JUDGMENT OF THE COURT (Fifth Chamber)
2 May 1996 *

In Case C-253/95,

Commission of the European Communities, represented by Claudia Schmidt, of its Legal Service, acting as Agent, with an address for service in Luxembourg at the office of Carlos Gómez de la Cruz, of its Legal Service, Wagner Centre, Kirchberg,

applicant,

v

Federal Republic of Germany, represented by Ernst Röder, Ministerialrat at the Federal Ministry of Economic Affairs, and Bernd Kloke, Oberregierungsrat at the same ministry, acting as Agents, D-53107 Bonn,

defendant,

APPLICATION for a declaration that, by failing to adopt the laws, regulations and administrative provisions needed in order to comply with 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) and, in the alternative, by failing to inform the Commission forthwith of the measures taken, the Federal Republic of Germany has failed to fulfil its obligations under the third paragraph of Article 189 of the EC Treaty in conjunction with Article 44(1) of that directive,

* Language of the case: German.

THE COURT (Fifth Chamber),

composed of: D. A. O. Edward, President of the Chamber, J.-P. Puissochet, P. Jann (Rapporteur), L. Sevón and M. Wathelet, Judges,

Advocate General: A. La Pergola,
Registrar: R. Grass,

having regard to the report of the Judge-Rapporteur,

after hearing the Opinion of the Advocate General at the sitting on 14 March 1996,

gives the following

Judgment

1 By application lodged at the Court Registry on 20 July 1995, the Commission of the European Communities brought an action under Article 169 of the EC Treaty for a declaration that, by failing to adopt the laws, regulations and administrative provisions needed in order to comply with 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) and, in the alternative, by failing to inform the Commission forthwith of the measures taken, the Federal Republic of Germany has failed to fulfil its obligations under the third paragraph of Article 189 of the EC Treaty in conjunction with Article 44(1) of that directive.

2 Under the first paragraph of Article 44(1) of the directive, Member States were to bring into force the laws, regulations and administrative provisions needed in order to comply with the directive before 1 July 1993 and to inform the Commission thereof forthwith.

3 Since it had not been notified of the provisions adopted by the Federal Republic of Germany in order to comply with the directive, the Commission gave the German Government formal notice on 9 August 1993 to submit its observations within two months.

4 On 5 November 1993 the German Government informed the Commission that work was in progress to transpose the directive into national law and attached to its reply the draft of the second Law amending the Haushaltsgrundsätzegesetz (Framework Law on the budget). On 27 December 1993 the Commission was informed that the Law had been adopted on 26 November 1993. That Law, which, according to the German Government, was intended to transpose all the directives in the field of public contracts into national law, was to enter into force on 1 January 1994.

5 On 7 February 1994 the German Government also sent to the Commission two draft Regulations on the application of the framework law on the budget.

6 Finally, on 7 April 1994, the Federal Republic of Germany sent to the Commission at its request the definitive version of the Verordnung über die Vergabebestimmungen für öffentliche Aufträge (Regulation on the award of public contracts) and the Verordnung über das Nachprüfungsverfahren für öffentliche Aufträge (Regulation on verification of public contracts). Those two regulations entered into force on 1 March 1994.

7 Since examination of those provisions showed that the measures needed in order to ensure the application of the directive to public service contracts had not been

taken, the Commission sent the German Government a reasoned opinion on 4 August 1994 calling upon it to adopt the requisite measures in order to comply with that opinion within two months.

8 By letter of 29 September 1994 the German Government stated that the Regulation on the award of public contracts, adopted on the basis of the second Law amending the framework law on the budget, which was intended to transpose all the European Community directives in the field of the award of public contracts into national law, entered into force on 1 March 1994 in respect of supply and works contracts and that the legislative procedure intended to extend it to service contracts was in hand. The German Government further undertook to send to the Commission the amended regulation immediately after its adoption.

9 Since it received no further information, the Commission brought the present action.

10 The German Government does not deny the infringement. It submits, however, that, immediately after the expiry of the time-limit for transposition of the directive into national law, the Federal Ministry of Economic Affairs indicated to the relevant contracting authorities that, as from 1 July 1993, the directive was directly applicable to the award of service contracts.

11 The German Government further submits that the work aimed at bringing about the legislative changes needed in order to transpose the directive into national law is in progress. In this regard it refers to the draft amendment to the Verdingungsordnung für Leistungen (Rules applicable to the award of supply contracts) and to the draft rules designed to replace the Verdingungsordnung für die Vergabe freiberuflicher Leistungen (Rules applicable to the award of contracts concerning the provision of services by the liberal professions). Likewise, a draft amendment to the Regulation on the award of public contracts which renders both sets of rules legally binding is about to be submitted to the Federal Government. The *Länder*, however, have not yet approved it.

12 The first point to note is that, according to the settled case-law of the Court, a Member State may not plead provisions, practices or circumstances existing in its internal legal system in order to justify a failure to comply with the obligations and time-limits laid down in a directive (see, in particular, Case C-259/94 *Commission* v *Greece* [1995] ECR I-1947, paragraph 5).

13 Secondly, the effect of the third paragraph of Article 189 of the Treaty is that Community directives must be implemented by appropriate implementing measures taken by the Member States. Only in specific circumstances, in particular where a Member State has failed to take the implementing measures required or has adopted measures which do not conform to a directive, has the Court recognized the right of persons affected thereby to rely in law on a directive as against a defaulting Member State. This minimum guarantee, arising from the binding nature of the obligation imposed on the Member States by the effect of directives under the third paragraph of Article 189, cannot justify a Member State absolving itself from taking in due time implementing measures sufficient to meet the purpose of each directive (see, in particular, Case C-433/93 *Commission* v *Germany* [1995] ECR I-2303, paragraph 24). The German Government's argument based on the direct effect of the directive cannot therefore be accepted either.

14 Since the directive has not been transposed into national law within the prescribed period, the Commission's action in that respect is well founded.

15 It must therefore be held that, by failing to adopt, within the prescribed period, the laws, regulations and administrative provisions needed to comply with the directive, the Federal Republic of Germany has failed to fulfil its obligations under Article 44(1) thereof.

Costs

16 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. The Commission has applied for costs and, since the Federal Republic of Germany has been unsuccessful in its defence, it must be ordered to pay the costs.

On those grounds,

THE COURT (Fifth Chamber)

hereby:

1. **Declares that, by failing to adopt, within the prescribed period, the laws, regulations and administrative provisions needed in order to comply with Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts, the Federal Republic of Germany has failed to fulfil its obligations under Article 44(1) of that directive;**

2. **Orders the Federal Republic of Germany to pay the costs.**

Edward Puissochet Jann

Sevón Wathelet

Delivered in open court in Luxembourg on 2 May 1996.

R. Grass D. A. O. Edward

Registrar President of the Fifth Chamber