Reports of Cases

JUDGMENT OF THE COURT (Fourth Chamber)

27 June 2013*

(Failure of a Member State to fulfil obligations — Directive 94/22/EC — Conditions for granting and using authorisations for the prospection, exploration and extraction of hydrocarbons — Non-discriminatory access)

In Case C-569/10,

ACTION under Article 258 TFEU for failure to fulfil obligations, brought on 3 December 2010,

European Commission, represented by K. Herrmann and M. Owsiany-Hornung, acting as Agents,

applicant,

v

Republic of Poland, represented by M. Szpunar, M. Drwięcki and. B. Majczyna acting as Agents, with an address for service in Luxembourg,

defendant,

THE COURT (Fourth Chamber),

composed of L. Bay Larsen (Rapporteur), President of the Chamber, J.-C. Bonichot, C. Toader, A. Prechal and E. Jarašiūnas, Judges,

Advocate General: P. Cruz Villalón,

Registrar: C. Strömholm, Administrator,

having regard to the written procedure and further to the hearing on 20 June 2012,

after hearing the Opinion of the Advocate General at the sitting on 20 November 2012,

gives the following

Judgment

1 By its application, the European Commission asks the Court to declare that, in failing to adopt the measures necessary to ensure that access to activities relating to the prospection, exploration and extraction of hydrocarbons is free of all discrimination as between interested entities and that the authorisations to carry out those activities are granted following a procedure in which all interested

* Language of the case: Polish.

entities may submit applications in accordance with criteria published in the *Official Journal of the European Union* prior to the beginning of the period in which applications may be submitted, the Republic of Poland has failed to comply with its obligations under Articles 2(2), 3(1) and 5(1) and (2) of Directive 94/22/EC of the European Parliament and of the Council of 30 May 1994 on the conditions for granting and using authorisations for the prospection, exploration and production of hydrocarbons (OJ 1994 L 164, p. 3).

Legal context

European Union law

2 Article 1(3) of Directive 94/22 defines 'authorisation' as being 'any law, regulation, administrative or contractual provision or instrument issued thereunder by which the competent authorities of a Member State entitle an entity to exercise, on its own behalf and at its own risk, the exclusive right to prospect or explore for or produce hydrocarbons in a geographical area. An authorisation may be granted for each activity separately or for several activities at a time'.

3 Article 2 of that directive provides:

'1. Member States retain the right to determine the areas within their territory to be made available for the exercise of the activities of prospecting, exploring for and producing hydrocarbons.

2. Whenever an area is made available for the exercise of the activities set out in paragraph 1, Member States shall ensure that there is no discrimination between entities as regards access to and exercise of these activities.

However, Member States may refuse, on grounds of national security, to allow access to and exercise of these activities to any entity which is effectively controlled by third countries or third country nationals.'

4 Article 3 of that directive provides:

'1. Member States shall take the necessary measures to ensure that authorisations are granted following a procedure in which all interested entities may submit applications in accordance either with paragraph 2 or 3.

2. This procedure shall be initiated:

(a) either at the initiative of the competent authorities by means of a notice inviting applications, to be published in the *Official Journal of the European Communities* at least 90 days before the closing date for applications;

(b) or by means of a notice inviting applications, to be published in the *Official Journal of the European Communities* following submission of an application by an entity without prejudice to Article 2(1). Other interested entities shall have a period of at least 90 days after the date of publication in which to submit an application.

Notices shall specify the type of authorisation, the geographical area or areas in part or all of which an application has been or may be made and the proposed date or time limit for granting authorisation.

Where preference is given to applications by entities which are single natural or legal persons, the notice shall so specify.

…

5. The following shall not be considered as the grant of an authorisation within the meaning of paragraph 1:

…

(b) the grant of an authorisation to an entity having another form of authorisation where the possession of the latter authorisation implies a right to the grant of the former authorisation;

…’

5 Article 5 of Directive 94/22 is worded as follows:

‘Member States shall adopt the necessary measures to ensure that:

(1) authorisations are granted on the basis of criteria concerning, in all cases:

(a) the technical and financial capability of the entities; and

(b) the way in which they propose to prospect, to explore and/or to bring into production the geographical area in question;

and, where applicable:

(c) if the authorisation is put up for sale, the price which the entity is prepared to pay in order to obtain the authorisations;

(d) if, following evaluation under the criteria (a), (b) and, where applicable, (c), two or more applications have equal merit, other relevant objective and non-discriminatory criteria, in order to make a final choice among these applications.

…

The criteria shall be drawn up and published in the *Official Journal of the European Communities* before the start of the period for submission of applications. Member States which have already published the criteria in their official journals may limit the publication in the *Official Journal of the European Communities* to a reference to the publication in their official journals. However, any change in criteria shall be published in full in the *Official Journal of the European Communities*;

(2) the conditions and requirements concerning the exercise or termination of the activity which apply to each type of authorisations by virtue of the laws, regulations and administrative provisions in force at the time of submission of the applications, whether contained in the authorisation or being one of the conditions to be accepted prior to the grant of such authorisation, are established and made available to interested entities at all times. In the case provided for in Article 3(2)(a), they may be made available only from the date starting from which applications for authorisation may be submitted;

…’

6 Article 6(1) and (2) of the same directive provides:

‘1. Member States shall ensure that the conditions and requirements referred to in Article 5(2) and the detailed obligations for use of a specific authorisation are justified exclusively by the need to ensure the proper performance of the activities in the area for which an authorisation is requested, by the application of paragraph 2 or by the payment of a financial contribution or a contribution in hydrocarbons.

2. Member States may, to the extent justified by national security, public safety, public health, security of transport, protection of the environment, protection of biological resources and of national treasures possessing artistic, historic or archaeological value, safety of installations and of workers, planned management of hydrocarbon resources (for example the rate at which hydrocarbons are depleted or the optimisation of their recovery) or the need to secure tax revenues, impose conditions and requirements on the exercise of the activities set out in Article 2(1).’

Polish law

7 Directive 94/22 was transposed into Polish law by the Polish Geological and Mining Law of 4 February 1994, as amended (Dz. U. 2005, No 228, item 1947) (‘the Geological and Mining Law’), and by the Regulation of the Council of Ministers concerning the tendering procedure for the acquisition of mining usufruct rights of 21 June 2005 (Dz. U. No 135, item 1131) (‘the Regulation of the Council of Ministers’).

8 That law distinguishes mining usufruct rights, granted by the Treasury in its capacity as owner of hydrocarbon deposits, and concessions, which are granted by the Minister for the Environment. In order to be able to prospect, explore or extract hydrocarbons in Poland, it is necessary to obtain both mining usufruct rights and a concession.

9 Article 9 of the Geological and Mining Law provides that, subject to the restrictions laid down in legislation in force and the agreement on mining usufruct rights, the holder of mining usufruct rights may, to the exclusion of any other parties, prospect, explore and extract a specified mineral and that the holder may, subject to the same restrictions, also dispose of its rights.

10 Article 10(1) of the same law provides that mining usufruct rights are to be created by way of an agreement for consideration and subject to a concession being obtained.

11 Article 11(2) to (4) of the Geological and Mining Law is worded as follows:

‘2. Without prejudice to Article 12(1), the creation of mining usufruct rights covering the prospection, exploration and extraction of natural gas, oil and its natural derivatives and coal bed methane shall be preceded by a competitive tendering procedure.

…

3. The competent authorities for issuing the invitation to tender relating to the acquisition of mining usufruct rights shall be the authorities responsible for the grant of concessions.

4. The Council of Ministers shall adopt regulations setting out the rules governing the publication of notices of invitations to tender for the acquisition of mining usufruct rights and the information to be included in those notices, the requirements to be fulfilled by the tenderer and the tenders, the time-limit for submitting tenders, the time-limit for the closing of the tendering procedure and the principles and detailed rules for the organisation and carrying-out of the tendering procedure and for the meetings and work of the tendering award committee.’

12 Article 12(1) and (3) of that law provides:

‘1. The entrepreneur that has explored and documented mineral deposits belonging to the Treasury and has prepared geological documentation to the level of accuracy required for the grant of a concession for extraction may apply for the grant of mining usufruct rights and shall have in that regard priority over other entities.

…

3. The rights referred to in paragraph 1 shall expire two years after receipt of written notice by which the competent authority in geological matters accepted the documentation.’

13 Under Article 15(1) of the Geological and Mining Law, a concession is required for: (1) the prospection or exploration of mineral deposits, and (2) the extraction of minerals. Article 15(2) states that matters not regulated in the Geological and Mining Law are to be regulated by the Law of 2 July 2004 on freedom of economic activity (Dz. U. No 173, item 1807).

14 Article 17 of the Geological and Mining Law provides:

‘1. Where warranted by particularly important State interests or particularly important public interests relating especially to environmental protection, the grant of a concession may be made conditional on the provision of a guarantee capable of providing compensation for the harmful effects of the activities carried out under the concession.

2. The form and amount of the guarantee referred to in paragraph 1 shall be fixed in the concession according to the type of activity pursued, the area covered by the concession, the period for which the concession was granted and the degree of harm to the environment arising from the planned activity.’

15 Article 18(1)(2b) of the Geological and Mining Law provides that the application for a concession must include the number of the applicant’s registration in the register of undertakings or in the register of economic activities.

16 Under Article 20(2)(1) of that law, the application for a mining concession must also include evidence of the applicant’s right to use the geological documentation.

17 Article 47(3) of the Geological and Mining Law states:

‘The entity who has borne the cost of geological work carried out on the basis of decisions made under this Law shall have the exclusive right to use, free of charge, the geological information obtained from that work for exploration and scientific purposes and to carry out activities regulated hereunder. This right shall expire five years after the date on which the decision authorising the work from which the information was derived or authorising another activity regulated hereunder or under other provisions ceases to have effect. Unless otherwise provided for in the concession or decision approving a programme of geological works, the entity having the right to use the geological information thus acquired may make it available to other parties.’

18 According to Article 6 of the Regulation of the Council of Ministers:

‘1. The tender specifications shall state inter alia:

…

(4) the information on the documents that the tenderer must produce in order to demonstrate that it fulfils the requirements, including the registration in the register of undertakings and the statement that it is not precluded from the tendering procedure under Article 5(2);

(5) the objective criteria for assessing the tenders which ensure observance of the principles of fair competition and identify their significance;

…

2. If the tenderer so requests in writing, the organiser of the tendering procedure shall provide the tenderer with the tender specifications of the tendering procedure, as from the day on which the invitation to tender is published.

3. The tenderer shall be allowed to contact the organiser of the tendering procedure to request explanations about the tender specifications, no later than 14 days before the time-limit for submitting tenders.

4. The organiser of the tendering procedure shall immediately provide all tenderers with those explanations, without disclosing the origin of the request. The explanations shall be considered firm for all tenderers.

…

6. The organiser of the tendering procedure shall extend the time-limits for submitting tenders in order to enable tenderers to reflect in their tenders the explanations received or the changes to the tender specifications.'

Background to the dispute and pre-litigation procedure

19 On 23 March 2007, the Commission sent a letter of formal notice to the Republic of Poland, in which it stated that the Geological and Mining Law was contrary to Articles 2(2), 3(1) and 5(1) and (2) of Directive 94/22.

20 By letter of 23 May 2007, the Republic of Poland responded to that letter of formal notice by stating that it had implemented Directive 94/22 correctly in its national law.

21 On 31 January 2008, the Commission sent the Republic of Poland a reasoned opinion in which it reiterated all the complaints set out in the letter of formal notice.

22 By letter of 20 March 2008, the Republic of Poland, without calling into question the well-foundedness of the complaints set out in the reasoned opinion, asked for the infringement proceedings to be closed, stating that legislative work for drafting a new Geological and Mining Law had allowed the 'infringements to be eliminated' and 'the provisions giving rise to doubts on the part of the Commission' to be removed. The Republic of Poland further informed the Commission that it would provide it with a timetable for that draft legislation by the end of June 2008.

23 By letter of 27 April 2010, the Republic of Poland informed the Commission that that draft legislation had been forwarded to the Polish Parliament on 18 November 2008 and that the Parliament had been unable to adopt it in 2009, but that it would inform the Commission once the new legislation had been adopted.

24 It is in those circumstances that the Commission brought this action.

The action

Admissibility

25 The Republic of Poland contends that the infringement action is inadmissible on the ground that the complaints set out in the application are not the same as the ones that had been put forward during the pre-litigation procedure.

26 The Commission replies that the subject-matter of the dispute and the complaints put forward during the pre-litigation procedure are the same as those which form the basis of the application. The extracts from the application referred to by the Republic of Poland do not contain new complaints, but rather more detailed legal reasoning in support of the complaints set out previously by the Commission in its reasoned opinion.

27 It adds that, in any event, even if the application did contain new complaints, only those complaints – and not all the complaints set out in the application – could be held to be inadmissible.

28 Before ruling on the Republic of Poland's argument that there is an absolute bar to proceeding with an action, it should be borne in mind that, according to the Court of Justice's settled case-law, the purpose of the pre-litigation procedure is to give the Member State concerned an opportunity, on the one hand, to comply with its obligations under European Union law and, on the other, to avail itself of its right to defend itself against the objections formulated by the Commission. The subject-matter of the action brought under Article 258 TFEU is, therefore, delimited by the pre-litigation procedure provided for by that article. Accordingly, the action cannot be founded on any objections other than those stated in the pre-litigation procedure (see, inter alia, Case C-152/98 *Commission* v *Netherlands* [2001] ECR I-3463, paragraph 23, and Case C-340/10 *Commission* v *Cyprus* [2012] ECR, paragraph 21). It must accordingly be founded on the same grounds and pleas as those stated in the reasoned opinion (see, inter alia, Case C-50/09 *Commission* v *Ireland* [2011] ECR I-873, paragraph 93), which must contain a cogent and detailed exposition of the reasons which led the Commission to the conclusion that the Member State concerned has failed to fulfil one of its obligations under Community law (see, inter alia, Case C-274/07 *Commission* v *Lithuania* [2008] ECR I-7117, paragraph 23 and the case-law cited).

29 That requirement cannot, however, go so far as to make it necessary that the national provisions mentioned in the reasoned opinion and in the application should always be completely identical (see Case C-11/95 *Commission* v *Belgium* [1996] ECR I-4115, paragraph 74, and judgment of 22 December 2008 in Case C-283/07 *Commission* v *Italy*, paragraph 22).

30 Nevertheless, where the Commission has not indicated during the pre-litigation procedure that the subject-matter of the action, that is to say, the infringement attributed to the Member State in question, extends beyond the national provisions specified in that procedure, then the action is inadmissible in so far as it covers national provisions other than those specified during the pre-litigation procedure (see, to that effect, Case 166/82 *Commission* v *Italy* [1984] ECR I-459, paragraphs 19 to 22, and Case C-243/89 *Commission* v *Denmark* [1993] ECR I-3353, paragraphs 15 to 17). That is because, in such a situation, the grounds of the alleged infringement and, therefore, its basis, have been extended without the Member State concerned having been given an opportunity, on the one hand, to comply with its obligations under European Union law and, on the other, to avail itself of its right to defend itself against the objections formulated by the Commission.

Consideration of the first plea in law

– Arguments of the parties

31 The first plea in law alleges infringement of the first subparagraph of Article 2(2) of Directive 94/22, in respect of which the Commission states that there is discrimination between entities as regards access to and pursuit of activities relating to the prospection, exploration and extraction of hydrocarbons. It argues, inter alia, that the exclusive right of an entity which has carried out geological work on the basis of a concession to explore hydrocarbon deposits to use geological information free of charge, as provided for in Article 47(3) of the Geological and Mining Law, combined with the requirement to demonstrate, in the application for an extraction concession, the applicant's right to use the geological documentation, as provided for in Article 20(2)(1) of that same law, is contrary to the principle of non-discriminatory access to activities relating to the extraction of hydrocarbons for all interested entities.

32 The Republic of Poland argues that this plea was put forward for the first time only in the proceedings before the Court and that it is, accordingly, inadmissible.

– Findings of the Court

33 Although it is true that in the reasoned opinion the Commission merely stated, in essence, that the Republic of Poland had failed to guarantee non-discriminatory access to activities relating to the prospection, exploration and extraction of hydrocarbons, in requiring applicants for a mining concession to include evidence of the right to use the geological documentation, as provided for in Article 20(2)(1) of the Geological and Mining Law, it is clear that such an obligation is necessarily based on the premise that, under Article 47(3) of that same law, the right to use such documentation free of charge falls to the entity which carried out the geological work on the basis of a concession for exploration of hydrocarbon deposits.

34 Accordingly, the reference to that second provision of the Geological and Mining Law in the application initiating proceedings must be viewed as an elaboration on a complaint already put forward by the Commission in the reasoned opinion.

35 Consequently, the objection of inadmissibility directed by the Republic of Poland against the first plea in law must be dismissed.

Consideration of the second plea in law

– Arguments of the parties

36 The second plea in law alleges infringement of Article 3(1) of Directive 94/22. The Commission complains, inter alia, that the Republic of Poland has failed, in respect of the issuance of the authorisation referred to in Article 1(3) of that directive, to provide that the grant of both mining usufruct rights and concessions must be done following a competitive tendering procedure and in accordance with the detailed rules guaranteeing non-discriminatory access to authorisation. Moreover, the fact that Article 12 of the Geological and Mining Law gives priority to the person having the right to use the geological documentation is also contrary to the requirement that a competitive tendering procedure be followed. The Commission further states that Article 52 of the Law on freedom of economic activity provides for the organisation of a tendering procedure only where the number of undertakings fulfilling the conditions for the grant of a concession and providing a guarantee of proper performance of the activity covered by the concession is greater than the number of concessions which have been earmarked to be granted.

37 Lastly, the Commission also states in its application that Article 53(4) of that law requires that the tender be submitted in Polish, which is contrary to the principle that all interested entities must be allowed to submit applications for authorisation to pursue activities relating to the prospection, exploration and extraction of hydrocarbons. The Commission has withdrawn this complaint in its reply, however.

38 The Republic of Poland argues that these complaints are inadmissible on the ground that they were put forward for the first time at the stage of the proceedings before the Court of Justice.

– Findings of the Court

39 Regarding the complaint that the Republic of Poland has failed, in respect of the issuance of the authorisation referred to in Article 1(3) of Directive 94/22, to provide that the grant of both mining usufruct rights and concessions must be done following a competitive tendering procedure and in accordance with the detailed rules guaranteeing non-discriminatory access to authorisation, suffice it to observe that this complaint had been put forward previously, in the reasoned opinion. The complaint is therefore admissible in the context of the present proceedings.

40 By contrast, the complaint alleging that the fact that Article 12 of the Geological and Mining Law gives priority to the person having the right to use the geological documentation is contrary to the requirement that a competitive tendering procedure be followed was not in the reasoned opinion. It follows that it is inadmissible.

41 Nor was the complaint alleging that Article 52 of the Law on freedom of economic activity provides for the organisation of a tendering procedure only where the number of undertakings fulfilling the conditions for the grant of a concession and providing a guarantee of proper performance of the activity covered by the concession is greater than the number of concessions which have been earmarked to be granted included in the reasoned opinion. It is accordingly also inadmissible.

42 Lastly, since the Commission has withdrawn the complaint that Article 53(4) of the Law on freedom of economic activity requires that the tender be submitted in Polish, it is no longer necessary to rule on this complaint.

Consideration of the third plea in law

– Arguments of the parties

43 The third plea in law alleges infringement of Article 5(1) and (2) of Directive 94/22. The Commission states, in particular, that the Polish rules do not implement correctly the requirement of publication in the *Official Journal of the European Union* of the assessment criteria referred to in Article 5(1). In its application, the Commission also complains that the Republic of Poland has also placed on the same level the criteria relating to the tenderer's technical and financial capability and the scope and technologies planned for the geological work, on the one hand, and the proposed amount to be paid for the mining usufruct rights, on the other. The Commission withdrew this last complaint at the hearing.

44 The Republic of Poland contends that these complaints are inadmissible on the ground that they were not put forward in the reasoned opinion.

– Findings of the Court

45 The first complaint alleging that the Polish rules do not implement correctly the requirement of publication in the *Official Journal of the European Union* of the assessment criteria referred to in Article 5(1) of Directive 94/22 was set out in the reasoned opinion and is, accordingly, admissible.

46 The second complaint, referred to in paragraph 43 above, was withdrawn by the Commission at the hearing. There is, accordingly, no longer any need to rule on it.

Substance

Consideration of the first plea in law

47 The first plea in law, alleging infringement of the first subparagraph of Article 2(2) of Directive 94/22, is broken down into two parts.

Consideration of the first part of the first plea

– Arguments of the parties

48 By the first part of the first plea, the Commission submits that, in requiring the application for a concession to include the number of the applicant's registration in the register of undertakings or in the register of economic activities in Poland in Article 18(1)(2b) of the Geological and Mining Law, the Polish rules give rise to a discriminatory situation in the very access to the procedure for obtaining a concession in respect of undertakings established in other Member States, which can apply for a concession only if they have an undertaking registered in Poland.

49 The Republic of Poland replies that the obligation to have an office in Poland provided for at the stage of application for a concession is not a hindrance to the freedom to pursue economic activity as this stage relates merely to monitoring operators' compliance with formal requirements and usually leads to the grant of the concession.

– Findings of the Court

50 It should be borne in mind that, under Article 2(2) of Directive 94/22, Member States are to ensure that there is no discrimination between entities as regards access to and pursuit of activities relating to the prospection, exploration and extraction of hydrocarbons in the areas made available for the pursuit of those activities.

51 Yet Article 18(1)(2b) of the Geological and Mining Law, in requiring operators established in other Member States wishing to obtain a concession for the prospection, exploration or extraction of hydrocarbons in Poland to have an office or establishment on Polish territory before the concession can even be granted to it, makes access to the envisaged economic activity more difficult for that operator than for an operator established principally in Poland. That provision in fact requires an economic operator applying for a concession to make – potentially considerable – investments when it is not even certain of being able to obtain such a concession.

52 Article 18(1)(2b) of the Geological and Mining Law is accordingly incompatible with Article 2(2) of Directive 94/22.

53 This conclusion is not affected by the Republic of Poland's assertion that the grant of a concession for a given area is subject only to certain formal requirements to be satisfied by the applicant, usually following the acquisition by the applicant of mining usufruct rights on that area. First, it cannot be taken for granted that the applicant will in all cases satisfy the requirements imposed for the grant of a concession and, second, the Republic of Poland itself recognised that there had been a case of a concession being refused.

54 Therefore, the first part of the first plea is well founded.

Consideration of the second part of the first plea second

– Arguments of the parties

55 By the second part of the first plea, the Commission argues that the exclusive right of an entity which has carried out geological work on the basis of a concession to explore hydrocarbon deposits to use geological information free of charge, as provided for in Article 47(3) of the Geological and Mining Law, combined with the requirement to demonstrate, in the application for an extraction concession, the applicant's right to use the geological documentation, as provided for in Article 20(2)(1) of that same law, is contrary to the principle of non-discriminatory access to activities relating to the extraction of hydrocarbons. An entity which has obtained a concession for the exploration of hydrocarbon deposits previously will be in a more favourable position than other entities interested in the grant of an extraction concession.

56 The Republic of Poland submits in that regard that, under Polish law, any interested entity enjoys equal, non-discriminatory access to the grant of concessions relating to prospection and exploration work in respect of hydrocarbons. Consequently, all entities have the opportunity to document a mineral deposit by drawing up the relevant geological documentation and, consequently, to obtain an exclusive right to use that geological information.

57 The applicable rules in Poland concerning the right to use geological information, which confer the right to use that information on entities which themselves have borne the costs necessary to obtain that information are based on one of the fundamental principles of Polish law and European Union law, namely observance of the right of property and other property-related rights.

58 The Republic of Poland submits that Article 47(3) of the Geological and Mining Law implements Article 3(5)(b) of Directive 94/22, which provides that the grant of an authorisation to an entity having another form of authorisation where the possession of the latter authorisation implies a right to the grant of the former authorisation is not to be considered as the grant of an authorisation within the meaning of Article 3(1).

– Findings of the Court

59 It should be borne in mind that, under Articles 10(1) and 11(2) of the Geological and Mining Law, the creation of mining usufruct rights covering the prospection, exploration and extraction of natural gas, oil and its natural derivatives and coal bed methane is, subject to Article 12(1) of that same law, to be preceded by a competitive tendering procedure, and that those rights are created by way of an agreement for consideration and subject to a concession being obtained.

60 Yet, as observed by the Advocate General in point 81 of his Opinion, the effect of Article 47(3), combined with Article 20(2)(1) of the Geological and Mining Law, is that the interested entity which has been successful in the tendering procedure relating to the mining usufruct rights covering the

extraction of the relevant hydrocarbons may not, during the five-year exclusivity period, obtain the extraction concession if the entity which carried out geological work earlier and therefore has an exclusive right to use the geological documentation does not make that documentation available to it.

61 Accordingly, the scheme in question, given the advantageous position that it confers for a five-year period on the entity which has previously pursued prospection and exploration activities, makes it in any event more difficult, if not impossible, for an entity which has not pursued either prospection or exploration of the deposits in question to obtain permission to extract hydrocarbons.

62 This conclusion is in no way called into question by the Republic of Poland's argument that the authorisation provided for by the national procedure encompasses both concessions for prospection and exploration and concessions for extraction.

63 Moreover, although the Member States are free to guarantee some compensation for entities which have incurred expenditure in drawing up geological documentation in the course of their prospection and exploration activities, that compensation may not be in the form provided for in the Geological and Mining Law without infringing the rule of non-discriminatory access for all entities to activities such as the extraction of hydrocarbons as laid down in Article 2(2) of Directive 94/22.

64 It follows that the second part of the first plea is well founded.

65 In the light of the foregoing, the first plea put forward by the Commission in support of its action must be upheld.

Consideration of the second plea in law

66 The second plea in law, alleging infringement of Article 3(1) of Directive 94/22, henceforth comprises only two parts.

Consideration of the first part of the second plea

– Arguments of the parties

67 By the first part of the second plea, the Commission submits that the provisions of the Geological and Mining Law do not guarantee that the competitive tendering procedure complying with the principles provided for in Article 3(2) of Directive 94/22 for obtaining authorisation for the prospection, exploration and extraction of hydrocarbons will be undertaken in each case.

68 The Commission does not question the Republic of Poland's choice to split the authorisation referred to in Article 1(3) of Directive 94/22, with the result that it is necessary to obtain mining usufruct rights then a concession. If so, however, the acquisition of those two rights should take place in accordance with the procedure provided for in Article 3(2) of Directive 94/22 and the detailed rules guaranteeing non-discriminatory access to authorisation. However, only mining usufruct rights are granted through a tendering procedure, whilst concessions are granted using an 'entitlement-based' procedure.

69 The Republic of Poland observes that, under the system provided for by the Geological and Mining Law, the authorisation under Article 1(3) of Directive 94/22 comprises both the mining usufruct rights and the concession.

70 Any entity may apply for the creation of mining usufruct rights, which opens up the possibility for its obtaining a concession. Each tender submitted in the tendering procedure relating to the creation of mining usufruct rights is assessed according to objective, non-discriminatory criteria.

71 In the Republic of Poland's submission, the fact that, in practice, only one entity is admitted to the formal administrative procedure relating to the grant of a concession, that being the entity whose tender was judged to be the best one and which, therefore, was successful at the end of the tendering procedure concerning the creation of the mining usufruct rights, confirms that the outcome of tendering procedure relating to the mining usufruct rights is decisive for the grant of the concession. Consequently, the objective of Directive 94/22 to ensure that the concession is granted to the entity which submitted the best tender in the tendering procedure, assessed on the basis of transparent, non-discriminatory criteria, is achieved by the national legal arrangement, viewed as a whole.

– Findings of the Court

72 Under Article 3(1) of Directive 94/22, Member States are to take the necessary measures to ensure that authorisations are granted following a procedure in which all interested entities may submit applications in accordance either with paragraph 2 or 3 of that article.

73 It is common ground that, under the national procedure as established by the Geological and Mining Law, the authorisation to exercise the exclusive right to engage in the prospection, exploration or extraction of hydrocarbons in a geographical area within the meaning of Article 1(3) of Directive 94/22 comprises both mining usufruct rights and concessions.

74 However, the fact that only the grant of the mining usufruct rights is done through a tendering procedure, whilst the grant of the concession to the successful applicant for those rights is subject only to compliance with certain formal requirements is not in itself incompatible with Article 3(1) of Directive 94/22. The possibility cannot be ruled out presumptively that such a system may guarantee that 'authorisations are granted following a procedure in which all interested entities may submit applications' within the meaning of Article 3(1). That would be so inter alia in a situation where all interested entities were able to submit applications for the grant of usufruct rights under non-discriminatory conditions and the grant of the concession to the successful applicant for those rights was subject only to requirements not involving an assessment of the applications on their merits for the purposes of Article 5(1)(d) of Directive 94/22.

75 Accordingly, the first part of the second plea is unfounded.

Consideration of the second part of the second plea

– Arguments of the parties

76 By the second part of the second plea, the Commission submits that the notice of the need to proceed with an invitation to tender is published only in the *Dziennik Ustaw Rzeczypospolitej Polskiej* (*Official Journal of the Republic of Poland*) and not in the *Official Journal of the European Union*, as required under Article 3(2) of Directive 94/22, to which reference is made in Article 3(1) thereof.

77 The Republic of Poland states that, under Article 4(2) of the Regulation of the Council of Ministers, the notice of the tendering procedure relating to the grant of mining usufruct rights covering the prospection, exploration or extraction of natural gas, oil and its natural derivatives and coal bed methane is also to be published in the *Official Journal of the European Union*.

– Findings of the Court

78 Under Article 3(2) of Directive 94/22, to which reference is made in Article 3(1) thereof, the procedure in which all interested entities must be able to submit applications for authorisation is to be initiated either at the behest of the competent authorities by way of notice calling for applications published in

the *Official Journal of the European Union*, or by way of notice calling for applications, which is published in the *Official Journal of the European Union* following the submission of an application by an entity.

79 It is not disputed that that publication requirement is, in respect of the grant of mining usufruct rights, complied with in the Polish legal order.

80 Moreover, the fact that the concession procedure is not so published is not, for the same reasons as set out in the analysis of the first part of the second plea, in itself contrary to Article 3(2) of Directive 94/22 or, therefore, Article 3(1).

81 It follows that the second part of the second plea is unfounded and must accordingly be rejected.

Consideration of the third plea in law

82 The third plea in law, alleging infringement of Article 5(1) and (2) of Directive 94/22, henceforth comprises three parts.

Consideration of the first part of the third plea

– Arguments of the parties

83 By the first part of the third plea, the Commission argues that, in providing that, where warranted by particularly important State interests or particularly important public interests relating especially to environmental protection, the grant of a concession may be made conditional on the provision of a guarantee capable of providing compensation for the harmful effects of the activities carried out under the concession, Article 17 of the Geological and Mining Law is contrary to Article 5(1)(a) of Directive 94/22. The Commission adds that making the grant of a concession subject to the provision of a guarantee cannot be based on Article 6(2) of that directive, which concerns not the grant or refusal to grant authorisation, but only the date on which the authorisation is granted.

84 The Republic of Poland disagrees with the Commission's submissions and considers that Article 6(2) of Directive 94/22 does allow the national authority which is competent to grant the concession to make the grant of that concession subject to the provision of a guarantee where warranted by particularly important State interests relating inter alia to environmental protection.

– Findings of the Court

85 Under Article 5(1)(a) of Directive 94/22, authorisations are to be granted on the basis of criteria concerning in any event the technical and financial capability of the entities.

86 It is true that the provision of a guarantee, to which the grant of a concession made be made subject under Article 17 of the Geological and Mining Law, does not come within the scope of Article 5(1)(a) of Directive 94/22.

87 However, it is apparent from a combined reading of Article 5(2) and Article 6(1) and (2) of Directive 94/22 that, where warranted by particularly important State interests or particularly important public interests relating especially to environmental protection, the grant of a concession may, as provided for in Article 17 of the Geological and Mining Law, be made conditional on the provision of a guarantee capable of providing compensation for the harmful effects of the activities carried out under the concession.

88 Accordingly, the first part of the third plea is unfounded.

Consideration of the second part of the third plea

– Arguments of the parties

89 By the second part of the third plea, the Commission submits that the requirement of publication in the *Official Journal of the European Union* of the specific criteria concerning the factors referred to in Article 5(1) of Directive 94/22 is not satisfactorily implemented in the Polish legal order.

90 The Republic of Poland denies that it breached its obligation to publish and define clearly all the criteria for assessing the interested entities' tenders. In its submission, Article 2(3) of the Regulation of the Council of Ministers satisfies that obligation.

– Findings of the Court

91 Under the fifth subparagraph of Article 5(1) of Directive 94/22, Member States are to take the measures necessary to ensure that the criteria on the basis of which authorisations are granted are drawn up and published in the *Official Journal of the European Union* before the start of the period for submission of applications.

92 It should be observed in that regard that, as stated by the Commission – without being contradicted on the point by the Republic of Poland – Article 2(3) of the Regulation of the Council of Ministers, on which the Republic of Poland relies, refers only to types of criteria on the basis of which the tender is to be considered the most advantageous. Moreover, although, as observed by the Commission, Article 4(2) and (3) of that same regulation provides for the publication in the *Official Journal of the European Union* of invitations to tender containing inter alia the criteria for assessing tenders, in practice it would appear that the Polish Government merely publishes in the *Official Journal of the European Union* the categories of criteria for assessing those tenders, whilst referring for a specific description of those criteria to the 'detailed conditions of the tendering procedure for the acquisition of mining usufruct rights for the prospection and extraction of oil and natural gas deposits in certain concession areas', which may be requested from the relevant department of the Ministry of the Environment.

93 It follows from the foregoing that the Republic of Poland has not taken all the measures necessary for ensuring satisfactory implementation of Article 5(1) of Directive 94/22 in the Polish legal order.

94 Consequently, the second part of the third plea is well founded.

Consideration of the third part of the third plea

– Arguments of the parties

95 By the third part of the third plea, alleging infringement of Article 5(2) of Directive 94/22, the Commission submits that the Polish rules do not guarantee that all of the conditions and requirements concerning the pursuit of the activities covered by that directive are fixed and made available to the interested entities as from the date on which applications may be submitted.

96 The Republic of Poland, whilst challenging the Commission's complaint, states merely that the Polish rules provide for the provision of all necessary information to the interested entities and that that information is accessible at a certain stage of the procedure, whilst retaining the possibility of setting out certain conditions in the concession documents, solely by way of exception.

– Findings of the Court

97 As provided for under Article 5(2) of Directive 94/22, the conditions and requirements concerning the pursuit or termination of the activity which are applicable to each type of authorisation by virtue of the laws, regulations and administrative provisions in force at the time of submission of the applications, whether contained in the authorisation or being one of the conditions to be accepted prior to the grant of such authorisation, are established and made available to interested entities at all times. In the case provided for in Article 3(2)(a) thereof, they may be made available only from the date starting from which applications for authorisation may be submitted.

98 Yet although the Republic of Poland disputes the complaint which makes up the third part of the third plea relied on by the Commission, it does not dispute the Commission's argument that the Polish rules do not guarantee that all of those conditions and requirements concerning the pursuit of the activities covered by Directive 94/22 are fixed and made available to the interested entities as from the date on which applications may be submitted.

99 Therefore, the Polish rules are not compatible with Article 5(2) of Directive 94/22.

100 Consequently, the third part of the third plea is well founded.

101 In the light of the foregoing, the first part of the third plea in law relied on by the Commission in support of its action must be rejected, whilst the second and third parts of the third plea must be upheld.

102 Consequently, the Court, firstly, finds that, in failing to adopt the measures necessary to ensure that access to activities relating to the prospection, exploration and extraction of hydrocarbons is free of all discrimination as between interested entities and that the authorisations to carry out those activities are granted following a procedure in which all interested entities may submit applications in accordance with criteria published in the *Official Journal of the European Union* prior to the beginning of the period in which applications may be submitted, the Republic of Poland has failed to comply with its obligations under Articles 2(2) and 5(1) and (2) of Directive 94/22 and, secondly, dismisses the action as to the remainder.

Costs

103 Under the first sentence of Article 138(3) of the Rules of Procedure, the parties are to bear their own costs where each party succeeds on some and fails on other heads. In the present case, since each of the parties has been unsuccessful on some heads of claim, they must be ordered to bear their own costs.

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

1. **Declares that, in failing to adopt the measures necessary to ensure that access to activities relating to the prospection, exploration and extraction of hydrocarbons is free of all discrimination as between interested entities and that the authorisations to carry out those activities are granted following a procedure in which all interested entities may submit applications in accordance with criteria published in the *Official Journal of the European Union* prior to the beginning of the period in which applications may be submitted, the**

Republic of Poland has failed to comply with its obligations under Articles 2(2) and 5(1) and (2) of Directive 94/22/EC of the European Parliament and of the Council of 30 May 1994 on the conditions for granting and using authorisations for the prospection, exploration and extraction of hydrocarbons.

2. **Dismisses the action as to the remainder.**

3. **Orders the European Commission and the Republic of Poland to bear their own costs.**

[Signatures]