having no professional connection with that concession. Those complainants did not have any interest in the correct application of the rules of competition, but had other motives. All bodies wishing to participate in the procedure had the same information and none of the tenderers or actual or potential interested parties disputed, by complaint, claim or legal action, the result of the procedure. Accordingly, there was equality of treatment.

49 Fourthly, the Kingdom of Spain observes that those complainants, before turning to the Commission, had lodged two actions against the disputed procedure before the Tribunal Supremo, the Spanish Supreme Court, which was in the best position to rule on the question of fact raised in the present case concerning the determination of the reasons for the amendment made in the second contract notice. The Tribunal Supremo dismissed those actions by two judgments of 11 February and 4 October 2003, in which it examined the award of the disputed concession also in the light of Community law and held that the principles of equal treatment and of non-discrimination had been upheld.

Findings of the Court

50 A preliminary point to note is that, although the Commission complains that the Kingdom of Spain has breached Articles 3 and 11(3), (6), (7), (11) and (12) of Directive 93/37, it does not dispute either the fact that a notice of invitation to tender was

published or the timing and means of that publication, as laid down in Article 11(7), (11) and (12) of that directive. In addition, it is apparent from its application that, with regard to Article 3 of that directive, the Commission's action relates only to Article 3(1) thereof.

51 In those circumstances, the Commission's action must be examined in the light of Articles 3(1) and 11(3) and (6) only of Directive 93/37.

52 In that regard, it is established that the operation at issue in the present case constitutes a 'public works concession' within the meaning of Article 1(d) of Directive 93/37. In accordance with that provision, the 'public works concession' is a contract of the same type as those concerning 'public works contracts' except for the fact that the consideration for the works consists either solely in the right to exploit the construction or in this right together with payment.

53 In accordance with Article 3(1) of Directive 93/37, should contracting authorities conclude a public works concession contract, the advertising rules as defined inter alia in Article 11(3) and (6) of that directive are to apply to that contract when its value is not less than ECU 5 000 000.

54 Article 11(3) of that directive requires contracting authorities who wish to award a works concession contract to make known their intention by means of a notice. That

notice, as is apparent from Article 11(6), must be drawn up in accordance with the models given in Annex V, and is to specify the information requested therein.

55 The information which that notice must contain includes, in accordance with Section II, entitled 'Object of the contract', of Annex V thereto, the main object and additional objects of the contract, a description of the object of the concession and of the location of the works referred to in the concession, and the quantity and overall scope thereof.

56 That advertising obligation, because it makes it possible to compare the offers which it contains, ensures a level of competition considered satisfactory by the European Union legislature in the field of public works concessions.

57 In that field, it is an expression of the principles of equal treatment and of transparency, with which the awarding authorities are required to comply in all circumstances.

58 By the clear formulation of the terms of the notice, the opportunity must be offered objectively to all potential tenderers, which are informed, experienced and reasonably aware, of forming a concrete idea of the works to be carried out and of their location, and in consequence of drafting their tenders.

59 The vital importance of the notice, as regards both public contracts and works concessions, with regard to the information, in conditions of compliance with the principle of equal treatment, for tenderers from different Member States, is emphasised in

Article 11(11) of Directive 93/37, pursuant to which any publication of information at a national level must not contain information other than that published in the *Official Journal of the European Communities*.

60 Having regard, however, to the limited space available in the model concession notice set out in Annex V to Directive 93/37, information on a concession can be set out in detail in the tender specifications which the concession-granting authority must draw up and which constitute the natural complement to the notice.

61 In the present case, it must be held that the additional works to which the complaints of the Commission relate, the value of which very considerably exceed the threshold laid down in Article 3(1) of Directive 93/37, were not set out in the object of the concession at issue, as defined in the second notice and the second tender specifications.

62 Nevertheless, the Kingdom of Spain submits that the second tender specifications should have been understood as meaning that they referred to the basic rules generally applicable to invitation to tender procedures, in particular the Law on motorways, and should have been interpreted in the light of those rules, the aim of which is to allow tenderers broad freedom to use their initiative. Accordingly, the tenderers should have understood, in the light of Article 8 of that law, that the concession-granting authority was in fact calling on their initiative and creativity with a view to resolving the essential problem, which was the density of the traffic on the A-6 motorway. That problem was well known and clearly apparent from the statistics of the competent national authorities. It is therefore common sense to understand that

the concession-granting authority expected such proposals. That expectation is also confirmed by the fact that certain works were no longer listed in the second tender specifications, in order to give more scope to tenderers' initiative, and by the formulation of clauses No 5(13) and (16) and No 29 of the second tender specifications.

63 That argument must be rejected.

64 It must be noted that, for the purposes of clarification of the requirements of a concession, it is sometimes inevitable that the notice or tender specifications refer to the national rules concerning the technical specifications on safety, health, environmental and other requirements. The fact that such a reference is possible cannot, however, enable the concession-granting authority to escape the advertising obligations laid down in Directive 93/37, pursuant to which the object of the concession must be defined in the notice and the tender specifications, which must contain the information referred to in paragraph 55 of the present judgment. Nor can it be accepted that it was necessary to interpret the notice or the tender specifications in the light of such rules in order to discern the true object of a concession.

65 That requirement must be interpreted strictly. Thus, the Court, in the context of a public works contract, has declared unlawful a reference from tender specifications to national legislation concerning the possibility that tenderers may submit variants of their tenders, in accordance with the first and second paragraphs of Article 19 of Directive 93/37, having regard to the fact that the minimum conditions which those variants were to meet were not specified in the tender specifications (see Case C-421/01 *Traunfellner* [2003] ECR I-11941, paragraphs 27 to 29). With regard to an obligation of transparency designed to ensure observance of the principle of equal treatment

of tenderers, which must be observed in any procurement procedure governed by Directive 93/37, that finding of the Court is also valid as regards works concessions.

66 It should also be added that it is acceptable for the concession-granting authority, having regard to possible particular features of the works which are the object of the concession, to leave some latitude to tenderers' initiative in the formulation of their tenders.

67 However, clauses No 5(13) and (16) and No 29 of the second tender specifications, which replaced the first, cannot be regarded as calling upon the tenderers' initiative with a view to proposing alternatives relating to works other than those clearly identified in the second notice. Clause No 5(13) does not state, in particular, the location of the measures to be taken to reduce any increase in traffic density caused by carrying out the works referred to in the second notice. In addition, clause No 5(16) merely requests tenderers to propose measures for adequate traffic 'management' between cities 'in the area affected by the construction of the sections that are the object of the concession', without further defining that area. What is more, clause No 29 refers, with insufficient precision, to measures to be taken concerning the toll sections of the A-6 motorway connecting to Ávila and Segovia.

68 It must be held that the tenderers' initiative and alternative tenders, expected by the Spanish Government on the basis that the second tender specifications replaced the first 'for technical reasons' and 'in order to redefine the object of the concession', apart from the fact that they could not be understood by a tenderer reasonably informed and aware in the manner alleged by the Kingdom of Spain, do not relate to the object of the disputed concession, but rather correspond to a general transport policy concern in the Member State involved. Thus, on the basis of such an understanding, as the Commission rightly points out, the tenderers would have been free to propose

unlimited works throughout the Autonomous Community of Madrid and the provinces of Ávila and Segovia.

69 In the same way, any possibly well-known problem existing at national level, of which as such potential tenderers established in other Member States cannot be assumed to be aware, cannot be taken into account by tenderers as an implied criterion of definition of the object of a concession and thus have an effect on the importance accorded by the European Union rules to the notice and the tender specifications.

70 In any event, even if it is accepted that all tenderers understood in the same way their freedom to use their initiative, it does not satisfy Directive 93/37 when, without any transparency, a public works concession contract is awarded which includes works referred to as 'additional' which of themselves constitute 'public works contracts' within the meaning of that directive and the value of which exceeds the threshold laid down therein.

71 If the opposite were true, that would mean that those works referred to as 'additional' would avoid the advertising obligation and, consequently, any call for competition. Having regard to the fact that tenderers using their initiative would be entirely free to submit proposals in which they determined the nature, scope and geographical location of the works to be carried out, independently and without any requirement to fulfil a predetermined object, it would not be possible to compare their tenders in any way.

72 In addition, it must be noted that the Kingdom of Spain cannot reasonably derive any support from Article 61 of Directive 2004/18. Putting aside the consideration that

that directive is not applicable *ratione temporis* to the present case, clearly the disputed additional works do not constitute, within the meaning of the abovementioned provision, 'additional works not included in the concession project initially considered' for the concession but which have, through unforeseen circumstances, become necessary for the performance of the work described therein.

73 The manner of proceeding adopted by the Kingdom of Spain in the present case cannot be justified either by point 3.1.1 of the Commission interpretative communication on concessions under Community law referred to above. That text relates only to cases where, unable to define its requirements in sufficiently precise technical terms, a concession-granting authority seeks to obtain alternative tenders intended to resolve a problem expressed in general terms, which is not the case here.

74 Accordingly, the conclusion must be that the additional works were awarded to Iberpistas despite the fact that they were not included in the object of the concession at issue, as described in the second notice and the second tender specifications, which constitutes breach of Articles 3(1) and 11(3) and (6) of Directive 93/37, read in conjunction with Annex V thereto.

75 As is clear from paragraph 57 of the present judgment, the provisions required appropriate advertising as required by Directive 93/37, constituting an expression of the principles of equal treatment and of transparency. Consequently, there is no need to consider separately the question of a possible breach of those principles.

76 The conclusion in paragraph 74 of the present judgment is not called into question by the argument drawn by the Kingdom of Spain from the fact that Iberpistas did not itself carry out the additional works, but awarded them to third-party undertakings,

in accordance with the requirements of publicity laid down in Article 3(4) of Directive 93/37. As the Commission rightly points out, Article 3 of that directive clearly requires both the concession-granting authority and the concessionaire to comply with cumulative and not alternative advertising obligations which must be met by them both, at all stages of the procedure, in order for that provision to remain effective.

77 In the same way, the argument of the Kingdom of Spain that the Commission decided to institute the present proceedings for failure to fulfil obligations following complaints lodged by parties having no connection with the contested procedure, and not by other tenderers actually or potentially interested in the award of the concession at issue, cannot succeed.

78 It is clear from settled case-law that it is for the Commission to determine whether it is expedient to take action against a Member State and what provisions, in its view, the Member State has infringed, and to choose the time at which it will bring an action for failure to fulfil obligations; the considerations which determine its choice cannot affect the admissibility of the action. In that regard, while the bringing and continuation of infringement proceedings is a matter for the Commission in its entire discretion, it is for the Court to consider whether there has been a failure to fulfil obligations as alleged, without its being part of its role to take a view on the Commission's exercise of its discretion (see, to that effect, Case C-33/04 *Commission* v *Luxembourg* [2005] ECR I-10629, paragraphs 65 to 67 and the case-law cited). Furthermore, the fact that other competing tenderers did not contest the procedure to award the disputed concession cannot have any effect on the assessment of the legality of that procedure or on whether the present action is well founded.

79 It must also be held that the argument that the Tribunal Supremo, hearing actions brought against the decision of the concession-granting authority, held by two

judgments that there was no breach of the provisions of Directive 93/37 or of the principle of equal treatment and proceeded to assess the facts regarding the clauses of the second tender specifications which fall within the jurisdiction of the national court, is not relevant either for the purposes of adjudicating in these proceedings.

80 It should be borne in mind that the fact that proceedings have been brought before a national court to challenge the decision of a competent authority which is the subject of an action for failure to fulfil obligations and the decision of that court cannot affect the admissibility of the action for failure to fulfil obligations brought by the Commission. The existence of the remedies available through the national courts cannot prejudice the bringing of an action under Article 226 EC, since the two procedures have different objectives and effects (see, to that effect, Case 31/69 *Commission* v *Italy* [1970] ECR 25, paragraph 9; Case 85/85 *Commission* v *Belgium* [1986] ECR 1149, paragraph 24; Case C-87/02 *Commission* v *Italy* [2004] ECR I-5975, paragraph 39; and Case C-508/03 *Commission* v *United Kingdom* [2006] ECR I-3969, paragraph 71).

81 In the light of all the above considerations, it must be concluded that, by awarding to Iberpistas, on 5 November 1999:

— the construction of a third lane in each direction on the part of the toll section of the A-6 motorway between Villalba and the Valle de los Caídos junction,

— the construction of a third reversible lane on the part of the toll section of the A-6 motorway between the Valle de los Caídos junction and the city of San Rafael, including the construction of a new tunnel, and

— the construction of a fourth lane in each direction on the toll-free section of the A-6 motorway between Madrid and Villalba,

without those works having been listed in the object of the public works concession contract, as described in the notice published in the *Official Journal of the European Communities* or in the tender specifications, the Kingdom of Spain has failed to fulfil its obligations under Articles 3(1) and 11(3) and (6) of Directive 93/37, read in conjunction with Annex V thereto.

82 The remainder of the action is dismissed.

Costs

83 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Commission applied for costs to be awarded against the Kingdom of Spain and the latter has been unsuccessful in its main pleas, the Kingdom of Spain must be ordered to pay the costs.

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

1. Declares that, by awarding to Iberpistas, on 5 November 1999

— the construction of a third lane in each direction on the part of the toll section of the A-6 motorway between Villalba and the Valle de los Caídos junction,

— the construction of a third reversible lane on the part of the toll section of the A-6 motorway between the Valle de los Caídos junction and the city of San Rafael, including the construction of a new tunnel, and

— the construction of a fourth lane in each direction on the toll-free section of the A-6 motorway between Madrid and Villalba,

without those works having been listed in the object of the public works concession contract, as described in the notice published in the *Official Journal of the European Communities* or in the tender specifications, the Kingdom of Spain has failed to fulfil its obligations under Articles 3(1) and 11(3) and (6) of Council Directive 93/37/EEC of 14 June 1993 concerning the coordination of procedures for the award of public works contracts, read in conjunction with Annex V thereto;

2. Dismisses the action as to the remainder;

3. Orders the Kingdom of Spain to pay the costs.

[Signatures]