Reports of Cases

JUDGMENT OF THE COURT (Fourth Chamber)

26 September 2013*

(Appeal — European Regional Development Fund (ERDF) — Community structural assistance in the region of Martinique — Reduction of financial assistance — Public works contracts — Compliance of operations with provisions of European Union law — Coordination of procedures for the award of public works contracts — Directive 93/37/EEC — Article 2 — Concept of 'direct subsidy' — Concept of 'facilities intended for sports, recreation and leisure')

In Case C-115/12 P,

APPEAL under Article 56 of the Statute of the Court of Justice of the European Union, brought on 1 March 2012,

French Republic, represented by E. Belliard, N. Rouam and G. de Bergues, acting as Agents,

appellant,

the other party to the proceedings being:

European Commission, represented by F. Dintilhac and A. Steiblytė, acting as Agents, with an address for service in Luxembourg,

defendant at first instance,

THE COURT (Fourth Chamber),

composed of L. Bay Larsen, President of the Chamber, J. Malenovský, U. Lõhmus (Rapporteur), M. Safjan and A. Prechal, Judges,

Advocate General: J. Kokott,

Registrar: M. Ferreira, Principal Administrator,

having regard to the written procedure and further to the hearing on 11 March 2013,

after hearing the Opinion of the Advocate General at the sitting on 18 April 2013,

gives the following

* Language of the case: French.

Judgment

1 By its appeal, the French Republic requests the Court to set aside the judgment of the General Court of the European Union of 16 December 2011 in Case T-488/10 *France* v *Commission* ('the judgment under appeal'), by which the General Court dismissed its action for annulment of Commission Decision C(2010) 5229 of 28 July 2010 concerning the cancellation of part of the contribution of the European Regional Development Fund (ERDF) under the single programming document in respect of objective 1 for Community structural assistance in the French region of Martinique ('the decision at issue').

Legal context

Regulation (EC) No 1260/1999

2 Council Regulation (EC) No 1260/1999 of 21 June 1999 laying down general provisions on the Structural Funds (OJ 1999 L 161, p. 1) provides in Article 12, headed 'Compatibility':

'Operations financed by the Funds … shall be in conformity with the provisions of the Treaty, with instruments adopted under it and with Community policies and actions, including the rules on … the award of public contracts ...'

Directive 93/37/EEC

3 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) has been repealed and replaced by 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), which entered into force on 31 January 2006. Nevertheless, given the date of the facts, the present dispute remains governed by Directive 93/37.

4 Article 1(a) of Directive 93/37 defines 'public works contracts' as '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'.

5 Article 2 of Directive 93/37 is worded as follows:

'1. Member States shall take the necessary measures to ensure that the contracting authorities comply or ensure compliance with this Directive where they subsidise directly by more than 50% a works contract awarded by an entity other than themselves.

2. Paragraph 1 shall concern only contracts covered by Class 50, Group 502, of the general industrial classification of economic activities within the European Communities (NACE) nomenclature and contracts relating to building work for hospitals, facilities intended for sports, recreation and leisure, school and university buildings and buildings used for administrative purposes.'

Background to the dispute

6 The facts giving rise to the present dispute, as set out in paragraphs 1 to 13 of the judgment under appeal, may be summarised as follows.

7 By Decision C(2000) 3493 of 21 December 2000, the Commission approved the single programming document for Community structural assistance under Objective 1 in the region of Martinique in France for the period from 1 January 2000 to 31 December 2006, which provides for a contribution from the European Regional Development Fund (ERDF) amounting to EUR 17 150 000 in respect of the measure 'Direct aid to tourism undertakings and other tourism operators'.

8 In 2003, société martiniquaise des villages de vacances ('SMVV'), which operates the Club Méditerranée holiday resort 'Les Boucaniers' in Martinique ('the Les Boucaniers complex'), decided to undertake works to renovate and extend the complex.

9 On 3 August 2004, the Regional Council of Martinique decided in favour of payment of a regional subsidy amounting to EUR 2 492 750 in respect of that project for the renovation and extension of the Les Boucaniers complex, the developer for which was SMVV and the total cost of which was estimated at EUR 49 981 446.

10 By decision C(2004) 4142 of 18 October 2004, the Commission set the level of the Community contribution to the project at EUR 12 460 000.

11 On 24 March 2005, the Region of Martinique and SMVV signed the regional development agreement for the project.

12 From 25 June to 13 July 2007, the Court of Auditors of the European Union audited the project. By letter of 11 February 2008, it sent the French Republic preliminary findings of its audit. It pointed out in particular a failure to comply in respect of the renovation and extension works with the procedure for the award of public contracts, which it said was applicable as the project was financed by contracting authorities to an amount of more than 50%. According to the Court of Auditors, having regard to the ERDF subsidy, to the regional subsidy and to the State subsidy of EUR 16 690 000 in the form of tax relief pursuant to Article 199 undecies B of the French General Tax Code (code general des impôts), the project was financed by public aid to the amount of 63.33%. In this connection the Court of Auditors referred in particular to Article 2 of Directive 93/37.

13 By letter of 20 May 2008, the French Republic disputed in particular that the tax relief in question could be considered to be a direct subsidy for the purposes of Article 2(1) of Directive 93/37. It also contended that the works to renovate and extend the Les Boucaniers complex did not constitute works for facilities intended for sports, recreation and leisure within the meaning of Article 2(2). Those works therefore did not fall within the scope of that article.

14 On 28 July 2010 the Commission, by adopting the decision at issue, decided to cancel in its entirety the ERDF contribution allocated to the project for the renovation and extension of the Les Boucaniers complex.

The action before the General Court and the judgment under appeal

15 By application lodged at the Registry of the General Court on 11 October 2010 the French Republic sought the annulment of the decision at issue in its entirety.

16 In support of its action, the French Republic relied on four pleas in law. The first plea alleged infringement of Article 2(1) of Directive 93/37 in that the Commission had considered that the works contracts awarded for the renovation and extension of the Les Boucaniers complex constituted works contracts directly subsidised by contracting authorities by more than 50%. The second plea alleged that the Commission infringed Article 2(2) of that directive in considering that the works in question fell under a contract relating to facilities intended for sports, recreation and leisure within the meaning of that provision. The third plea alleged infringement of the duty to state reasons in that the

Commission did not set out clearly and unequivocally the reasons why the works for the renovation and extension of the Les Boucaniers complex amounted to works for facilities intended for sports, recreation and leisure within the meaning of Article 2(2) of Directive 93/37. The fourth plea, put forward in the alternative, alleged infringement of the principle of proportionality in that the Commission adopted a correction rate of 100% of the subsidy granted by the ERDF.

17 The General Court rejected all those pleas and consequently dismissed the action in its entirety.

18 As regards the first plea, the General Court, in paragraphs 25 to 33 of the judgment under appeal, began by dealing with the French Republic's argument, based on settled case-law concerning State aid, that the term 'subsidy' must be interpreted as covering only positive benefits.

19 The General Court observed in paragraph 27 of the judgment under appeal that, although the concept of a subsidy is mentioned in the case-law concerning State aid, in connection with defining the concept of State aid, it has not itself been defined in that case-law.

20 The General Court also recalled, in paragraph 28 of the judgment under appeal, that in interpreting a provision of European Union law it is necessary to consider not only its wording but also the context in which it occurs and the objects of the rules of which it is part. In the following paragraph of the judgment, it observed that the aim of Directive 93/37 is to avoid both the risk of preference being given to national tenderers or applicants whenever a contract is awarded by the contracting authorities and the possibility that a body financed or controlled by the State, regional or local authorities or other bodies governed by public law may choose to be guided by considerations other than economic ones.

21 Concerning, in particular, the objective pursued by the Community legislature in Article 2 of Directive 93/37, the General Court stated, in paragraphs 30 and 31 of the judgment under appeal, that that article is intended to prevent certain contracting authorities from seeking to evade the public procurement rules by entrusting to private bodies responsibility for the carrying out of works which relate in actual fact to public procurement and which those contracting authorities subsidise directly by more than 50%. It explained that, in essence, there is no difference between the case where a contracting authority itself concludes a contract with a contractor and the case where it subsidises directly by more than 50% a works contract awarded by an entity other than itself. Article 2 is thus intended, according to the General Court, to ensure that contracts are awarded impartially in cases where public entities have a decisive influence. Consequently, the General Court held in paragraph 32 of the judgment under appeal that 'subsidy' within the meaning of Article 2(1) of Directive 93/37 should be interpreted broadly and in functional terms.

22 The General Court concluded that the effectiveness of Directive 93/37 would not be fully preserved if application of the regime which it establishes could be excluded simply because the costs of financing a contract are lessened not by positive benefits from a public entity but by tax reductions, and that 'subsidy' within the meaning of Article 2(1) does not exclude the tax reductions at issue which, like positive benefits, enable the costs of financing a contract to be lessened.

23 In paragraphs 34 and 35 of the judgment under appeal, the General Court, first, noted other measures of European Union law in which the concept of a subsidy has not been defined as a purely positive benefit and, second, rejected the French Republic's argument derived from the *travaux préparatoires* relating to the initial introduction of the provision which became Article 2(1) of Directive 93/37.

24 Next, in paragraphs 36 and 37 of the judgment under appeal, the General Court rejected the French Republic's contention that the tax reductions at issue are not of a direct nature, as required by Article 2(1) of Directive 93/37. It relied on the fact that those reductions were directly connected with the works contract at issue and with the investments made for that purpose.

25 So far as concerns the second plea, the General Court, in paragraphs 42 to 50 of the judgment under appeal, began by dealing with the French Republic's line of argument that the sports, recreation and leisure facilities of the holiday complex are only ancillary and that the works essentially related to a hotel establishment with catering.

26 After establishing that the works were part of a single project consisting in the complete renovation of the Les Boucaniers complex, the General Court stated in paragraph 43 of the judgment under appeal that account should be taken not of the works undertaken but of the complex's overall purpose when examining whether the works contracts at issue related to building work for such facilities.

27 In paragraph 48 of the judgment under appeal, the General Court concurred with the Commission's assessment that the Les Boucaniers complex is an integrated concept bringing together accommodation, catering, sports, recreation and leisure activities and shared facilities. It observed that, even if the surface area and staff numbers of the Les Boucaniers complex are largely connected with accommodation and catering, the complex is characterised by those activities, which constitute the core of the concept of that holiday resort and form the fundamental and in any event necessary part of that concept. The General Court thus concluded that the Les Boucaniers complex is itself in the nature of a sports, recreation and leisure facility in the broad sense. It added that, in the case in point, it should not be determined what the object of the works contracts at issue is, but it should be examined whether the project in question falls within one of the categories referred to in Article 2(2) of Directive 93/37.

28 Next, in paragraph 50 of the judgment under appeal, the General Court rejected as too restrictive the French Republic's breakdown of the cost of the works according to which only 10.6% of the cost of the works concerning the renovation and extension of the Les Boucaniers complex related to the sports, recreation and leisure facilities.

29 In paragraphs 53 and 54 of the judgment under appeal, the General Court held that NACE is irrelevant for interpreting the concept in Article 2(2) of Directive 93/37 of facilities intended for sports, recreation and leisure.

30 Finally, in paragraph 57 of the judgment under appeal, the General Court concluded that the concept of facilities intended for sports, recreation and leisure within the meaning of Article 2(2) of Directive 93/37 did not require the existence of a link with the traditional needs of the public authorities or with tasks of general interest. In this connection, the General Court observed in paragraphs 58 to 64 of the judgment under appeal that, even though the concept in question forms part of an exhaustive list, it itself is not limited by any criterion and that it must be interpreted broadly and in functional terms in order to ensure that the effectiveness of Directive 93/37 is not compromised. According to the General Court, a restrictive interpretation of the concept of facilities intended for sports, recreation and leisure cannot be consistent with the objectives of that directive.

31 As to the third plea, the General Court concluded in paragraphs 69 to 71 of the judgment under appeal that, in the light of the explanations given in the decision at issue and during the administrative procedure, the Commission had explained its reasoning to the requisite legal standard.

32 As regards the fourth plea, the General Court held in paragraph 74 of the judgment under appeal that, given that the works in question constitute a single project, the amount of the assistance concerned by the irregularity found comprises the total amount of the assistance envisaged for the project. Consequently, the entirety of the financing for the project was the subject of an irregularity, and therefore the entirety of the financial assistance was wrongly charged to the ERDF. The General Court accordingly concluded that the correction was not to be limited on the basis of the principle of proportionality.

Forms of order sought

33 The French Republic contends that the Court of Justice should:

— set aside the judgment under appeal in its entirety; and

— itself give final judgment in the matter by annulling the decision at issue or refer the case back to the General Court.

34 The Commission contends that the Court should:

— declare the second part of the first plea of the appeal and the first part of its third plea inadmissible or, in the alternative, dismiss them and dismiss the appeal in its entirety; and

— order the appellant to pay the costs.

The appeal

35 In support of its appeal, the French Republic advances three pleas in law.

The first plea: an error of law relating to the application of Article 2(1) of Directive 93/37

Arguments of the parties

36 The first plea advanced by the French Republic in support of its appeal is divided into two parts.

37 By the first part of the plea, it contends that the General Court erred in law in holding that tax reduction measures could be categorised as 'subsidies' for the purposes of Article 2(1) of Directive 93/37.

38 According to the French Republic, the categorisation by the General Court is contrary to the wording of Article 2(1) of Directive 93/37 and contradicts the intention of the European Union legislature to limit the concept of a subsidy to positive benefits. First, it complains that the General Court departed from the traditional definition of that concept, as adopted by the Court of Justice in relation to State aid. In the absence of any indication to the contrary in the directive in question, that concept must be defined in the light of the usual meaning of the word 'subsidy' in order that the principle of legal certainty is observed. Second, it asserts that its interpretation is supported by the fact that the final wording of that provision differs from the various proposals in the *travaux préparatoires*, where in particular the word 'finance' was used instead of the word 'subsidise'. Third, it adds that the need to preserve the effectiveness of a provision, relied upon by the General Court, cannot extend to giving that provision an interpretation on a functional basis which goes beyond its wording.

39 By the second part of the first plea, the French Republic contends that the General Court erred in law in holding that a tax reduction was of a direct nature for the purposes of Article 2(1) of Directive 93/37 where it had been granted specifically on the basis of the works contract in question, despite the fact that it had not been granted to the developer, the main contractor or the operator or owner of the establishment concerned.

40 The French Republic submits that the tax reductions in question were granted to the members – natural persons – of the commercial partnerships who invested in the works contract for the renovation and extension of the Les Boucaniers complex. Those tax reductions admittedly encouraged investment but they did not directly reduce the costs of the works.

41 The Commission contends that the first part of the first plea must be declared unfounded. The second part must be declared inadmissible or, in the alternative, dismissed as unfounded.

Findings of the Court

42 Article 2(1) of Directive 93/37 requires contracting authorities to comply with the directive where they subsidise directly by more than 50% a works contract awarded by an entity other than themselves.

43 By the first part of the first plea, the French Republic submits in essence that the concept of a subsidy, for the purposes of that provision, covers only positive subsidies and cannot therefore include tax reductions.

44 Since that concept is not defined in Directive 93/37, it must, in the absence of reference to the law of the Member States, be given an autonomous and uniform interpretation, taking into account the context of and the objective pursued by the provision in which it appears (see, to this effect, Case C-376/11 *Pie Optiek* [2012] ECR, paragraph 33 and the case-law cited).

45 The French Republic contests neither the statement of the objectives of Article 2(1) of Directive 93/37 which is set out by the General Court in paragraphs 29 to 31 of the judgment under appeal nor that, as the Advocate General has observed in point 43 of her Opinion, those objectives support a broad interpretation of the concept of a subsidy. On the other hand, by its line of argument it complains in essence that the General Court, by construing that concept broadly and in functional terms so as to include tax reductions, exceeded the limits of what is permissible in a teleological interpretation.

46 However, contrary to the French Republic's submissions, the term 'to subsidise', in its usual sense, means quite simply to grant an advantage. Therefore, the term is not limited, as a general rule, to positive benefits. Nor is doubt cast on this interpretation by any 'traditional' definition of the concept of a subsidy, to which the French Republic refers and which is allegedly applied in the field of State aid.

47 The French Republic's line of argument that the General Court's interpretation runs counter to the intention of the European Union legislature inasmuch as that interpretation fails to take account of the history of Article 2 of Directive 93/37 must also be rejected.

48 The use of the term 'subsidise' in that provision and not the verb 'finance' used by the Commission in its proposal for Article 1a in 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 (OJ 1989 L 210, p. 1), a provision which corresponds to Article 2 of Directive 93/37, cannot, in the absence of other indications, be sufficient to infer an intention on the part of the European Union legislature to restrict that term solely to positive subsidies, to the exclusion, in particular, of tax deductions.

49 Accordingly, it must be held that the General Court did not err in law in holding that tax reduction measures could be categorised as subsidies for the purposes of Article 2(1) of Directive 93/37. The first part of the first plea must therefore be dismissed as unfounded.

50 As regards the second part of this plea, contrary to the Commission's submissions the French Republic seeks to challenge not findings of fact made by the General Court in the judgment under appeal but its legal classification of facts, namely the classification of the tax reductions granted as 'direct' subsidisation for the purposes of Article 2(1) of Directive 93/37.

51 Given that it is clear from settled case-law that the Court has jurisdiction to review such a legal classification (see, inter alia, Case C-136/92 P *Commission* v *Brazzelli Lualdi and Others* [1994] ECR I-1981, paragraph 49), it must be concluded that this part of the first plea is admissible.

52 As to the substance, it follows clearly from the wording of Article 2(1) of Directive 93/37 that the concept of 'direct subsidy' relates not to the persons, but to the work concerned. A narrow interpretation of that concept would, moreover, enable a contracting authority to circumvent Article 2 of Directive 93/37 and thereby to its escape its obligations under that directive.

53 In this connection, it is to be noted that the General Court pointed out in paragraph 36 of the judgment under appeal that the tax reductions were directly connected with the works contract at issue, that they were not intended to reduce certain general burdens on the persons concerned and that they were granted by the French Republic to the project of renovation and extension of the Les Boucaniers complex specifically for the carrying out of those works.

54 It must be held that, in those circumstances, the General Court was correct in linking the directness of a subsidy as referred to in Article 2(1) of Directive 93/37 to the financing of the project and to the investments made for that purpose.

55 Accordingly, the second part of the first plea advanced by the French Republic must also be rejected and therefore this plea must be dismissed as unfounded.

The second plea: an error of law committed by the General Court in that it distorted the content of the decision at issue and substituted its own reasoning for that of the Commission

Arguments of the parties

56 By its second plea, the French Republic contends that the General Court distorted the content of the decision at issue and substituted its own reasoning for that of the Commission. In its submission, the distortion consists in the fact that the General Court held that the Commission took into account not the nature of the works carried out but the overall purpose of the Les Boucaniers complex in determining whether the works contract for the renovation and extension of that holiday resort fell within the scope of Article 2(2) of Directive 93/37.

57 The French Republic states that it was not until the oral procedure before the General Court that the Commission acknowledged that account should be taken not of the works undertaken in the Les Boucaniers complex but of the complex's overall purpose.

58 The Commission takes the view that this plea is unfounded.

Findings of the Court

59 As regards review of the distortion which the French Republic claims to be present in the General Court's finding, in paragraph 43 of the judgment under appeal, that the Commission analysed whether Article 2(2) of Directive 93/37 was applicable by examining, in the decision at issue, the project consisting in a complete renovation of the Les Boucaniers complex and that that examination was based not on the works undertaken but on the complex's overall purpose, it is to be pointed out that, in accordance with the Court of Justice's settled case-law, distortion must be obvious from the documents on the Court's file, without there being any need to carry out a new assessment of the facts and the evidence (see, inter alia, Case C-551/03 P *General Motors* v *Commission* [2006] ECR I-3173, paragraph 54).

60 Even though it is possible to interpret the decision at issue in the manner argued for by the French Republic, the different interpretation adopted by the General Court does not reveal any distortion of its content (see, to this effect, Case C-260/09 P *Activision Blizzard Germany* v *Commission* [2011] ECR I-419, paragraph 54).

61 Accordingly, in the absence of factors indicating material inaccuracy in the General Court's reading of the decision at issue, it is not to be held that that reading amounts to distortion or substitution of the decision's reasoning.

62 It follows that the second plea must be dismissed as unfounded.

The third plea: an error of law relating to the application of Article 2(2) of Directive 93/37

Arguments of the parties

63 By its third plea, which is divided into two parts, the French Republic contests the categorisation of the works contract for the renovation and extension of the Les Boucaniers complex as a contract relating to building work for a facility intended for sports, recreation and leisure within the meaning of Article 2(2) of Directive 93/37.

64 As regards the first part of the third plea, the French Republic submits that the General Court erred in law by holding that the concept of facilities intended for sports, recreation and leisure in Article 2(2) of Directive 93/37 had to be interpreted broadly and was not limited to facilities that are intended to meet the traditional needs of the public authorities, that is to say, the users' collective needs.

65 The French Republic contends that such a limitation, even though not expressly mentioned in Article 2(2) of Directive 93/37, follows from a systemic interpretation in relation to the wording and the object of that provision and to the other categories of contracts to which the provision refers. It observes that the objective of Article 2(2) of Directive 93/37 is to require application of the rules laid down by the directive to works contracts in respect of which there is a genuine risk that those rules will be circumvented by contracting authorities. In its submission, only contracts relating to facilities that are intended to meet the users' collective needs present such a risk. All the other categories of contracts referred to in Article 2(2) of the directive have in common the fact that they relate to buildings which are intended to meet such needs.

66 The Commission contends that the first part of the third plea is inadmissible in that it seeks to change the subject matter of the proceedings before the General Court.

67 In the alternative, the Commission considers that the first part of the third plea is unfounded.

68 By the second part of the third plea, the French Republic contends that the General Court erred in law in holding that the term 'works contracts' within the meaning of Article 2 of Directive 93/37 must be interpreted independently of the term 'public works contracts' within the meaning of Article 1(a) of the directive and that the Commission therefore did not infringe Article 2(2) of the directive in considering that the works contract at issue here fell within the scope of that provision even though that contract was not of direct economic interest to the contracting authority.

69 According to the French Republic, the term 'works contracts' within the meaning of Article 2 of Directive 93/37 must be interpreted in the light of the term 'public works contracts', a concept which requires that such a contract be performed in the contracting authority's direct economic interest (Case C-451/08 *Helmut Müller* [2010] ECR I-2673, paragraphs 50 to 52). The French Republic explains that the contract relating to the renovation of the Les Boucaniers complex cannot be regarded as being of such direct economic interest solely because the renovation plays a part in the economic and tourism development of Martinique. It considers that Article 2 of the directive covers only works contracts which, if concluded by a contracting authority, would be public works contracts within the meaning of Article 1(a) of the directive.

70 The Commission contends that this part of the third plea should be dismissed.

Findings of the Court

71 So far as concerns the Commission's contention that the first part of the third plea is inadmissible, it is settled case-law that to allow a party to put forward for the first time before the Court of Justice a plea in law which it has not raised before the General Court would be to authorise it to bring before the Court of Justice, whose jurisdiction in appeals is limited, a case of wider ambit than that which came before the General Court and that in an appeal the jurisdiction of the Court of Justice is confined to review of the findings of law on the pleas argued before the General Court (Case C-266/05 P *Sison* v *Council* [2007] ECR I-1233, paragraph 95 and the case-law cited).

72 However, it is clear from the documents before this Court that the concepts of the users' collective needs and of traditional needs of the public authorities have been used interchangeably by the French Republic both during the proceedings before the General Court and in the context of its appeal before this Court.

73 Even though, as the Commission asserts, the concept of 'users' collective needs' was not relied upon in those terms in the proceedings before the General Court, it is apparent from paragraph 55 of the judgment under appeal that the French Republic's line of argument relating to the concept of 'traditional needs of the public authorities' concerned the condition by virtue of which only 'sports, recreation and leisure facilities which are open to all and not those which are restricted to a private clientele' were referred to in Article 2(2) of Directive 93/37. This condition is in fact connected with the users' collective needs.

74 It follows that the use, in the context of the appeal, of the concept of the users' collective needs does not involve a change to the subject matter of the proceedings before the General Court and, therefore, that the first part of the third plea is admissible.

75 As to the substance, it must be determined whether the General Court erred in law in not taking the view that the term 'facilities intended for sports, recreation and leisure' within the meaning of Article 2(2) of Directive 93/37 is limited to facilities which are intended to meet the users' collective needs.

76 It must be held, as the General Court pointed out, in essence, in paragraphs 57 and 58 of the judgment under appeal, that such a limitation results neither from the wording of Directive 93/37 nor from the latter's *travaux préparatoires*. Article 2(2) of Directive 93/37 does not qualify the concept of 'facilities intended for sports, recreation and leisure' in any way.

77 Nor can such a limitation of that concept be founded on a systemic interpretation of Article 2(2) of Directive 93/37. Even if all the categories of contracts that are set out in that provision have the common feature that they relate to buildings capable, where appropriate, of meeting the users' collective needs, it cannot be inferred from this fact alone that the ability to satisfy such needs constitutes a condition for the application of that provision.

78 It must therefore be held that the General Court did not err in law in refusing to take the view that the term 'facilities intended for sports, recreation and leisure' within the meaning of Article 2(2) of Directive 93/37 was limited to facilities which are intended to meet the users' collective needs. It follows that the first part of the third plea must be dismissed as unfounded.

79 As regards the second part of this plea, paragraph 64 of the judgment under appeal, to which the French Republic refers in the context of this part of the plea, forms an integral part of the General Court's response to the argument that Article 2(2) of Directive 93/37 relates only to categories of contracts which fall, by their nature, within the traditional needs of the public authorities.

80 The General Court correctly held, in paragraph 64 of the judgment under appeal, that the European Union legislature, by means of Article 2 of Directive 93/37, expressly extended the scope of that directive to certain specified non-public contracts.

81 Accordingly, Article 2 of Directive 93/37 must be interpreted independently of Article 1(a) of the directive. It is to be noted that a different interpretation would reduce considerably the scope of Article 2, which would run counter to the objective pursued by that article of preventing circumvention.

82 It follows that the General Court did not err in law in holding that the definition of the concept of public works contracts in Article 1(a) of Directive 93/37 does not give rise to a condition for application of Article 2 of the directive that is linked to the 'traditional needs of the public authorities'.

83 Consequently, the second part of the third plea must also be rejected and the whole of this plea must be dismissed as unfounded.

84 As none of the pleas put forward by the French Republic has been upheld, the appeal must be dismissed in its entirety.

Costs

85 Under Article 184(2) of the Rules of Procedure, where the appeal is unfounded the Court is to make a decision as to costs. Under Article 138(1) of the Rules of Procedure, applicable to appeal proceedings by virtue of Article 184(1) thereof, 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 Commission has applied for costs and the French Republic has been unsuccessful, the latter must be ordered to pay the costs.

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

1. Dismisses the appeal;

2. Orders the French Republic to pay the costs.

[Signatures]