Reports of Cases

JUDGMENT OF THE COURT (Fifth Chamber)

12 December 2013*

(Procedures for awarding public contracts in the water, energy, transport and telecommunications sectors — Directive 93/38/EEC — Directive not transposed into national law — Whether the State may rely on that directive against a body holding a public service concession in the case where that directive has not been transposed into national law)

In Case C-425/12,

REQUEST for a preliminary ruling under Article 267 TFEU from the Tribunal Administrativo e Fiscal do Porto (Portugal), made by decision of 26 June 2012, received at the Court on 18 September 2012, in the proceedings

Portgás – Sociedade de Produção e Distribuição de Gás SA

v

Ministério da Agricultura, do Mar, do Ambiente e do Ordenamento do Território,

THE COURT (Fifth Chamber),

composed of T. von Danwitz (Rapporteur), President of the Chamber, E. Juhász, A. Rosas, D. Šváby and C. Vajda, Judges,

Advocate General: N. Wahl,

Registrar: M. Ferreira, Principal Administrator,

having regard to the written procedure and further to the hearing on 4 July 2013,

after considering the observations submitted on behalf of:

— Portgás – Sociedade de Produção e Distribuição de Gás SA, by J. Vieira Peres, advogado,

— the Ministério da Agricultura, do Mar, do Ambiente e do Ordenamento do Território, by M. Ferreira da Costa and M. Pires da Fonseca, acting as Agents,

— the European Commission, by M. Afonso and A. Tokár, acting as Agents,

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

gives the following

* Language of the case: Portuguese.

Judgment

1 This request for a preliminary ruling concerns the interpretation of Council Directive 93/38/EEC of 14 June 1993 coordinating the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors (OJ 1993 L 199, p. 84), as amended by Directive 98/4/EC of the European Parliament and of the Council of 16 February 1998 (OJ 1998 L 101, p. 1) ('Directive 93/38').

2 The request has been made in proceedings between Portgás – Sociedade de Produção e Distribuição de Gás SA ('Portgás') and the Ministério da Agricultura, do Mar, do Ambiente e do Ordenamento do Território (Ministry of Agriculture, the Sea, the Environment and Town and Country Planning; 'the Ministério') concerning a decision ordering the recovery of financial aid which was granted to that company under the European Regional Development Fund, on the ground that, when it procured gas meters from another company, Portgás had not complied with the European Union law rules on public procurement.

Legal context

European Union law

3 Article 2(1) of Directive 93/38 provides:

'This Directive shall apply to contracting entities which:

(a) are public authorities or public undertakings and exercise one of the activities referred to in paragraph 2;

(b) when they are not public authorities or public undertakings, have as one of their activities any of those referred to in paragraph 2 or any combination thereof and operate on the basis of special or exclusive rights granted by a competent authority of a Member State.'

4 Among the activities mentioned in Article 2(2) of Directive 93/38 is the provision or operation of fixed networks intended to provide a service to the public in connection with the production, transport or distribution of gas.

5 Under Article 4(1) and (2) of that directive:

'1. When awarding supply, works or service contracts, or organising design contests, the contracting entities shall apply procedures which are adapted to the provisions of this Directive.

2. Contracting entities shall ensure that there is no discrimination between different suppliers, contractors or service providers.'

6 Article 14(1)(c)(i) of Directive 93/38 provides that the directive applies to contracts awarded by contracting entities which carry out activities in the field of gas transport or distribution, provided that the estimated value of those contracts, net of value added tax, is not less than EUR 400 000.

7 Under Article 15 of Directive 93/38, supply and works contracts and contracts which have as their object services listed in Annex XVI A to that directive are to be awarded in accordance with the provisions of Titles III, IV and V thereof.

8 In accordance with Article 45(2) of Directive 93/38, the Portuguese Republic was required to adopt the measures necessary to comply with that directive and to apply them by 1 January 1998 at the latest. As regards the amendments made to Directive 93/38 by Directive 98/4, those amendments were to be transposed into the Portuguese domestic legal system by 16 February 2000 at the latest.

Portuguese law

9 Directive 93/38 was transposed into Portuguese law by Decree-Law No 223/2001 of 9 August 2001 (*Diário da República* I, series -A, No 184, of 9 August 2001, p. 5002). In accordance with Article 53(1) thereof, Decree-Law No 223/2001 entered into force 120 days after the date of its publication.

The dispute in the main proceedings and the question referred for a preliminary ruling

10 Portgás is a company limited by shares under Portuguese law which is active in the natural gas production and distribution sector.

11 On 7 July 2001, Portgás concluded a contract for the supply of gas meters with Soporgás – Sociedade Portuguesa de Gás Lda. The value of that contract was EUR 532 736.92.

12 On 21 December 2001, Portgás submitted an application for Community co-financing under the European Regional Development Fund, which was approved. The contract awarding financial aid to cover the eligible expenditure of Project POR/3.2/007/DREN, which included the procurement of those gas meters, was signed on 11 October 2002.

13 Following an audit carried out by the Inspecção-Geral das Finanças (Inspectorate General of Finances), on 29 October 2009, the manager of the Programa Operacional Norte (Operational Programme North) ordered the recovery of the financial assistance which had been granted to Portgás in connection with that project, on the ground that, with regard to the procurement of those gas meters, Portgás had failed to comply with the rules of European Union law on public procurement, with the result that all expenditure that had been the subject of public co-financing was ineligible.

14 Portgás brought a special administrative action before the Tribunal Administrativo e Fiscal do Porto (Porto Administrative and Customs Court) by which it sought annulment of the decision ordering that recovery. Before that court, Portgás claimed that the Portuguese State could not require it, as a private undertaking, to comply with the provisions of Directive 93/38. According to Portgás, at the time when the contract was entered into with Soporgás – Sociedade Portuguesa de Gás Lda, the provisions of that directive had not yet been transposed into the Portuguese legal system and, therefore, they could not have direct effect in relation to Portgás.

15 The Ministério contended before the referring court that Directive 93/38 is addressed not only to the Member States but also to all contracting entities, as defined in that directive. According to the Ministério, in its capacity as the holder of the only public service concession in the area covered by the concession, Portgás was subject to the obligations arising from that directive.

16 Since it had doubts as to the interpretation of the provisions of European Union law invoked in the main proceedings, the Tribunal Administrativo e Fiscal do Porto decided to stay the proceedings and to refer the following question to the Court for a preliminary ruling:

‘May Articles 4(1) and 14(1)(c)(i) of … Directive 93/38 …, and the other provisions of [that directive] and the general principles of Community law applicable, be interpreted as meaning that they create obligations for private persons who hold public service concessions – in particular an entity covered by

Article 2(1)(b) of Directive 93/38 … – where that directive has not been transposed into national law by the Portuguese State, so that failure to comply with those obligations may be invoked against the entity holding the individual concession by the Portuguese State by means of an act attributable to one of its Ministries?'

The question referred for a preliminary ruling

17 By its question, the referring court is asking, in essence, whether Articles 4(1), 14(1)(c)(i) and 15 of Directive 93/38 may be relied on against a private undertaking solely on the ground that, in its capacity as the exclusive holder of a public service concession, that undertaking comes within the group of persons covered by that directive and, if so, whether the authorities of the Member State concerned may rely on those provisions in circumstances where Directive 93/38 has not yet been transposed into the domestic system of that Member State.

18 As a preliminary point, it should be recalled that, according to settled case-law of the Court, whenever the provisions of a directive appear, so far as their subject-matter is concerned, to be unconditional and sufficiently precise, they may be relied on before the national courts by individuals against the State where the latter has failed to implement the directive in domestic law by the end of the period prescribed or where it has failed to implement the directive correctly (see, inter alia, Case 8/81 *Becker* [1982] ECR 53, paragraph 25, and Case C-282/10 *Dominguez* [2012] ECR, paragraph 33 and the case-law cited).

19 So far as Articles 4(1), 14(1)(c)(i) and 15 of Directive 93/38 are concerned, it must be pointed out that those provisions require, in unconditional and precise terms, contracting entities carrying out activities in, inter alia, the gas transport and distribution sectors to award supply contracts, the estimated value of which is not less than EUR 400 000, in accordance with the provisions of Titles III, IV and V of that directive and to ensure that there is no discrimination between different suppliers, contractors or service providers.

20 It follows that those provisions of Directive 93/38 are unconditional and sufficiently precise to be relied on before national courts.

21 That being so, it is necessary to establish whether those provisions may be relied on, before national courts, against a private undertaking, such as Portgás, in its capacity as the exclusive holder of a public service concession.

22 In this connection, it should be recalled that, in accordance with the third paragraph of Article 288 TFEU, the binding nature of a directive, which constitutes the basis for the possibility of relying on it, exists only in relation to 'each Member State to which it is addressed'. It follows, according to settled case-law, that a directive cannot of itself impose obligations on an individual and cannot therefore be relied on as such against such a person before a national court (Case 80/86 *Kolpinghuis Nijmegen* [1987] ECR 3969, paragraph 9; Case C-91/92 *Faccini Dori* [1994] ECR I-3325, paragraph 20; and *Dominguez*, paragraph 37 and the case-law cited).

23 So far as concerns the entities against which the provisions of a directive may be relied on, it is apparent from the Court's case-law that those provisions may be relied on against a State, regardless of the capacity in which the latter is acting, whether as employer or public authority. In either case, it is necessary to prevent the State from being able to take advantage of its own failure to comply with European Union law (see, to that effect, Case 152/84 *Marshall* [1986] ECR 723, paragraph 49; Case C-188/89 *Foster and Others* [1990] ECR I-3313, paragraph 17; and *Dominguez*, paragraph 38).

24 Thus, according to settled case-law, the entities against which reliance may be placed on the provisions of a directive that are capable of having direct effect include a body, whatever its legal form, which has been given responsibility, pursuant to a measure adopted by the State, for providing a public-interest service under the control of the State and which has, for that purpose, special powers beyond those which result from the normal rules applicable in relations between individuals (*Foster and Others*, paragraph 20; Case C-343/98 *Collino and Chiappero* [2000] ECR I-6659, paragraph 23; Case C-157/02 *Rieser Internationale Transporte* [2004] ECR I-1477, paragraph 24; Case C-356/05 *Farrell* [2007] ECR I-3067, paragraph 40; and *Dominguez*, paragraph 39).

25 It follows from that case-law that, even if a private party comes within the group of persons covered by a directive, the provisions of that directive may not be relied on as such against that person before the national courts. Consequently, as the Advocate General has noted in point 41 of his Opinion, the mere fact that a private undertaking which is the exclusive holder of a public service concession is among the entities expressly referred to as constituting the group of persons covered by Directive 93/38 does not mean that the provisions of that directive may be relied on against that undertaking.

26 Rather, it is necessary that that public service should be provided under the control of a public authority and that that undertaking should have special powers beyond those which result from the normal rules applicable in relations between individuals (see, to that effect, *Rieser Internationale Transporte*, paragraphs 25 to 27).

27 As regards the position of Portgás, it is apparent from the order for reference that that undertaking has been entrusted by the Portuguese State with providing, as holder of an exclusive concession, a public service, namely, the operation of the gas distribution network in the region of northern Portugal.

28 However, the information provided by the referring court does not enable the Court to determine whether, at the time of the facts at issue in the main proceedings, that public service was provided under the control of State authorities and whether Portgás had special powers going beyond those which result from the normal rules applicable in relations between individuals.

29 In this connection, it should be observed that, as regards the question whether that public-interest service was provided under the control of the Portuguese authorities, Portgás has argued, without being contradicted by the Portuguese Government, that the Portuguese State does not hold a majority or the entirety of its share capital and that the Portuguese State may neither appoint members to its management and supervisory bodies nor issue instructions concerning the operation of its public service activity. However, it is not clear from the documents before the Court whether those circumstances were satisfied at the time of the facts at issue in the main proceedings.

30 As to whether Portgás had special powers going beyond those which result from the normal rules applicable in relations between individuals, it should be observed that, although that undertaking enjoyed, pursuant to the concession contract, special and exclusive rights, that does not mean, as the Advocate General has noted in point 39 of his Opinion, that it had such special powers. The fact that Portgás could request that the expropriations necessary for the establishment and operation of the infrastructures be carried out, without, however, being able itself to do so, is not sufficient, in itself, for a finding that Portgás had special powers going beyond those which result from the normal rules applicable in relations between individuals.

31 In those circumstances, is for the referring court to establish whether, at the time of the facts at issue in the main proceedings, Portgás was a body which had been given responsibility for providing, under the control of a public authority, a public-interest service and whether that undertaking had, for that purpose, such special powers.

32 On the assumption that Portgás featured among the entities against which, pursuant to the case-law cited in paragraph 24, the provisions of Directive 93/38 may be relied on by an individual, it is necessary to examine whether those provisions could also be relied on against Portgás by the Portuguese authorities.

33 In this connection, it should be observed that, although the Court has held that unconditional and sufficiently precise provisions of a directive may be relied on by individuals against a body which has been given responsibility, under the control of the State, for a public-interest service and which has, for that purpose, special powers (see, to that effect, *Foster and Others*, paragraphs 18 and 20, and *Dominguez*, paragraphs 38 and 39 and the case-law cited), the case in the main proceedings has arisen in a context different from the context of that case-law.

34 In the context of the present case, it should be recalled that, according to the case-law of the Court, the obligation on a Member State to take all the measures necessary to achieve the result prescribed by a directive is a binding obligation imposed by the third paragraph of Article 288 TFEU and by the directive itself. That duty to take all appropriate measures, whether general or particular, is binding on all the authorities of the Member States (see Case C-129/96 *Inter-Environnement Wallonie* [1997] ECR I-7411, paragraph 40 and the case-law cited) as well as on bodies which, under the control of those authorities, have been given responsibility for a public-interest service and which have, for that purpose, special powers. It follows that the authorities of the Member States must be in a position to ensure that such bodies comply with the provisions of Directive 93/38.

35 It would be contradictory to rule that State authorities and bodies satisfying the conditions set out in paragraph 24 of the present judgment are required to apply Directive 93/38, while denying those authorities the possibility to ensure compliance, if necessary before national courts, with the provisions of that directive by a body satisfying those conditions when that body must itself also comply with Directive 93/38.

36 Furthermore, the Member States would be able to take advantage of their own failure to comply with European Union law in failing correctly to transpose a directive into national law if compliance with the provisions of Directive 93/38 by such bodies could not be ensured on the initiative of a State authority.

37 Lastly, that approach would make it possible for a private competitor to rely on the provisions of Directive 93/38 against a contracting entity which satisfies the criteria set out in paragraph 24 of the present judgment, whereas State authorities could not rely on the obligations flowing from that directive against such an entity. Consequently, whether or not such a contracting entity would be required to comply with the provisions of Directive 93/38 would depend on the nature of the persons or bodies relying on Directive 93/38. In those circumstances, Directive 93/38 would no longer be applied in a uniform manner in the domestic legal system of the Member State concerned.

38 It follows that a private undertaking, which has been given responsibility, pursuant to a measure adopted by the State, for providing, under the control of the State, a public-interest service and which has, for that purpose, special powers going beyond those which result from the normal rules applicable in relations between individuals, is obliged to comply with the provisions of Directive 93/38 and the authorities of a Member State may therefore rely on those provisions against it.

39 In the light of all the foregoing considerations, the answer to the question referred is that:

— Articles 4(1), 14(1)(c)(i) and 15 of Directive 93/38 must be interpreted as meaning that they cannot be relied on against a private undertaking solely on the ground that, in its capacity as the exclusive holder of a public-interest service concession, that undertaking comes within the group of persons covered by Directive 93/38, in circumstances where that directive has not yet been transposed into the domestic system of the Member State concerned.

— Such an undertaking, which has been given responsibility, pursuant to a measure adopted by the State, for providing, under the control of the State, a public-interest service and which has, for that purpose, special powers going beyond those which result from the normal rules applicable in relations between individuals, is obliged to comply with the provisions of Directive 93/38 and the authorities of a Member State may therefore rely on those provisions against it.

Costs

40 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Fifth Chamber) hereby rules:

Articles 4(1), 14(1)(c)(i) and 15 of Council Directive 93/38/EEC of 14 June 1993 coordinating the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors, as amended by Directive 98/4/EC of the European Parliament and of the Council of 16 February 1998, must be interpreted as meaning that they cannot be relied on against a private undertaking solely on the ground that, in its capacity as the exclusive holder of a public-interest service concession, that undertaking comes within the group of persons covered by Directive 93/38, in circumstances where that directive has not yet been transposed into the domestic system of the Member State concerned.

Such an undertaking, which has been given responsibility, pursuant to a measure adopted by the State, for providing, under the control of the State, a public-interest service and which has, for that purpose, special powers going beyond those which result from the normal rules applicable in relations between individuals, is obliged to comply with the provisions of Directive 93/38, as amended by Directive 98/4, and the authorities of a Member State may therefore rely on those provisions against it.

[Signatures]