JUDGMENT OF THE COURT (Sixth Chamber)
16 December 1997 *

In Case C-341/96,

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 in the Federal Ministry of Economic Affairs, and Bernd Kloke, Oberregierungsrat in the same Ministry, acting as Agents, D-53107 Bonn,

defendant,

APPLICATION for a declaration that, by failing to adopt within the prescribed period all the laws and regulations necessary to comply with Council Directive 93/36/EEC of 14 June 1993 coordinating procedures for the award of public supply contracts (OJ 1993 L 199, p. 1) and, in the alternative, by failing to notify the Commission immediately of the measures adopted in order to transpose that directive, the Federal Republic of Germany has failed to fulfil its obligations under the third paragraph of Article 189 of the EC Treaty and Article 34(1) of the directive,

* Language of the case: German.

THE COURT (Sixth Chamber),

composed of: H. Ragnemalm (Rapporteur), President of the Chamber, G. F. Mancini, P. J. G. Kapteyn, J. L. Murray and K. M. Ioannou, Judges,

Advocate General: N. Fennelly,
Registrar: R. Grass,

having regard to the report of the Judge-Rapporteur,

after hearing the Opinion of the Advocate General at the sitting on 23 October 1997,

gives the following

Judgment

1 By application lodged at the Court Registry on 15 October 1996 the Commission of the European Communities brought an action under Article 169 of the EC Treaty for a declaration that, by failing to adopt within the prescribed period all the laws and regulations necessary to comply with Council Directive 93/36/EEC of 14 June 1993 coordinating procedures for the award of public supply contracts (OJ 1993 L 199, p. 1) and, in the alternative, by failing to notify it immediately of the measures adopted in order to transpose that directive, the Federal Republic of Germany has failed to fulfil its obligations under the third paragraph of Article 189 of the EC Treaty and Article 34(1) of the said directive.

2 Under Article 34(1) of Directive 93/36 Member States were to bring into force the laws, regulations and administrative provisions necessary to comply with that directive before 14 June 1994 and immediately to inform the Commission thereof.

3 Having received no notification of the measures taken to transpose Directive 93/36 into German law and in the absence of any other information from which it could conclude that the Federal Republic of Germany had fulfilled its obligations, the Commission initiated the procedure for failure to fulfil obligations provided for by Article 169 of the Treaty by sending a letter of formal notice to that Member State on 9 August 1994.

4 By letter of 6 October 1994 the German Government referred the Commission to a letter dated 25 July 1994 in which it informed the Commission that Directive 93/36 was to be transposed by means of an amendment to Part A of the Verdingungsordnung für Leistungen — ausgenommen Bauleistungen (Rules regarding Public Supply Contracts except in the Construction Sector, hereinafter 'the VOL/A') and that that amendment was expected to be published in the autumn of 1994.

5 In the absence of any information concerning the proposed measures of transposition, the Commission, by letter of 16 January 1996, sent a reasoned opinion to the Federal Republic of Germany requesting it to take the measures necessary to comply with its obligations under Directive 93/36 within two months from notification.

6 In a letter dated 10 April 1996 the German Government informed the Commission that, in so far as Directive 93/36 constituted a restatement of Council Directive 77/62/EEC of 21 December 1976 coordinating procedures for the award of public supply contracts (OJ 1977 L 13, p. 1), which has been amended several times, it had already been transposed into German law by the rules which entered into force at the beginning of 1994.

7 In the same letter the German Government indicated that the transposition of the new elements contained in Directive 93/36 was under way. In that respect, it was necessary for the draft measures, which had previously been sent to the Commission, to be voted on by the German Government and approved by the Bundesrat

(Federal Council). However, as a result of the Federal Republic of Germany's federal structure, it had not been possible to complete the process leading to adoption of those measures within the prescribed period.

8 Having received no information concerning the adoption of those draft measures or the entry into force of the corresponding provisions, the Commission brought the present action.

9 The Federal Republic of Germany does not deny the alleged infringement. It submits, however, that the important amendment of Directive 93/36 concerning the definition of 'contracting authority' had already been incorporated into Paragraph 57(a)(1)(2) of the Zweites Gesetz zur Änderung des Haushaltsgrundsätzegesetzes (Second Law amending the Law on Budgetary Principles, BGBl. I, p. 1928).

10 Furthermore, according to the German Government, draft measures amending the VOL/A and the order governing the award of public supply contracts have been drawn up. Those draft measures provide that the amended VOL/A is to be given force of law. The legislation could enter into force during the first six months of 1997.

11 Since Directive 93/96 has not been fully transposed within the period prescribed therein the Commission's action is well founded.

12 It must therefore be held that, by failing to adopt within the prescribed period all the laws and regulations necessary to comply with Directive 93/96, the Federal Republic of Germany has failed to fulfil its obligations under Article 34(1) of that directive.

Costs

13 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs. Since the Federal Republic of Germany has been unsuccessful, it must be ordered to pay the costs.

On those grounds,

THE COURT (Sixth Chamber)

hereby:

1. Declares that, by failing to adopt within the prescribed period all the laws and regulations necessary to comply with Council Directive 93/36/EEC of 14 June 1993 coordinating procedures for the award of public supply contracts, the Federal Republic of Germany has failed to fulfil its obligations under Article 34(1) of that directive;

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

Ragnemalm Mancini Kapteyn

Murray Ioannou

Delivered in open court in Luxembourg on 16 December 1997.

R. Grass H. Ragnemalm

Registrar President of the Sixth Chamber