JUDGMENT OF THE COURT (Second Chamber)

26 April 2007 *

In Case C-195/04,

ACTION under Article 226 EC for failure to fulfil obligations, brought on 29 April 2004,

Commission of the European Communities, represented by M. Huttunen and K. Wiedner, acting as Agents, with an address for service in Luxembourg,

applicant,

v

Republic of Finland, represented by T. Pynnä and E. Bygglin, acting as Agents, with an address for service in Luxembourg,

defendant,

* Language of the case: Finnish.

supported by:

Kingdom of Denmark, represented by J. Molde, acting as Agent, with an address for service in Luxembourg,

Federal Republic of Germany, represented by A. Tiemann and M. Lumma, acting as Agents,

Kingdom of the Netherlands, represented by H.G. Sevenster and C.M. Wissels and by P. van Ginneken, acting as Agents,

interveners,

THE COURT (Second Chamber),

composed of C.W.A. Timmermans, President of the Chamber, R. Schintgen, P. Kūris, R. Silva de Lapuerta (Rapporteur) and G. Arestis, Judges,

Advocate General: E. Sharpston,
Registrar: B. Fülöp, Administrator,

having regard to the written procedure and further to the hearing on 8 June 2006,

after hearing the Opinion of the Advocate General at the sitting on 18 January 2007,

gives the following

Judgment

1 By its application, the Commission of the European Communities seeks a declaration from the Court that the Republic of Finland has failed to comply with its obligations under Article 28 EC by allowing Senaatti-kiinteistöt (formerly Valtion kiinteistölaitos), the authority responsible for the management of Finnish

government buildings, in the context of a contract for catering equipment, to infringe fundamental rules of the EC Treaty, and in particular the principle of non-discrimination, which implies an obligation of transparency.

Facts of the dispute and the pre-litigation procedure

2 In March 1998, as part of a restricted procedure, Senaatti-kiinteistöt published in the *Official Journal of the European Communities* and in the *Suomen säädöskokoelma* (Official Journal of the Republic of Finland) a call for tenders concerning a public works contract for the renovation and alteration of the premises of the regional administration of Turku ('the initial call for tenders').

3 That contract was divided into lots, the individual value of which ranged from FIM 1 000 000 to FIM 22 000 000. Tenders could be made for one, several or all of the lots. One of those lots concerned the supply and installation of catering equipment for the kitchen of the administration's restaurant.

4 The parties are at odds over the question whether, at that stage of the tendering procedure, a tender was submitted to the contracting authority in respect of that lot. According to the Republic of Finland, just one tender was submitted — by the company Kopal Markkinointi Oy — whereas, according to the Commission, this was not the case.

5 In early 2000, the contracting authority wrote directly to four undertakings, inviting them to tender for the supply and installation of catering equipment.

6 By letter of 14 February 2000, the contracting authority informed the addressees of the earlier letter that it had decided to reject all tenders received because they were too expensive. The Republic of Finland and the Commission disagree as to whether that letter was sent to all those undertakings which, in response to the initial call for tenders, had submitted a bid for the supply and installation of catering equipment.

7 In the letter of 14 February 2000, the contracting authority also states that it has entrusted the company Amica Ravintolat Oy — to which the restaurant of the Turku regional administration was leased — with the purchase of the catering equipment on its behalf up to a maximum amount of FIM 1 050 000 and invites the addressees of the letter to submit their tenders directly to that company.

8 Amica Ravintolat Oy finally bought the equipment in question from Hackman-Metos Oy.

9 Having received a complaint querying the regularity of the procedure followed by Senaatti-kiinteistöt, the Commission gave the Republic of Finland formal notice by letter of 17 July 2002 to submit its observations within two months of receipt of that letter.

10 The Finnish authorities replied to the letter of formal notice by letter of 3 September 2002.

11 On the view that the Republic of Finland had failed to fulfil its obligations under Article 28 EC, the Commission issued a reasoned opinion on 19 December 2002 calling on the Republic of Finland to take the measures necessary to comply with that opinion within two months of its notification.

12 By letter of 12 February 2003, the Finnish authorities disputed the infringement alleged by the Commission, arguing that, in the present case, Article 28 EC had been complied with, as had the principle of non-discrimination and the obligation of transparency, which derive from that provision.

13 Since it was not convinced by the explanations provided by the Finnish Authorities, the Commission decided to bring the present action.

14 By order of the President of the Court of 14 October 2004, the Kingdom of Denmark, the Federal Republic of Germany and the Kingdom of the Netherlands were granted leave to intervene in support of the form of order sought by the Republic of Finland.

Admissibility

15 The Republic of Finland contends that the Commission's application is inadmissible.

16 According to that Member State, the reasoned opinion does not refer to the same objections as those contained in the application. Thus, in the reasoned opinion, the Commission stated that the contracting authority ought to have ensured a sufficient degree of advertising and that the infringement complained of arose from the fact that it was the tenant of the Turku regional administration's restaurant who had concluded the contract for the supply of catering equipment, acting as the authority's agent; in its application, on the other hand, the Commission states that the contracting authority ought to have organised an invitation to tender and that the infringement arises from the fact that the invitation to tender was not successful and that, therefore, the contract in question had not been the subject of a published call for tenders.

17 In that way, the Commission has widened the subject-matter of the action as delimited in the pre-litigation procedure.

18 In this regard, although it is true that the subject-matter of proceedings brought under Article 226 EC is circumscribed by the pre-litigation procedure provided for in that provision and that, consequently, the Commission's reasoned opinion and the application must be based on the same objections, that requirement cannot go so far as to mean that in every case exactly the same wording must be used in both, where the subject-matter of the proceedings has not been extended or altered but

simply narrowed (see, in particular, Case C-229/00 *Commission* v *Finland* [2003] ECR I-5727, paragraphs 44 and 46, Case C-433/03 *Commission* v *Germany* [2005] ECR I-6985, paragraph 28, and Case C-150/04 *Commission* v *Denmark* [2007] ECR I-1169, paragraph 67). Accordingly, in its application the Commission may clarify its initial grounds of objection provided, however, that it does not alter the subject-matter of the dispute (Case C-67/99 *Commission* v *Ireland* [2001] ECR I-5757, paragraph 23, judgment of 12 October 2004 in Case C-328/02 *Commission* v *Greece*, not published in the ECR, paragraph 32, and Case C-494/01 *Commission* v *Ireland* [2005] ECR I-3331, paragraph 38).

19 It should be pointed out, however, that in the present case the Commission has neither extended nor altered nor even narrowed the subject-matter of the action, as delimited in the reasoned opinion of 19 December 2002.

20 In fact, not only is it clear from the wording of the heads of claim of the reasoned opinion and of the Commission's application, which are framed in almost exactly the same terms, that those documents are based on the same objections, but it is also apparent that, by asserting in its application that the contracting authority should have organised an invitation for tender, the Commission merely clarified the objection alleged initially in its reasoned opinion, that is to say, that the contract for the supply of catering equipment for the regional administration of Turku should have been sufficiently advertised.

21 However, the Court may of its own motion examine whether the conditions laid down in Article 226 EC for bringing an action for failure to fulfil obligations are

satisfied (Case C-362/90 *Commission* v *Italy* [1992] ECR I-2353, paragraph 8, Case C-439/99 *Commission* v *Italy* [2002] ECR I-305, paragraph 8, and Case C-98/04 *Commission* v *United Kingdom* [2006] ECR I-4003, paragraph 16).

22 It is clear from Article 38(1)(c) of the Rules of Procedure of the Court of Justice, and from the case-law relating to that provision, that an application must state the subject-matter of the proceedings and a summary of the pleas in law on which the application is based, and that that statement must be sufficiently clear and precise to enable the defendant to prepare its defence and the Court to rule on the application. It is therefore necessary for the essential points of law and of fact on which a case is based to be indicated coherently and intelligibly in the application itself (Case C-178/00 *Italy* v *Commission* [2003] ECR I-303, paragraph 6, judgment of 14 October 2004 in Case C-55/03 *Commission* v *Spain*, not published in the ECR, paragraph 23, and Case C-199/03 *Ireland* v *Commission* [2005] ECR I-8027, paragraph 50) and for the heads of claim to be set out unambiguously so that the Court does not rule *ultra petita* or indeed fail to rule on an objection (Case C-296/01 *Commission* v *France* [2003] ECR I-13909, paragraph 121, and Case C-255/04 *Commission* v *France* [2006] ECR I-5251, paragraph 24).

23 In the present case, however, the Commission's application does not fulfil those requirements.

24 By its action, the Commission seeks a declaration that the Republic of Finland failed to comply with its obligations under Article 28 EC on the ground that, in the context

of a contract for catering equipment, Senaatti-kiinteistöt infringed fundamental Treaty rules and in particular the principle of non-discrimination, which implies an obligation of transparency.

25 As the Advocate General points out in point 45 of her Opinion, the heads of claim as formulated in the application are ambiguous and do not enable the Court to identify clearly and precisely the misconduct which the Commission imputes to the Republic of Finland, since it brackets together Article 28 EC, fundamental Treaty provisions, the principle of non-discrimination and the obligation of transparency.

26 In addition, even if the Commission's action were intended to obtain a declaration of infringement of Article 28 EC, neither the heads of claim of the application nor the submissions made in the body of the application identify with clarity and precision which measure is alleged in the present case to constitute a quantitative restriction on imports or a measure having equivalent effect within the meaning of that article.

27 In fact, the Commission merely calls into question the contracting authority's conduct 'in the context of a contract for catering equipment'.

28 Furthermore, at no point in the proceedings was the Commission able to state coherently and precisely the facts which provide the basis for the objections on which it relies in support of its application.

29 Thus, in its application the Commission does not furnish any precise evidence in relation to the first call for tenders, but merely states that 'it was unsuccessful in relation to the acquisition of catering equipment'.

30 In that respect, neither the submissions made in the body of the application nor the Commission's replies to the Court's questions at the hearing enable the Court to establish with certainty whether a tender for the supply and installation of catering equipment was submitted to the contracting authority in the context of the call for tenders.

31 By the same token, in its reply the Commission asserts — without, however, demonstrating the truth of that assertion — that at least one of the undertakings which submitted such a tender was not one of the four undertakings contacted by the contracting authority in 2000, and that the lot relating to the supply and installation of catering equipment which was part of the contract announced in the initial call for tenders did not have the same subject-matter as the contract which gave rise to the contacts made during the same year.

32 In those circumstances, the Court does not have sufficient evidence to enable it to appreciate exactly the scope of the infringement of Community law imputed to the Republic of Finland and thus to determine whether there is a breach of obligations as alleged by the Commission (see, to that effect, *Commission* v *United Kingdom*, cited above, paragraph 18).

33 Consequently, the action must be dismissed as inadmissible.

Costs

34 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 Republic of Finland has applied for costs and the Commission's action is inadmissible, the Commission must be ordered to pay the costs.

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

1. Dismisses the action as inadmissible;

2. Orders the Commission of the European Communities to pay the costs.

[Signatures]