Reports of Cases

JUDGMENT OF THE COURT (Second Chamber)

11 July 2013 *

(Failure of a Member State to fulfil obligations — Directive 2004/18/EC — Scope ratione temporis — Public works concession — Sale of land by a public body — Construction project established by that body for the redevelopment of public spaces)

In Case C-576/10,

ACTION under Article 258 TFEU for failure to fulfil obligations, brought on 9 December 2010,

European Commission, represented by M. van Beek, A. Tokár and C. Zadra acting as Agents, with an address for service in Luxembourg,

applicant,

v

Kingdom of the Netherlands, represented by C. Wissels and J. Langer, acting as Agents,

defendant,

supported by

Federal Republic of Germany, represented by T. Henze, J. Möller, and A. Wiedmann, acting as Agents,

intervener,

THE COURT (Second Chamber),

composed of R. Silva de Lapuerta, President of the Chamber, G. Arestis, J.-C. Bonichot, A. Arabadjiev and J.L. da Cruz Vilaça (Rapporteur), Judges,

Advocate General: M. Wathelet,

Registrar: C. Strömholm, Administrator,

having regard to the written procedure and further to the hearing on 31 January 2013,

after hearing the Opinion of the Advocate General at the sitting on 11 April 2013

gives the following

* Language of the case: Dutch.

Judgment

1 By its application, the European Commission seeks a declaration from the Court that, by having infringed EU public procurement law and in particular 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), in connection with the award of a public works concession by the municipality of Eindhoven, the Kingdom of the Netherlands has failed to fulfil its obligations under Article 2 and Title III of that directive.

Legal context

2 Article 1(2) and (3) of Directive 2004/18 provides:

'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.…

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.'

3 Pursuant to Article 2 of that directive, contracting authorities are to treat economic operators equally and non-discriminatorily and to act in a transparent way.

4 Title III of Directive 2004/18 sets out the rules on public works concessions.

5 Article 80(1) of Directive 2004/18, which is part of Title V thereof, provides:

'The Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive no later than 31 January 2006. They shall forthwith inform the Commission thereof. …'

Factual background to the dispute

6 The present dispute stems from the realisation of a construction project in the municipality of Eindhoven ('the municipality') in an area located between the existing district of Doornakkers and the new residential district of Tongelresche Akkers, owned by that municipality ('the Doornakkers centre').

7 On 7 August 2001, the Eindhoven municipal council ('the municipal council') approved the opinion on the Doornakkers centre. That document described the plans for the creation of a community centre (including a healthcare centre and a play, integration and learning centre, 'the SPILcentrum') and a

commercial centre in which there would also be apartments. On 12 September 2001, the municipal council approved an urban development plan for the Doornakkers centre project. That plan contained the planning guidelines for the district and provided for infrastructure and facilities with a view to integrating the districts of Doornakkers and Tongelresche Akkers.

8 On 23 April 2002, the municipal council approved the opinion entitled 'Selection of a promoter for the Doornakkers centre' ('the opinion of 23 April 2002'), which had been drafted by the municipality's staff on 11 April 2002. That opinion set out the criteria to be applied in selecting the purchaser of the land on which the Doornakkers centre project would be carried out. It stated that the sale contract should comply with 'the framework conditions and guidelines set by the municipality, namely the specifications', and that it should 'meet the … wishes of the purchasers/ end users'. It was also stated that 'the fact that the municipality opts for a sale subject to conditions means that there will be no tender procedure and that the public procurement rules are not applicable'.

9 The framework conditions and guidelines mentioned in the preceding paragraph set out, inter alia, the functions and the heights of the buildings in accordance with the urban development plan. They envisage the construction of apartments and housing, the extension of the existing healthcare centre, a connecting area between the two main sites, good accessibility, an underground car park in accordance with municipal parking regulations, conservation of valuable green spaces and the creation of a square and a new district park.

10 Pursuant to the opinion of 23 April 2002, the companies Hurks Bouw en Vastgoed BV ('Hurks') and Haagdijk BV were requested to submit plans.

11 By decision of 15 July 2003, the municipality chose Hurks as the promoter of the Doornakkers centre and contractual partner approached.

12 From July 2003 to October 2005, Hurks fleshed out its construction plans into a master plan which was approved by the municipality on 14 February 2006. With a view to implementing the plan, the municipality and Hurks concluded a contract of cooperation, which was signed by Hurks on 12 June 2007 and by the municipality on 16 July 2007 ('the cooperation contract').

13 It is apparent from recital F in the preamble to that contract that the municipality and Hurks reached an agreement on the development and realisation of the SPILcentrum. The parties to that agreement decided that the SPILcentrum would consist of apartments, an extension of an existing health centre and an underground car park, a commercial centre also including housing, another underground car park and apartments. It was provided that Hurks would carry out those works at its own risk and for its own account. With a view to the successful realisation of those projects, the municipality and Hurks also reached an agreement on the sale of land by the municipality to Hurks.

14 In parallel to those negotiations, the municipality, on 13 February 2007, chose the Woonbedrijf foundation to be the owner of the SPILcentrum. To that end, a cooperation contract was signed by the municipality and the Woonbedrijf foundation on 15 April 2008.

The pre-litigation procedure and the proceedings before the Court

15 Following a complaint relating to the circumstances of the award of the Doornakkers centre project, the Commission, by letter of 2 July 2008, requested the Kingdom of the Netherlands for information on that project. That Member State replied by letter of 19 December 2008.

16 On 24 February 2009, the Commission sent that Member State a letter of formal notice based on an infringement of EU public procurement law, specifically of Directive 2004/18. The Kingdom of the Netherlands replied by letter of 30 June 2009, claiming, inter alia, that Directive 2004/18 was not applicable *ratione temporis*.

17 On 9 October 2009, the Commission issued a reasoned opinion, in which it confirmed, in essence, the position expressed in its letter of formal notice and put forward arguments with a view to demonstrating that Directive 2004/18 was applicable in the present case. The Commission also asked the Kingdom of the Netherlands to take the necessary measures within two months of receipt of that opinion.

18 That Member State replied to the reasoned opinion by letter of 8 December 2009. In its response, it challenged the position adopted by the Commission relating to the infringement of Directive 2004/18 and reasserted, on the basis of Case C-337/98 *Commission* v *France* [2000] ECR I-8377, paragraphs 36 and 37, that, rather than Directive 2004/18, it was 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) that was applicable to the facts of the present case.

19 In those circumstances the Commission decided to bring the present action.

20 By order of the President of the Court of 17 May 2011, the Federal Republic of Germany was given leave to intervene in support of the form of order sought by the Kingdom of the Netherlands.

The action

Admissibility

Arguments of the parties

21 The Kingdom of the Netherlands raises two pleas of inadmissibility.

22 Firstly, it claims that the Commission's action is inadmissible in so far as the Commission used documents on which the Kingdom of the Netherlands was unable to give its opinion during the pre-litigation stage, in breach of its rights of defence.

23 After the reply of the Kingdom of the Netherlands to the reasoned opinion, the Commission, by letter of 12 May 2010, called on that Member State to produce a number of documents, including the protocol agreement of 15 January 2010 on the SPILcentrum and the resulting cooperation contract between the municipality and the Woonbedrijf foundation. That contract was sent to the Commission by letter of 11 June 2010 from the Minister for Foreign Affairs, with a note that the Commission should not use that information in the present proceedings.

24 Furthermore, the Kingdom of the Netherlands alleges that the Commission introduced into the proceedings three documents which were not annexed to the letter of 11 June 2010 or discussed during the pre-litigation procedure. These are an information letter of 18 March 2008 from the Eindhoven municipal council on housing development initiated by the municipality in respect of the period 2005-2010, the administrative regulation of 6 October 2009 entitled 'Temporary incentive scheme for housing construction projects for 2009' and a statement taken from the website of the Ministry of Housing, Spatial Planning and the Environment.

25 Secondly, according to the Kingdom of the Netherlands, the Commission has extended the subject-matter of the proceedings in relation to the pre-litigation stage.

26 It was only in its application that the Commission claimed for the first time, in order to show that there was a contract for pecuniary interest, that the municipality received a 'service'. During the pre-litigation stage, the Commission focused exclusively on the existence of a 'consideration' provided by the municipality to Hurks to prove that there was such a contract. The Commission therefore set out a new complaint in its application, in breach of the Court's case-law (Case C-458/08 *Commission* v *Portugal* [2010] ECR I-11599, paragraph 43).

27 The Commission claims that the Court should reject all those claims.

Findings of the Court

28 So far as concerns the first plea of inadmissibility, it must be recalled that, in accordance with settled case-law, the letter of formal notice sent by the Commission to the Member State and then the reasoned opinion issued by the Commission delimit the subject-matter of the dispute, so that it cannot thereafter be extended. The opportunity for the Member State concerned to be able to submit its observations, even if it chooses not to avail itself thereof, constitutes an essential guarantee intended by the Treaty, adherence to which is an essential formal requirement of the procedure for finding that a Member State has failed to fulfil its obligations. Consequently, the reasoned opinion and the action brought by the Commission must be based on the same complaints as those set out in the letter of formal notice initiating the pre-litigation procedure (Case C-186/06 *Commission* v *Spain* [2007] ECR I-12093, paragraph 15, and Case C-535/07 *Commission* v *Austria* [2010] ECR I-9483, paragraph 41).

29 Furthermore, the Court has also held that the production by the Commission of additional evidence intended, at the stage of proceedings before the Court, to support the proposition that the failure thus alleged is general and consistent cannot be ruled out in principle (Case C-494/01 *Commission* v *Ireland* [2005] ECR I-3331, paragraph 37, and judgment of 22 December 2008 in Case C-189/07 *Commission* v *Spain*, paragraph 29).

30 According to the Kingdom of the Netherlands, the four documents submitted for the first time in the application were used by the Commission in order to establish that the realisation of the Doornakkers centre project was of immediate economic benefit to the municipality and, consequently, that the contract concluded between the municipality and Hurks was for pecuniary interest.

31 However, and as the Advocate General observed in point 31 of his Opinion, the documents produced by the Commission, whose use is being challenged by the Netherlands Government, concern only the factual situation which was the subject-matter of the pre-litigation procedure and merely illustrate the complaint made in that procedure.

32 In those circumstances, the Commission was entitled to use those documents to support the complaint, set out from the time of the letter of formal notice, relating to the existence of a contract for a public works concession, one of whose conditions was that it was for pecuniary interest (see, to that effect, *Commission* v *Ireland*, paragraph 36).

33 Consequently, the first plea of inadmissibility must be rejected.

34 As regards the second plea of inadmissibility, admittedly, the subject-matter of proceedings brought under Article 258 TFEU is circumscribed by the pre-litigation procedure provided for in that provision and, consequently, the Commission's reasoned opinion and the application must be based on the same complaints, however that requirement cannot go so far as to mean that in every case exactly the same wording must be used in each, where the subject-matter of the proceedings has not been extended or altered (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-195/04 *Commission* v *Finland* [2007] ECR I-3351, paragraph 18).

35 Thus, in its application the Commission may clarify its initial complaints provided, however, that it does not alter the subject-matter of the proceedings (*Commission* v *Ireland*, paragraph 38, and Case C-195/04 *Commission* v *Finland*, paragraph 18).

36 In the present case, it can be seen by simply reading the letter of formal notice, the reasoned opinion and the application lodged before the Court that the subject-matter of the proceedings was not altered by the Commission in the course of the present proceedings for failure to fulfil obligations.

37 Those documents expressly show that the Commission seeks a declaration that 'the Kingdom of the Netherlands has not complied with its obligations under Article 2 and Title III of Directive 2004/18'.

38 Specifically, in its reasoned opinion, the Commission alleged that the municipality did not conclude a cooperation contract with Hurks, but a contract for a public works concession, whose existence was dependent, inter alia, on the fact that that contract was for pecuniary interest.

39 In the application, while repeating the same claim, the Commission referred to Case C-451/08 *Helmut Müller* [2010] ECR I-2673, in which the Court defined the concept of a contract for pecuniary interest. That definition, which indeed forms part of the case-law on that concept, concerned the services received by the contracting authority pursuant to a public contract in return for consideration.

40 In doing so, the Commission merely set out in detail the arguments supporting its conclusion as to the fact that the contract concluded between the municipality and Hurks was for pecuniary interest, arguments which had already been put forward in more general terms in the letter of formal notice and the reasoned opinion, and therefore did not alter the subject-matter of the proceedings (see, to that effect, *Commission* v *Germany*, paragraph 29, and *Commission* v *Portugal*, paragraph 47).

41 Since the second plea of inadmissibility put forward by the Kingdom of the Netherlands must also be rejected, the Commission's action must be declared admissible.

Substance

Arguments of the parties

42 In its application, the Commission first of all analysed the issue of the scope *ratione temporis* of Directive 2004/18 which had been raised by the Kingdom of the Netherlands during the pre-litigation stage.

43 While pointing out that the Member States were required to have implemented Directive 2004/18 into national law by 31 January 2006 at the latest, the Commission observes that the cooperation contract was not signed by the two parties until 16 July 2007, that is approximately 18 months after the expiry of the time-limit set for that implementation.

44 In the Commission's view, although, admittedly, the municipality had already taken some decisions before that date, including the choice of Hurks as promoter and contractual partner, the fact remains that it was only after 14 February 2006, the date on which the municipality adopted the master plan submitted by Hurks, that the negotiations on the essential aspects of the cooperation contract began.

45 It is apparent from a letter from the municipality dated 22 May 2007 that it carried out negotiations with Hurks for over a year regarding the content of the cooperation contract. The negotiations covered the issue of whether the municipality should purchase from Hurks part of the works completed, in particular the SPILcentrum, to prevent Hurks from having to bear the financial risk of the entire project alone, in addition to the apportionment of the financial burden concerning the construction of public spaces such as an esplanade and a park.

46 In this connection, the Commission submits that the Court's case-law according to which public contracts must be re-awarded if one of the essential terms of the contract is amended and results in the conclusion of a new contract (see, to that effect, *Commission* v *France*, paragraph 44) applies *a fortiori* in a situation such as that in the present case.

47 The Commission adds that, when the municipality decided, on 23 April 2002, to request two operators to draw up plans, it had not laid down any of the essential characteristics of the contract to be concluded and had not even established at that time whether it was a public contract or a concession.

48 According to the Commission, the negotiations between the municipality and Hurks concerning all or at least the most important of the conditions of the cooperation contract were not started effectively until after the date on which Directive 2004/18 was required to have been implemented. Therefore, and in the light of the Court's case law in *Commission* v *France*, the Commission submits that that directive is applicable in the present case.

49 The Kingdom of the Netherlands submits, in essence, that it is the decision approving the opinion of 23 April 2002, in which the municipal council envisaged merely selling the land and entrusting a promoter with the task of developing it, which constitutes the decisive element in order to ascertain whether Directive 2004/18 is applicable *ratione temporis*.

50 The Kingdom of the Netherlands concludes that the proceedings originated before the deadline for implementation of Directive 2004/18. It follows from the Court's case-law that it is not the date the contract was awarded which is decisive, but that of the decision which is alleged to have infringed EU law.

51 The position adopted by the Commission, according to which the decisive moment is that 'at which all or at least the most important of the conditions of the [cooperation] contract' actually existed, is derived from an incorrect interpretation of *Commission* v *France*.

Findings of the Court

52 As the Advocate General pointed out in point 56 of his Opinion, the applicable directive is, as a rule, the one in force when the contracting authority chooses the type of procedure to be followed and decides definitively whether it is necessary for a prior call for competition to be issued for the award of a public contract (see, to that effect, *Commission* v *France*, paragraphs 36 and 37).

53 It would be contrary to the principle of legal certainty to determine the applicable law by reference to the date of the award of the contract since that date marks the end of the procedure, while the decision of the contracting authority to proceed with or without a prior call for competition is normally taken at the initial stage of that procedure (*Commission* v *France*, paragraph 40).

54 Nevertheless, in that judgment the Court also stated that, where the negotiations opened after that decision are substantially different in character from those already conducted and are, therefore, such as to demonstrate the intention of the parties to renegotiate the essential terms of the contract, the application of the provisions of a directive with a time-limit for implementation which expired after the date of that decision, might be justified (see, to that effect, *Commission* v *France*, paragraph 44).

55 In the present case, it must be stated that the decision to realise the Doornakkers centre construction project without a prior call for competition took place when the municipal council approved the opinion of 23 April 2002.

56 It is apparent from the actual wording of point 2.5 of that opinion that the fact that the municipality chose the method of a sale of the land subject to conditions 'means that there will be no tender procedure and that the public procurement rules are not applicable'.

57 In those circumstances, the Commission's argument that, when the municipality decided, in accordance with the opinion of 23 April 2002, to request two operators to draw up plans, it had not yet determined whether the project was to be a public contract or a concession, must be rejected.

58 The decision approving the opinion of 23 April 2002 thus constitutes, in principle, the decision which is alleged to have infringed EU law and whose date determines the law applicable to such a claim (see, to that effect, Case C-138/08 *Hochtief and Linde-Kca-Dresden* [2009] ECR I-9889, paragraph 29).

59 Moreover, concerning the Commission's argument alleging that the municipality did not establish in a binding form at the beginning of the 'procedure' the conditions and essential characteristics of the concession, but made the content of the contract and its essential conditions dependent on the progress of the negotiations with Hurks, it is important to point out, firstly, that the Commission itself asserted, at point 76 of the application, that it is apparent from an information document sent in June 2002 to the candidate promoters by the municipality that the latter 'already had a relatively clear idea of the expected result'. According to the Commission, that document contained 'details concerning the number of plots, the maximum height of the construction, the general direction the commercial development was to take, the location of the entrances to the health centre and the reintroduction of certain functions in the district park'.

60 Secondly, at point 77 of the application, the Commission acknowledged that a comparison between Article 1.1 of the cooperation contract and that information document 'shows that, for the most part, the assignment of the buildings to be constructed had been defined by the municipality as early as 2002'.

61 Thirdly, as the Advocate General observed in points 70 and 71 of his Opinion, the fact that the allocation of the financial risks for certain parts of the SPILcentrum project and responsibility for the development of public spaces could have been finally decided after the opinion of 23 April 2002 is not crucial. In the light of the Court's case-law, neither of those two specific features of the Doornakkers centre project can be regarded as substantially different in character from those initially envisaged (see, to that effect, *Commission* v *France*, paragraph 44, and Case C-454/06 *pressetext Nachrichtenagentur* [2008] ECR I-4401, paragraphs 34 to 37).

62 Therefore, the premises on which the Court's case-law relied on by the Commission in paragraph 46 above is based, namely the amendment of one of the essential terms of the contract and, consequently, the requirement that a new contract be concluded, are not established in the present case.

63 Given that both the municipality's decision not to conduct a prior call for competition for the Doornakkers centre project and the choice of the essential characteristics of that project are evident from the opinion of 23 April 2002, that is to say, at a time when Directive 2004/18 had not yet been adopted, it must be held that that directive is not applicable *ratione temporis*.

64 Since the Commission's action seeks quite specifically to prove that the Kingdom of the Netherlands failed to fulfil its obligations under Article 2 and Title III of Directive 2004/18, the inevitable conclusion is that the action must be dismissed.

Costs

65 Under Article 138(1) 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 the Netherlands has applied for costs and the Commission has been unsuccessful, the latter must be ordered to pay the costs.

66 Pursuant to Article 140(1) of the Rules of Procedure, the Federal Republic of Germany must bear its own costs.

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

1. Dismisses the action;

2. Orders the European Commission to pay the costs;

3. Orders the Federal Republic of Germany to bear its own costs.

[Signatures]