JUDGMENT OF THE COURT (Third Chamber)

26 May 2011 *

In Case C-306/08,

ACTION under Article 226 EC for failure to fulfil obligations, brought on 9 July 2008,

European Commission, represented by A. Alcover San Pedro, D. Kukovec and M. Konstantinidis, acting as Agents,

applicant,

v

Kingdom of Spain, represented by M. Muñoz Pérez, acting as Agent,

defendant,

* Language of the case: Spanish.

THE COURT (Third Chamber),

composed of K. Lenaerts, President of the Chamber, D. Šváby (Rapporteur), R. Silva de Lapuerta, E. Juhász and T. von Danwitz, Judges,

Advocate General: N. Jääskinen,
Registrar: R. Şereş, Administrator,

having regard to the written procedure and further to the hearing on 6 May 2010,

after hearing the Opinion of the Advocate General at the sitting on 16 September 2010,

gives the following

Judgment

1 By its action, the European Commission seeks a declaration that by awarding 'integrated action programmes' ('IAPs') pursuant, successively, to Law 6/1994 of 15 November 1994 regulating urban development activities in the Valencian Community (Ley 6/1994, de 15 de noviembre, Reguladora de la Actividad Urbanística de la Comunidad Valenciana ('the LRAU')) and to Valencian Urban Development Law 16/2005 of 30 December 2005 (Ley 16/2005, de 30 de diciembre, Urbanística Valenciana ('the

LUV')), the Kingdom of Spain has failed to fulfil its obligations under 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), as amended by Commission Directive 2001/78/EC of 13 September 2001 (OJ 2001 L 285, p. 1; 'Directive 93/37'), and under 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), respectively.

Legal context

European Union legislation

Directive 92/50/EEC

2 The 16th recital in the preamble to 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) states:

'… public service contracts, particularly in the field of property management, may from time to time include some works; … it results from Directive 71/305/EEC that, for a contract to be a public works contract, its object must be the achievement of a

work; …, in so far as these works are incidental rather than the object of the contract, they do not justify treating the contract as a public works contract.'

3 Article 8 of Directive 92/50 provides:

'Contracts which have as their object services listed in Annex IA shall be awarded in accordance with the provisions of Titles III to VI.'

4 Category No 12 in Annex IA to Directive 92/50 mentions, among others, '[a]rchitectural services; engineering services and integrated engineering services; urban planning and landscape architectural services; related scientific and technical consulting services; technical testing and analysis services'.

Directive 93/37

5 Article 1 of Directive 93/37 provides:

'For the purpose of this Directive:

(a) "public works contracts" are contracts for pecuniary interest concluded in writing between a contractor and a contracting authority as defined in (b), which have as their object either the execution, or both the execution and design, of works related to one of the activities referred to in Annex II or a work defined in (c) below, or

the execution, by whatever means, of a work corresponding to the requirements specified by the contracting authority;

…

(c) 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;

(d) "public works concession" is a contract of the same type as that indicated in (a) 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;

…'

6 Article 6(6) of Directive 93/37 requires contracting authorities to observe the principle of non-discrimination.

7 Articles 11 and 12 of Directive 93/37 set forth the common advertising rules and provide, in particular, for the publication in full of contract notices in the *Official Journal of the European Communities* and the time-limits for the receipt of tenders and for the dispatch of the contract documents and additional information.

8 Articles 24 to 29 of Directive 93/37 lay down the qualitative selection criteria applicable to contractors among which are criteria concerning the evaluation of the technical abilities of contractors.

Directive 2004/18

9 Recital 10 in the preamble to Directive 2004/18 is in the following terms:

'A contract shall be deemed to be a public works contract only if its subject-matter specifically covers the execution of activities listed in Annex I, even if the contract covers the provision of other services necessary for the execution of such activities. Public service contracts, in particular in the sphere of property management services, may, in certain circumstances, include works. However, in so far as such works are incidental to the principal subject-matter of the contract, and are a possible consequence thereof or a complement thereto, the fact that such works are included in the contract does not justify the qualification of the contract as a public works contract.'

10 Article 1 of Directive 2004/18 provides:

'1. For the purposes of this Directive, the definitions set out in paragraphs 2 to 15 shall apply.

2 (a) "Public contracts" are contracts for pecuniary interest concluded in writing between one or more economic operators and one or more contracting authorities and having as their object the execution of works, the supply of products or the provision of services within the meaning of this Directive.

(b) "Public works contracts" are public contracts having as their object either the execution, or both the design and execution, of works related to one of the activities within the meaning of Annex I or a work, or the realisation, by whatever means, of a work corresponding to the requirements specified by the contracting authority. A "work" means the outcome of building or civil

engineering works taken as a whole which is sufficient of itself to fulfil an economic or technical function.

…

(d) "Public service contracts" are public contracts other than public works or supply contracts having as their object the provision of services referred to in Annex II.

…

3. "Public works concession" is a contract of the same type as a public works contract except for the fact that the consideration for the works to be carried out consists either solely in the right to exploit the work or in this right together with payment.

4. "Service concession" is a contract of the same type as a public service contract except for the fact that the consideration for the provision of services consists either solely in the right to exploit the service or in this right together with payment.

…'

11 Article 2 of Directive 2004/18 requires contracting authorities to observe the principles of non-discrimination, equal treatment and transparency.

12 Article 6 of Directive 2004/18 prohibits the disclosure of information which economic operators have forwarded to contracting authorities confidentially.

13 Article 17 of Directive 2004/18 provides that '[w]ithout prejudice to the application of Article 3, this Directive shall not apply to service concessions as defined in Article 1(4)'.

14 Article 24 of Directive 2004/18 lays down the rules applicable to the submission of variants by tenderers where the criterion for award is that of the most economically advantageous tender.

15 Article 53 of Directive 2004/18 sets out the contract award criteria and requires the contracting authority to specify, where the award is made to the most economically advantageous tender, the relative weighting which it gives to each of the criteria chosen.

16 Category No 12 in Annex IIA to Directive 2004/18 mentions, among others, '[a]rchitectural services; engineering services and integrated engineering services; urban planning and landscape architectural services; related scientific and technical consulting services; technical testing and analysis services'.

Legislation of the Autonomous Community of Valencia

IAPs

17 The LRAU and the LUV provide for two regimes for implementing urban planning, namely isolated action, in cases of single parcels of land involving their being built upon, and integrated action, which covers joint development of two or more parcels in accordance with a single programme converting those parcels into plots for construction (Article 6(2) and (3) of the LRAU and Articles 14 and 15 of the LUV).

18 The IAP is the planning instrument which governs the implementation of integrated action (Article 12G of the LRAU and Article 39(a) of the LUV). Its purpose is to determine the scope of the integrated action and the works which are to be executed, to fix the time-limits applicable, to establish the technical and financial conditions governing its management, to regulate the undertakings and obligations of the agent of urban development ('the developer') by defining its relations with the owners concerned and with the administration and to determine the guarantees to ensure the observance of those obligations and the penalties applicable (Article 29(2) of the LRAU and Article 117(1) of the LUV).

19 In particular, IAPs must make specific provision to attain the following necessary objectives: urban development of all the plots; connection of the plots concerned to and their integration with the existing infrastructure, energy, communications and public services networks; obtaining, for the administration free of charge, plots for public services; obtaining, for the administration free of charge, the legally applicable right to build for the public land bank; management of the legal conversion of the plots concerned and the equitable division of the costs and benefits between the parties concerned (Article 30 of the LRAU and Article 124 of the LUV).

20 Although the implementation of isolated action may be public or private, that of IAPs is always public, and the administration is entitled to decide whether their management will be direct or indirect (Article 7(1) and (2) of the LRAU and Article 117(4) of the LUV). Management is direct when all the works and investments are financed by public funds and managed by the administration, its bodies, entities, or public undertakings (Article 7(2) of the LRAU and Article 117(4) of the LUV) without the right to receive any commercial profit (Article 128(4) of the LUV). On the other hand, in cases of indirect management, the administration delegates the status of developer to an individual, whether or not he is the owner of the plots, selected by a competitive public tendering procedure (Article 7(2) of the LRAU and Article 117(4) of the LUV).

Indirect management

21 Within the framework of indirect management of IAPs, the developer is the public agent responsible for the development and for the execution of the urban planning activities designated by the IAP, which include, in any event, the preparation of the technical documents established in the bases, the proposal for and management of the corresponding land consolidation project, as well as the recourse to the building contractor responsible for the implementation of the planning project, in the cases and according to the conditions laid down by law. The developer will have to finance the cost of the investments, works, installations, and compensation necessary for the execution of the programme, which will have to be guaranteed in and according to sufficient proportions, the cost of which can be passed on to the ownership of the building plots arising therefrom either by compensation in developed plots or by payment in cash by the owners of the developed plots resulting from the integrated action (Article 29(9A) of the LRAU and Articles 19 and 162(1) of the LUV). Those costs include, in particular, the costs of the urban development works and the developer's commercial profit, which is limited, under the LUV, to 10% of the development costs (Article 67(1) of the LRAU and Article 168 of the LUV).

22 The owners concerned by integrated action may cooperate in it, by contributing their undeveloped plots and receiving, in exchange, developed plots. They may, in particular, either participate proportionally in the development costs by granting a part of their plots to the developer, or by paying in cash, as consideration to the developer, their proportion of the development costs (Article 29(9B) of the LRAU and Article 162(2) of the LUV).

23 Owners who expressly decline to cooperate may seek expropriation on the basis of the original value of the plots concerned (Article 29(9C) of the LRAU and Article 162(3) of the LUV).

24 The administration exercises, of its own motion or at the developer's request, its public rights and powers such as expropriation or compulsory consolidation where they are necessary to implement an IAP (Articles 29(10), 66 and 68 of the LRAU and Articles 162(3) and 169 of the LUV).

The award and approval procedure

— The LRAU

25 Under Article 44 of the LRAU, the procedure may be commenced on the initiative of a public body or of an individual, whether or not he owns the plots to be developed.

26 Under Article 45(1) of the LRAU, any individual may request the administration to make public a technical tender for an IAP which must contain a copy of the development certificate issued by the competent administration or of its request covering the minimum conditions for connection and integration of the proposal for integrated action, as well as the preliminary draft of the development with descriptions of the development works to be carried out.

27 Under the terms of Article 45(2) of the LRAU, the administration may either reject that request or submit it to a public inquiry, if appropriate with observations or alternatives.

28 Article 46 of the LRAU provides that publication of the proposal for an IAP drawn up by an individual or, in the case of a public initiative, by the competent administration, is to be in a general information journal and in the Official Journal of the Autonomous Community of Valencia. In accordance with the same provision, during the public information phase, observations or technical tenders are accepted. At the conclusion of the public information phase, tenderers may submit legal and financial tenders. Observations and technical tenders are to be submitted, in open envelopes, within a period of 20 days from the publication of the proposal for the IAP and legal and financial tenders, in closed envelopes, within five days following the expiry of the previous period, which may be extended by 20 days.

29 Article 46(2) of the LRAU mentions the documents which are to form part, first, of the technical tender, namely, in particular, the description of the development works, and, second, of the legal and financial tender including the detailed rules concerning relations between the developer and the owners, any agreements already existing with the latter, an estimate, even if preliminary and approximate, of the costs of the development works and the developer's consideration with reference to correction indices in relation to the estimate of the costs of the development works.

30 Under Article 47 of the LRAU, the administration may either reject all the tenders and, if appropriate, decide to manage the IAP directly, or approve the IAP defining its content by the selection of a technical tender and a legal and financial tender from those submitted, making the partial amendments to them which it considers expedient. Concurrently, the administration may award the IAP to the tenderer of a legal and financial tender relating to the most appropriate technical tender. That award is to be made according to the award criteria which are mentioned in it, including the guarantees or possibilities of collaboration of the owners concerned to facilitate or ensure the implementation of the integrated action.

31 The administration and the developer are to execute an urban development agreement containing, in accordance with Article 32(c) of the LRAU, their respective undertakings, the time-limits, the guarantees provided by the developer, as well as the penalties laid down for the developer's breach of its obligations.

32 Article 48 of the LRAU provides for a simplified procedure on the initiative of an individual.

33 Under Article 67(3) of the LRAU, the costs initially provided for in the IAP may be re-evaluated during the approval of the development project for objective reasons which were not foreseeable by the developer.

— The LUV

34 Under Article 130 of the LUV, the procedure for the award and approval of an IAP may be commenced on the initiative of a public body or of an individual, whether or not they are owners of the plots.

35 Under Article 130(2) of the LUV, individuals may accompany their request with a planning document specifying the detailed or structural arrangement of the development which is proposed as well as documents referred to in Article 131(2)(a) to (e) of the LUV.

36 Under Article 130(3) of the LUV, the administration may reject the individual's request, commence the procedure for indirect management, or decide to have recourse to direct management.

37 Under the terms of Article 130(5) of the LUV, the administration's failure to respond is taken to be agreement, if the tender submitted by the first tenderer involves execution of the structural planning directives in force and the administration does not reply to the request within a period of three months.

38 Under Article 131(2) of the LUV, the decision to commence the procedure for indirect management of an IAP also implies approval of the particular specifications governing the procedure for the award of the IAP. They must state whether variants are accepted, define the aspects for which tenderers may propose variants and lay down the minimum conditions which they must fulfil.

39 According to the terms of Article 132(2) and (4) of the LUV, the public competition for the award of an IAP must be published, at least, in the *Official Journal of the European Union* and in the Official Journal of the Autonomous Community of Valencia, irrespective of the IAP's estimated value.

40 Under Article 133 of the LUV, tenderers' tenders are to contain the documents relating to the capacities required, to the technical tender and to the legal and financial tender.

41 The criteria for evaluating the technical and professional capacity of tenderers are set out in Article 123 of the LUV.

42 The content of the technical tender is specified in Article 126 of the LUV.

43 The content of the legal and financial tender is, for its part, specified in Article 127 of the LUV, under which it must contain terms governing relations between the developer and the owners concerned and, in particular, the detailed rules concerning the consideration for it as well as sufficient information to enable the owners to ascertain the financial consequences which the tender in question involves for them. The financial and legal tender must establish, in particular, the expected development costs, the developer's profit and the exchange coefficient applicable in case of payment in plots.

44 Article 135(3) of the LUV sets out the criteria for the award of the IAP which will have to be evaluated as regards the technical tender.

45 Article 135(4) of the LUV sets out the criteria for the award of the IAP which will have to be evaluated as regards the legal and financial tender, particularly the amount of the development costs as well as the lowest proportion of building plots or rights to build made available to the developer by compulsory consolidation or the highest proportion of its own or its associates' plots which must be used to comply with the special obligations to build arising from approval of the IAP.

46 Article 137 of the LUV contains provisions applicable to the award and approval of the IAP. Under Article 137(5) of the LUV, if the IAP amends structural planning, approval by the administration is conditional on the final authorisation of the regional government.

47 Article 138 of the LUV requires the contract with the developer to be executed in the form of an administrative document within a month following the date of the award of the contract. That article lists the matters which must be included in the contract.

48 Under Article 143(4)(d) of the LUV, in the event of termination of the contract with the developer, the administration may request tenderers who submitted legal and financial tenders relating to the technical tender which was accepted to pursue the execution of the programme, and, alternatively, launch a call for tenders on the basis of the technical tender accepted at the conclusion of the first call for tenders.

49 Under Article 155(6) and (7) of the LUV, the administration may make amendments to the development project contained in the tender accepted on the award of an IAP where the changes thus made represent an increase not exceeding 20 % of the cost of the development works.

50 According to Article 168(3) of the LUV, the maximum amount of the development costs may not be increased unless they are re-evaluated, which may not involve an increase of the part of the development costs corresponding to the developer's profit.

51 As regards the execution of the development works, the LUV requires that it be entrusted to a building contractor selected by the developer within the framework of a public competition, in accordance with the rules for the award of public contracts. Neither the developer concerned nor undertakings linked to it may participate in that public competition.

52 Under the first transitional provision of the LUV, IAPs commenced before its entry into force, which was on 1 February 2006, are governed by the LRAU provided that, before that date, they were the object of municipal approval or the maximum period for making an express decision on that approval had expired.

The pre-litigation procedure and the Commission's action

53 Following complaints, the Commission, by a letter of formal notice of 21 March 2005, informed the Kingdom of Spain that several provisions of the LRAU relating to the award of IAPs were, in its view, contrary to Directives 93/37 and 92/50. The Kingdom of Spain replied to that letter of formal notice by a letter of 31 March 2005, claiming that the award of IAPs did not constitute a contract governed by those directives. It referred, also, to the draft adoption of the LUV, which also gave rise to contacts and an exchange of letters between it and the Commission.

54 Since it was not satisfied by the Kingdom of Spain's explanations and since it considered the award of IAPs under the LRAU constituted a failure to fulfil its obligation under those directives, the Commission, on 15 December 2005, issued a reasoned opinion with which that Member State had to comply within a period of three weeks expiring on 6 January 2006.

55 In its reply dated 26 January 2006 to the reasoned opinion, the Kingdom of Spain referred to the adoption of the LUV repealing the LRAU, the entry into force of the LUV being envisaged for 1 February 2006. Following exchanges with the Commission, that Member State, by letter of 17 March 2006, made some additional observations.

56 In the light of the persistence of the alleged infringement and the expiry of the time-limit laid down for the transposition of Directive 2004/18, the Commission, on 10 April 2006, sent the Kingdom of Spain an additional letter of formal notice to which the latter replied by letter of 7 July 2006.

57 Since it considered, first, that the LUV and, second, the award of IAPs under the LRAU between 21 March 2005 and 31 January 2006 constituted breach, in particular, of Directive 2004/18, the Commission issued an additional reasoned opinion dated 12 October 2006.

58 Since the Kingdom of Spain maintained its position in its reply, dated 11 January 2007, to the additional reasoned opinion, the Commission brought the present action, seeking from the Court a declaration that the Kingdom of Spain has:

— by awarding IAPs pursuant to the LRAU, failed to fulfil its obligations under Articles 1, 6(6), 11, 12 and 24 to 29 of Directive 93/37; and

— by awarding IAPs pursuant to the LUV, failed to fulfil its obligations under Articles 2, 6, 24, 30, 31(4)(a) and 53 of Directive 2004/18.

The application to reopen the oral procedure

59 By letter dated 22 November 2010, the Commission requested that the oral procedure be reopened, submitting, in essence, that the issue of the competent administration's financial participation, as analysed by the Advocate General in his Opinion, constitutes an essential element of the dispute and requires additional clarification.

60 In that regard, it is appropriate to note that the Court may of its own motion, or on a proposal from the Advocate General, or at the request of the parties, order the reopening of the oral procedure in accordance with Article 61 of the Rules of Procedure if it considers that it lacks sufficient information, or that the case must be dealt with on the basis of an argument which has not been debated between the parties (see, in particular, Case C-42/07 *Liga Portuguesa de Futebol Profissional and Bwin International* [2009] ECR I-7633, paragraph 31 and the case-law cited).

61 However, neither the Statute of the Court of Justice of the European Union nor its Rules of Procedure make provision for the parties to submit observations in response to the Advocate General's Opinion (see *Liga Portuguesa de Futebol Profissional and Bwin International*, paragraph 32).

62 The Court considers, having heard the Advocate General, that it has all the material necessary for it to decide the dispute before it and that the case does not have to be examined in the light of arguments that have not been the subject of discussion before it. Therefore, there is no need to order the reopening of the oral procedure.

The action

Admissibility

63 The Kingdom of Spain raises the partial inadmissibility of the action so far as it concerns breach of Directive 93/37 by the LRAU. In that regard, the Kingdom of Spain considers that the fact that the first reasoned opinion could require that the LRAU be adapted to Directive 93/37 instead of referring to Directive 2004/18, the time-limit

for the transposition of which into domestic law was on the point of expiring, can be criticised.

64 In the Kingdom of Spain's submission, the LRAU ceased to be applied on the entry into force of the LUV and the Commission has not established the approval of a significant number of IAPs under the LRAU during the period prior to the LUV coming into effect. Furthermore, the Kingdom of Spain submits that, where national and Community legislation was repealed, as in this case, more than two years before the bringing of proceedings, there is no longer any point in pursuing the proceedings.

65 In that respect, it is with regard to the legislation in force on 6 January 2006, the date on which the period prescribed in the first reasoned opinion of 15 December 2005 expired, that it must be decided whether the alleged infringement occurred. On that date both the LRAU and Directive 93/37 were in force.

66 As regards the time at which the Commission chose to bring the proceedings against the Kingdom of Spain, it is sufficient to observe that it is for the Commission, in performing the task conferred upon it by Article 211 EC, to ensure that the provisions of the Treaty are applied and verify whether the Member States have acted in accordance with those provisions. If the Commission considers that a Member State has infringed provisions of the Treaty, it is for it to determine whether it is expedient to take action against that State and what provisions the State has infringed, and to choose the time at which it will initiate infringement proceedings; the considerations which determine its choice of time cannot affect the admissibility of its action (see Case C-35/96 *Commission* v *Italy* [1998] ECR I-3851, paragraph 27; Case C-33/04 *Commission* v *Luxembourg* [2005] ECR I-10629, paragraph 66; and Case C-531/06 *Commission* v *Italy* [2009] ECR I-4103, paragraph 23).

67 In the light of the foregoing, the plea of inadmissibility submitted by the Kingdom of Spain must be rejected.

Substance

Arguments of the parties

68 The Commission submits that several aspects of the procedure for awarding and approving IAPs in indirect management under the LRAU and the LUV are, respectively, contrary to Articles 1, 6(6), 11, 12 and 24 to 29 of Directive 93/37 and to Articles 2, 6, 24, 30, 31(4)(a) and 53 of Directive 2004/18.

69 The Commission submits that the relationship between the administration and the developer constitutes, under Directives 93/37 and 2004/18, a public contract the principal object of which, as is clear from the description of integrated action, is the execution of public infrastructure and urban development works.

70 The fact that the physical execution of those works must, within the framework of the LUV, be entrusted by the developer to a building contractor does not in the least alter the classification of the contract as a works contract since it is the developer which undertakes to the administration to carry them out.

71 As regards the pecuniary interest of the award and the approval of IAPs, the Commission observes that the LRAU and the LUV put in place a system in which there

is a bilateral contract between the developer and the local authority under which the consideration moving to the local authority relates directly to the execution of public works and the supply of certain connected services. In addition, the developer receives from the landowners a sum of money or its equivalent in plots.

72 The Commission submits that the pecuniary interest of the contract finds expression in the administration's decision to approve the IAP and to select the developer as well as in its exercise of its public rights and powers to guarantee compliance with the provisions of the approved IAP.

73 The Commission adds that, if the administration decides to manage the IAP directly, it must carry out the projects itself and expend the sums necessary for the works. In that case, it incurs costs which it then passes on to the owners whereas, if it opts for indirect management, the administration expends nothing, but nor does it receive anything. The Commission concludes that, by opting for indirect management, the administration ceases entirely to receive certain monies, and the fact that it also does not bear certain expenses in no way qualifies that statement.

74 Lastly, the Commission submits, as is clear particularly from Case C-399/98 *Ordine degli Architetti and Others* [2001] ECR I-5409, paragraphs 77 and 84, and Case C-220/05 *Auroux and Others* [2007] ECR I-385, paragraphs 45 and 57, that payments by third parties are indicative of pecuniary interest.

75 In its reply, the Commission observes that the Tribunal Supremo (Supreme Court, Spain) has made an interpretation which is diametrically opposed to that maintained in this case by the Kingdom of Spain and which essentially mirrors the Commission's analysis.

76 The Kingdom of Spain submits, for its part, that the relationship between the administration and the developer constitutes, having regard to the method of remunerating the developer, not a public works contract but a public service concession which does not come within the scope of Directives 93/37 and 2004/18, and that, therefore, the award of IAPs is subject to the principles of primary European Union law.

77 The Kingdom of Spain submits that the Commission is confusing IAPs with planning projects, when the execution of public works does not constitute the exclusive, or even fundamental, purpose of IAPs. Approval of an IAP, by means of an award, also involves the financing and management of land consolidation as well as the assignment of development works to service providers. The developer is therefore also financially responsible for the execution of the works and is liable to carry out the necessary administrative procedures in order to guarantee that the operations are free of charge for the administration and that the land-related costs and profits from them are fairly divided between the owners.

78 The Kingdom of Spain also contends that there is no pecuniary interest bearing on the administration since the developer's remuneration is provided exclusively by the owners.

79 First of all, the owner's obligation to finance the costs of planning and, therefore, to remunerate the developer does not arise from a unilateral decision of the administration, but from its voluntary decision to participate in the land consolidation and thus to obtain the benefit of new plots for building.

80 Next, the LRAU and the LUV do not provide for any guarantee of payment from public funds from which a contract for consideration arises between the administration and the developer, which is responsible to the administration even if the building contractor or the owners do not comply with their respective obligations.

81 Finally, the choice of indirect management in place of direct management does not involve consideration, any more than the exercise by the administration of its public rights and powers for the purposes of land consolidation or expropriation.

82 In the light of those considerations, the Kingdom of Spain contends that the developer must be regarded not as a 'successful tenderer' for a contract in the strict sense, but as a 'concessionaire', since the developer's remuneration depends on the exploitation on the market of building plots and not on a fixed price guaranteed by the administration. In particular, it assumes the characteristics of a service concessionaire, since the financial management of the land consolidation is the most relevant function from the economic point of view.

83 The Kingdom of Spain contends, also, that the Commission's argument is contrary to the effectiveness of Directives 93/37 and 2004/18.

Findings of the Court

84 As a preliminary point, it should be noted that the present action relates only to the award of contracts for urban development under laws adopted successively by the Autonomous Community of Valencia on the basis of its regional powers in respect of urban development, land use and town and country planning.

85 More particularly, the Commission criticises the Kingdom of Spain for awarding IAPs, that is to say integrated action programmes for the joint urban development of several parcels in accordance with a single programme converting those parcels into building plots, pursuant, first, to the LRAU and, second, to the LUV, in breach of Directives 93/37 and 2004/18 respectively.

86 The Commission's complaints concern only the procedure for approving IAPs in indirect management, which, under the legislation in question, involves the delegation, by the competent contracting authority to an individual, of the status of developer, selected according to a competitive public procedure whether or not the developer owns the plots concerned.

87 In that regard, the Commission submits that the urban development contracts in question must be classified as 'public works contracts' and must on that basis comply with the requirements laid down by Directive 93/37 and, later, Directive 2004/18. That follows, as regards the complaints in respect of the LRAU, from the legal basis of the action limited to breach of Directive 93/37 alone and, as regards the complaints in respect of the LUV, from the additional reasoned opinion, as the Commission notes in its application and as it confirmed at the hearing.

88 As regards the concept of 'public works contracts' within the meaning of Article 1(a) of Directive 93/37 and of Article 1(2)(b) of Directive 2004/18, it must be observed that it covers contracts for pecuniary interest, concluded in writing between one or more economic operators and one or more contracting authorities and having as their object either the execution, or both the design and execution, of works related to one of the activities referred to in Annex II to Directive 93/37 or Annex I to Directive 2004/18 or of a work defined in Article 1(c) of Directive 93/37 or Article 1(2)(b) of Directive 2004/18, or the execution, by whatever means, of a work corresponding to the requirements specified by the contracting authority.

89 In addition, it is clear from the 16th recital in the preamble to Directive 92/50 and from recital 10 in the preamble to Directive 2004/18, in conjunction with Article 1(a) of Directive 93/37 and Article 1(2)(b) of Directive 2004/18 respectively, that a contract can be deemed to be a 'public works contract' only if its subject-matter corresponds to the definition given in the preceding paragraph and that works which are

incidental to, and not the subject-matter of, the contract do not justify the contract's qualification as a public works contract.

90 It is clear, moreover, from the case-law of the Court that, where a contract contains elements relating both to a public works contract and another type of contract, it is the main object of the contract which determines which body of European Union rules on public contracts is to be applied in principle (see, to that effect, *Auroux and Others*, paragraph 37).

91 That determination must be made in the light of the essential obligations which predominate and which, as such, characterise the transaction, as opposed to those which are only ancillary or supplementary in nature and are required by the very object of the contract (Case C-412/04 *Commission* v *Italy* [2008] ECR I-619, paragraph 49).

92 In this case, it must be observed that the Commission confines itself to putting forward the argument that the urban development contracts at issue must be classified as 'public works contracts' on the ground that the main object of IAPs is, for the purposes of Articles 1(c) of Directive 93/37 and 1(2)(b) of Directive 2004/18, a 'work' of urban development of two or more parcels leading to the construction of highway access by a paved road, the distribution of drinking water and electricity, the evacuation of waste water from gutters and public lighting. In that regard, the Commission observes that the services provided by the developer, such as the preparation of technical documents, the drawing-up and management of the development project or even, under the LUV, the selection of the contractor which will carry out the works, are instrumental and ancillary.

93 It is also appropriate to observe that the Kingdom of Spain rejects the Commission's assessment that IAPs should be classified as a 'work', in the sense of Directives 93/37 and 2004/18, and contends that the execution of such a work does not constitute its

exclusive or even fundamental purpose. To that effect, that Member State contends that the developer is also financially liable for the execution of the works and is likewise responsible for taking the necessary steps to guarantee that the operations are free of charge for the administration, and that the costs relating to them and the corresponding land-related profits are fairly divided between the owners of the building plots who finance them. In addition, that Member State contends that the contracts at issue must be classified as 'service concessions', within the meaning of Article 1(4) of Directive 2004/18.

94 According to settled case-law, in proceedings under Article 226 EC for failure to fulfil obligations, it is for the Commission to prove that failure. It is the Commission, indeed, which must place before the Court all the information needed to enable the Court to establish that failure, and in so doing the Commission may not rely on any presumptions (Case C-490/09 *Commission* v *Luxembourg* [2011] ECR I-247, paragraph 49 and the case-law cited).

95 In that regard and as regards the nature of the activities for which the developer is responsible, notwithstanding the Kingdom of Spain's analysis, the Commission has not sought to substantiate its own allegations or to refute those of the defendant Member State by detailed examination of that information.

96 Indeed, it has not been established that the works consisting of the connection and integration of the plots concerned to the existing infrastructure, energy, communications and public services networks constitute the main object of the contract concluded between the community and the developer within the framework of an IAP in indirect management. In fact, the execution of the IAP by the developer includes, as is clear particularly from paragraphs 21 and 23 of the present judgment, activities which cannot be classified as 'works', within the meaning of the directives relied on by the Commission in its application, namely the preparation of the development plan, the proposal and management of the corresponding land consolidation project, obtaining for the administration free of charge plots for public ownership and for

the community's public land bank, management of the legal conversion of the plots concerned or even the equitable division of the costs and profits between the parties concerned as well as the transactions for financing and guaranteeing the cost of the investments, works, installations and compensation necessary for the execution of the IAP. Such is also the case where the developer, as stated in Article 119(1) of the LUV, must organise the public competition for the appointment of the building contractor to which the execution of the urban development works is to be entrusted.

97 In addition, some of the activities which IAPs involve, under both the LRAU and the LUV as stated in the preceding paragraph, seem to correspond, by their nature, to the activities referred to in Category No 12 in Annexes IA to Directive 92/50 and IIA to Directive 2004/18, relating to the services referred to, respectively, in Article 1(a) of Directive 92/50 and Article 1(2)(d) of Directive 2004/18.

98 It follows that the Commission has not proved that the main object of the contract concluded between the local authority and the developer is a public works contract within the meaning of Directive 93/37 or Directive 2004/18, which is a condition precedent to a declaration of the alleged failure to fulfil obligations.

99 It follows from the foregoing that the Commission's action must be dismissed.

Costs

100 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 Kingdom of Spain has applied for costs and the Commission has been unsuccessful, the Commission must be ordered to pay the costs.

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

1. Dismisses the action;

2. Orders the European Commission to pay the costs.

[Signatures]