OPINION OF ADVOCATE GENERAL ELMER

delivered on 11 May 1995 *

1. The present case involves the question whether the Federal Republic of Germany breached its obligations under the Treaty by failing to comply by 3 February 1993 with two directives on the award of public supply and public works contracts.

2. The first of those directives is Council Directive 88/295/EEC of 22 March 1988 amending Directive 77/62/EEC relating to the coordination of procedures on the award of public supply contracts and repealing certain provisions of Directive 80/767/EEC [1] (hereafter 'Directive 88/295'). Member States were required under Article 20 of that directive to adopt the measures necessary to comply with it by 1 January 1989 and forthwith to inform the Commission thereof. The directive was provisionally implemented in the Federal Republic of Germany by way of an 'innerstaatliche Verwaltungsvorschrift' (internal administrative circular) by letter of 22 December 1988 from the German Minister for Economic Affairs. The Deutscher Verdingungsausschuß für Leistungen — ausgenommen Bauleistungen — (German Committee for the Award of Supply Contracts other than Building Contracts) also introduced, on the basis of the directive, amendments to the Verdingungsordnung für Leistungen — ausgenommen Bauleistungen — Teil A (Contracting Rules for the Award of Supply Contracts, with the Exception of Building Contracts, Part A) (hereafter 'VOL/A'), and the amended provisions were published by the German Minister for Economic Affairs in the *Bundesanzeiger* (Federal Gazette) on 6 March 1990.

3. The second directive is Council Directive 89/440/EEC of 18 July 1989 amending Directive 71/305/EEC concerning coordination of procedures for the award of public works contracts [2] (hereafter 'Directive 89/440'). Article 3 of this directive required Member States to bring into force the measures necessary to comply with it not later than one year after the date of its notification and forthwith to inform the Commission thereof. The directive was notified to the Member States on 19 July 1989 and the period for implementing the directive therefore expired on 19 July 1990. The Deutscher Verdingungsausschuß für Bauleistungen (German Committee for the Award of Building Contracts) introduced, on the basis of the directive, a revised version of the Verdingungsordnung für Bauleistungen, Teil A (Contracting Rules for the Award of Building Contracts, Part A) (hereafter 'VOB/A'),

* Original language: Danish.

1 — OJ 1988 L 127, p. 1.

2 — OJ 1989 L 210, p. 1.

which was published by the Federal Minister for Regional Policy, Construction and Urban Planning in the *Bundesanzeiger* on 19 July 1990.

4. By letters of formal notice of 27 February 1992, the Commission informed the Federal Republic of Germany of its view that the measures necessary to give effect to these directives had not been adopted in Germany. In the Commission's view, the VOL/A and VOB/A were to be regarded as purely private bodies of rules and the fact that the administrative authorities were required to apply them pursuant to internal administrative instructions did not create any right on the part of individuals to rely on the rules contained therein.

In reasoned opinions of 3 December 1992, the Commission maintained that the directives had not been properly transposed into German law and gave the Federal Republic of Germany two months to introduce the necessary measures.

5. By an action subsequently brought on 3 November 1993, the Commission sought a declaration that the Federal Republic of Germany had failed to fulfil its obligations under the Treaty by not notifying or adopting, within the period prescribed in the reasoned opinions, the measures required to comply with Directive 88/295 and Directive 89/440. The Commission stated at the hearing that the action in this case for a declaration that the Treaty had been infringed related only to the question whether those directives had been implemented in the Federal Republic of Germany by 3 February 1993, the date on which the period set in the reasoned opinions had expired. The question whether any of the rules brought into force by the Federal Republic of Germany on 1 January 1994 correctly transpose the directives is being dealt with separately by the Commission and may later give rise to separate Treaty-infringement proceedings.

6. In support of its contention, the Commission argues that, according to the Court's case-law, Member States are required to transpose directives into national law in such a way that individuals can ascertain the full extent of their rights and, where appropriate, rely on them before national courts. [3] The two directives at issue in this case are designed precisely to make it possible for individual suppliers and undertakers to rely on the rules in the directives relating to the award of contracts as against the public awarding authorities and, if necessary, to pursue a breach of those rules before the national courts.

3 — See, for instance, the judgments in Case 29/84 *Commission* v *Germany* [1985] ECR 1661 and in Case 363/85 *Commission* v *Italy* [1987] ECR 1733.

Transposition by way of internal administrative rules is not sufficient to satisfy those requirements in view of the fact that individuals cannot rely on such rules before national courts. Nor is it sufficient to incorporate the rules of the directives in the VOL/A and VOB/A. Those rules are drawn up by committees consisting of representatives of 'Gebietskörperschaften' (regional authorities), and representatives of business and trade-union groups. Their powers have no statutory basis and the rules which they draw up must be classified as being exclusively private-law procedural rules. The Commission has referred in this connection to the Court's judgment in Case C-361/88 *Commission* v *Germany*, [4] concerning the transposition of Directive 80/779/EEC [5] by way of a general administrative circular entitled 'Technische Anleitung zur Reinhaltung der Luft' ('Technical instructions concerning air purity'), at paragraph 20 of which the Court held that '... the Federal Republic of Germany has not pointed to any national judicial decision explicitly recognizing that that circular, apart from being binding on the administration, has direct effect *vis-à-vis* third parties. It cannot be claimed, therefore, that individuals are in a position to know with certainty the full extent of their rights in order to rely on them, where appropriate, before the national courts or that those whose activities are liable to give rise to nuisances are adequately informed of the extent of their obligations.'

In the Commission's opinion, the complaints procedure set out in Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts [6] (hereafter 'Directive 89/665') supplements the opportunities for bringing breaches of the directives on the award of public contracts before national courts but does not replace them.

7. At the hearing, the Federal Republic of Germany stated its position with regard to the case as follows. It does not deny that it failed to inform the Commission within the time-limits, as it was required to do by the directives. Regarding the transposition of the directives, which the Federal Republic of Germany effected after the expiry of the period set in the reasoned opinions, it is also not denied that internal administrative rules, along with the VOL/A and VOB/A, do not confer rights on individuals which can be relied on before national courts. However, it was not until Directive 89/665 that rules were laid down to govern the procedure for complaints concerning breaches of the directives. It follows from Article 2(8) of that directive that the purpose was to make it possible for Member States to introduce complaints procedures equivalent to judicial review. The Commission's view that it follows from the directives on the award of public contracts that individuals must be in a

4 — [1991] ECR I-2567.

5 — Council Directive 80/779/EEC of 15 July 1980 on air quality limit values and guide values for sulphur dioxide and suspended particulates (OJ 1980 L 229, p. 30).

6 — OJ 1989 L 395, p. 33.

position to bring breaches before national courts is thus at variance with that directive. Furthermore, it follows from the Court's case-law on the direct effect of directives that individuals are able to plead breaches of the rules on the award of contracts contained in the directives as against public authorities, for instance by way of actions for damages.

8. In the course of the proceedings, the parties addressed a number of detailed questions regarding the manner in which the directives were transposed by the VOL/A and VOB/A.

9. I wish to preface my examination of the matter by pointing out that, in its case-law, the Court of Justice has ruled that directives dealing with the award of contracts confer rights on individuals which those individuals can, subject to certain conditions, invoke against public authorities before national courts (see the judgment in Case 31/87 *Beentjes* v *Netherlands* [7] and that in Case 103/88 *Fratelli Costanzo* v *Comune di Milano* [8]).

10. Directive 89/665 is dated 21 December 1989 and is thus subsequent in time to the judgments cited. The Federal Republic of Germany's submissions regarding the import of that directive must therefore be based on the assumption that it was designed to restrict the rights which that case-law conferred on individuals *vis-à-vis* public authorities. However, an examination of the content of and recitals in the preamble to the directive provides no grounds for such an assumption. It appears, on the contrary, that the purpose behind the directive was to reinforce 'the existing arrangements at both national and Community levels ... particularly at a stage when infringements can be corrected'. [9]

11. The third paragraph of Article 189 of the Treaty, which deals with the transposition of directives into domestic law, does not necessarily require that '... [a directive's] provisions be incorporated formally and *verbatim* in express, specific legislation'. Depending on the content of the directive, 'a general legal context may ... be adequate for the purpose, provided that it does indeed guarantee the full application of the directive in a sufficiently clear and precise manner so that, where the directive is intended to create rights for individuals, the persons concerned can ascertain the full extent of their rights and, where appropriate, rely on them before the national courts.' [10]

12. According to the Court's case-law, Member States cannot avoid their obligation under the third paragraph of Article 189 of the Treaty to transpose directives into national law by reference to the Court's

7 — [1988] ECR 4635.
8 — [1989] ECR 1839.

9 — Second recital in the preamble.
10 — Judgment in Case 363/85 *Commission* v *Italy*, cited above in footnote 3, paragraph 7.

case-law under which provisions in directives may, under certain circumstances, be directly relied on by individuals before national courts as against public authorities. [11]

13. It is common ground in this case that the directives covered by the Commission's application had, when the period set by the reasoned opinions expired on 3 February 1993, been transposed in the Federal Republic of Germany solely by way of internal administrative rules and the private-law provisions of the VOL/A and VOB/A. It is also not disputed that these do not provide individuals with rights on which they can rely before national courts.

14. The Commission's submissions regarding infringement of the Treaty must accordingly be upheld.

For present purposes, there is no need to examine the detailed questions regarding the manner in which the directives were transposed by way of the VOL/A and VOB/A.

15. Since it has been unsuccessful, the Federal Republic of Germany should, as requested by the Commission in the forms of order which it seeks, be ordered to pay the costs of the proceedings.

Conclusion

16. In the light of the foregoing, I propose that the Court should rule as follows:

(1) By failing to adopt within the prescribed period the measures necessary to comply with Council Directive 89/440/EEC of 18 July 1989 amending Directive 71/305/EEC concerning coordination of procedures for the award of public works contracts and with Council Directive 88/295/EEC of 22 March 1988 amending Directive 77/62/EEC relating to the coordination of proce-

11 — See the judgment in Case 102/79 *Commission* v *Belgium* [1980] ECR 1473.

dures on the award of public supply contracts and repealing certain provisions of Directive 80/767/EEC, the Federal Republic of Germany has failed to fulfil its obligations under the Treaty;

(2) The Federal Republic of Germany is ordered to pay the costs of the proceedings.