JUDGMENT OF THE COURT (Fifth Chamber)
17 December 1998 *

In Case C-353/96,

Commission of the European Communities, represented by Richard Wainwright, Principal Legal Adviser, 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

Ireland, represented by Michael A. Buckley, Chief State Solicitor, acting as Agent, and Eoghan Fitzsimons SC and Feargal Ó Dubhghaill BL, with an address for service in Luxembourg at the Irish Embassy, 28 Route d'Arlon,

defendant,

APPLICATION for a declaration that, by failing to comply with the provisions 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), as amended by Council Directive 88/295/EEC of 22 March 1988 (OJ 1988 L 127, p. 1), and in particular by failing to publish its invitation to tender for the supply of fertiliser on behalf of Coillte Teoranta (The Irish Forestry Board Limited) in the *Official Journal of the European Communities*, Ireland has failed to fulfil its obligations under the EC Treaty,

* Language of the case: English.

THE COURT (Fifth Chamber),

composed of: J.-P. Puissochet, President of the Chamber, P. Jann (Rapporteur), J. C. Moitinho de Almeida, C. Gulmann and M. Wathelet, Judges,

Advocate General: S. Alber,
Registrar: D. Louterman-Hubeau, Principal Administrator,

having regard to the Report for the Hearing,

after hearing oral argument from the parties at the hearing on 28 May 1998, at which the Commission was represented by Richard Wainwright and Ireland by Michael A. Buckley and Donal O'Donnell SC,

after hearing the Opinion of the Advocate General at the sitting on 16 July 1998,

gives the following

Judgment

1 By application lodged at the Court Registry on 29 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 comply with the provisions 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), as amended by Council Directive 88/295/EEC of 22 March 1988 (OJ 1988 L 127, p. 1), and in particular by failing to publish its invitation to tender for the supply of fertiliser on behalf of Coillte Teoranta in the *Official Journal of the European Communities*, Ireland had failed to fulfil its obligations under the EC Treaty.

Relevant Community legislation

2 Until 1994 the award of public supply contracts was governed in the Community by Directive 77/62, as amended *inter alia* by Directive 88/295.

3 Article 1 of Directive 77/62 defines 'contracting authority' as follows:

'For the purpose of this directive:

...

(b) "contracting authorities" shall be the State, regional or local authorities and the legal persons governed by public law or, in Member States where the latter are unknown, bodies corresponding thereto as specified in Annex I;

...'.

4 Point VI of Annex I to Directive 77/62 specifies, with respect to Ireland, that the corresponding bodies are 'other public authorities whose public supply contracts are subject to control by the State'.

5 Council Directive 93/36/EEC of 14 June 1993 coordinating procedures for the award of public supply contracts (OJ 1993 L 199, p. 1) repealed Directive 77/62. Its provisions were to be transposed into national law by 14 June 1994 at the latest; Ireland had not yet done so on that date.

6 Under Article 1 of that directive,

'For the purpose of this Directive:

...

(b) "*contracting authorities*" shall be the State, regional or local authorities, bodies governed by public law, associations formed by one or several of such authorities or bodies governed by public law;

"*a body governed by public law*" means any body:

— established for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character, and

— having legal personality, and

— financed, for the most part, by the State, or regional or local authorities, or other bodies governed by public law, or subject to management supervision by those bodies, or having an administrative, managerial or supervisory board, more than half of whose members are appointed by the State, regional or local authorities or by other bodies governed by public law;

...'.

7 Article 3 of Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts (OJ 1989 L 395, p. 33) provides:

'1. The Commission may invoke the procedure for which this Article provides when, prior to a contract being concluded, it considers that a clear and manifest infringement of Community provisions in the field of public procurement has been committed during a contract award procedure falling within the scope of Directives 71/305/EEC and 77/62/EEC.

2. The Commission shall notify the Member State and the contracting authority concerned of the reasons which have led it to conclude that a clear and manifest infringement has been committed and request its correction.

3. Within 21 days of receipt of the notification referred to in paragraph 2, the Member State concerned shall communicate to the Commission:

(a) its confirmation that the infringement has been corrected; or

(b) a reasoned submission as to why no correction has been made; or

(c) a notice to the effect that the contract award procedure has been suspended either by the contracting authority on its own initiative or on the basis of the powers specified in Article 2(1)(a).

4. A reasoned submission in accordance with paragraph 3(b) may rely among other matters on the fact that the alleged infringement is already the subject of judicial or other review proceedings or of a review as referred to in Article 2(8). In such a case, the Member State shall inform the Commission of the result of those proceedings as soon as it becomes known.

5. ...'

Background to the dispute

8 The establishment of Coillte Teoranta in the form of a private company was provided for by Section 9 of the Irish Forestry Act 1988 (hereinafter 'the Act').

9 According to the Act, the objects of Coillte Teoranta are to carry on the business of forestry and related activities on a commercial basis and, in accordance with efficient silvicultural practices, to establish and carry on woodland industries, and to participate with others in forestry activities consistent with those objects.

10 Under Paragraph 3(14) of its memorandum of association, the objects of Coillte Teoranta, as owner of 12 national parks, access to which is free of charge, also include the provision of recreation, sporting, educational, scientific and cultural facilities.

11 The Irish Government transferred to Coillte Teoranta land and other property worth approximately IEP 700 000 000. In return for those assets, Coillte Teoranta issued shares to the Minister for Finance, who is thus its majority shareholder.

12 As regards the structure of Coillte Teoranta, it follows from the Act and its memorandum and articles of association that it was established by the Minister for Energy (hereinafter 'the Minister'), that its memorandum and articles and any amendments

thereto must be approved by him (Sections 11 and 15), that the chairman and other directors are appointed and their remuneration determined by him (Section 15(2)(b) and (d)), that the first Chief Executive is to be appointed by the Minister and hold office on the terms determined by him (Section 35), that the appointment of the company's auditors must be approved by the Minister (Section 15(2)(e)) and that the company is to comply with State policy and any ministerial directives with regard to the remuneration, allowances and conditions of employment of its employees (Section 36). Some of the Minister's decisions require the consent of the Minister for Finance.

13 In managing its business Coillte Teoranta must comply with the following obligations: the Minister may issue written directions requiring it to comply with State policy decisions of a general kind concerning forestry, or to provide or maintain specified services or facilities, or to maintain or use specified land or premises in its possession for a particular purpose (Section 38 of the Act); it is obliged to consult the Minister for Finance concerning forestry development in areas of scientific interest (Section 13); it must submit each year to the Minister a programme for the sale and acquisition of land (Section 14); the establishment and acquisition of subsidiaries must be approved by the Minister (Section 15(2)(g)); a general meeting must be convened if the two ministers so request (Paragraph 15 of the articles); and its annual report and auditor's report must be laid before the Irish Parliament (Sections 30 and 31 of the Act).

14 As regards finance, under the relevant provisions, Coillte Teoranta's share capital must be approved by the Minister for Finance (Section 10 of the Act). It is not authorised to borrow without the approval of the Minister (Section 24), and the Minister for Finance may guarantee repayment of any borrowings (Section 25). It may invest a sum not exceeding IEP 250 000 in other undertakings. That sum may be increased with the approval of the Minister given with the consent of the Minister for Finance (Section 15(2)(h)). He may also make sums available to Coillte Teoranta on particular terms for specific purposes.

15 On 10 March 1994 Coillte Teoranta called for tenders for a fertiliser supply contract worth over ECU 200 000 for the period from 1 April 1994 to 31 March 1995. It did not have a notice published in the *Official Journal of the European Communities*. On 30 May 1994 it awarded the contract. On 21 June 1994 Connemara Machine Turf Co. Ltd, an undertaking whose tender had not been accepted, brought proceedings in the High Court challenging the award of the contract.

16 On 18 May 1994, before the contract was awarded, the Commission received a complaint concerning the tendering procedure. Pursuant to Article 3(1) of Directive 89/665, it sent a letter to the Irish Government on 30 June 1994. In that letter the Commission expressed doubts as to whether the award procedure complied with the Community rules on public supply contracts, and stated that the letter was deemed to be a letter of formal notice in accordance with Article 169 of the Treaty. It essentially argued that Coillte Teoranta as contracting authority had failed to publish an invitation to tender in the *Official Journal of the European Communities* as required by Directive 77/62, in particular Article 9 thereof.

17 The Irish Government, by letter of 22 July 1994, contested the Commission's arguments. It submitted that the procedure provided for in Article 3(1) and (2) of Directive 89/665 was not applicable, since the contract had been concluded before the Commission's letter was received; that, as provided for in Article 3(4) of Directive 89/665, the alleged infringement was already the subject of proceedings before a national court in Ireland; that Coillte Teoranta was not in any event a contracting authority within the meaning of either Directive 93/36 or Directive 77/62; that Ireland had correctly transposed the directives into national law; and that even if there had been a breach of the Community rules on public supply contracts, proceedings under Article 169 of the Treaty were inappropriate, in view of the existence of another remedy provided for in Directive 89/665.

18 Since it was not satisfied with the response, the Commission sent Ireland a reasoned opinion on 23 February 1996 pursuant to the first paragraph of Article 169 of the Treaty, to which Ireland replied by letter of 7 June 1996, confirming the position it had adopted in its earlier letter.

19 It was in these circumstances that the Commission brought the present action for failure to fulfil obligations.

Admissibility

20 While not formally contesting the admissibility of the application, the Irish Government raises the question whether proceedings under Article 169 of the Treaty may be initiated when other means exist of remedying a possible failure to fulfil obligations, such as those provided for in Article 3 of Directive 89/665.

21 It submits that, since proceedings were brought in the High Court on 21 June 1994, it is Article 3(4) of that directive which applies in the present case. It is in the context of those proceedings that any infringement of the relevant provisions on the award of public contracts should be assessed. Moreover, such an infringement would not be the result of a failure by Ireland to fulfil its obligations, but would be attributable to Coillte Teoranta if it were to be regarded as a contracting authority.

22 On this point, it must be noted that the special procedure under Directive 89/665 is a preliminary measure which can neither derogate from nor replace the powers

of the Commission under Article 169 of the Treaty. That article gives the Commission discretionary power to bring an action before the Court where it considers that a Member State has failed to fulfil an obligation under the Treaty and that the State concerned has not complied with the Commission's reasoned opinion (Case C-359/93 *Commission* v *Netherlands* [1995] ECR I-157, paragraph 13).

23 As regards the question whether Ireland may be held liable for the actions of Coillte Teoranta as contracting authority, it is sufficient to state that the directives on public contract awards would be deprived of their effectiveness if the actions of a contracting authority were not imputable to the Member State concerned.

24 The application is accordingly admissible.

Substance

25 The Commission considers that only Directive 77/62 is relevant. It submits that by virtue of the various provisions governing the status of Coillte Teoranta, it must be regarded as falling within the notion of the State, as defined by the Court in Case 31/87 *Beentjes* v *Netherlands State* [1988] ECR 4635.

26 In that judgment, it claims, the Court gave a functional interpretation to the concept of the State for the purposes of Council Directive 71/305/EEC of 26 July 1971 concerning the coordination of procedures for the award of public works contracts (OJ, English Special Edition 1971 (II), p. 682), which contained the same definition of contracting authorities as Directive 77/62. Following that interpretation, a body

whose composition and functions are laid down by legislation and which largely depends on the public authorities must be regarded as falling within the notion of the State, even if it is not formally part of the State administration.

27 The Commission further considers that Coillte Teoranta may also be regarded as an 'other' public authority whose public supply contracts are subject to control by the State within the meaning of Point VI of Annex I to Directive 77/62.

28 According to the Irish Government, Coillte Teoranta cannot be regarded as a contracting authority within the meaning of either Directive 77/62 or Directive 93/36.

29 It submits that Coillte Teoranta is a private undertaking subject to the Companies Act. It is thus a commercial company belonging to the State. The powers of appointing and removing its officers and defining its general policy are no more extensive than those provided for in the memorandum and articles of a private company which is owned almost entirely by a single shareholder. Its day-to-day business, on the other hand, is managed independently and the State has no influence on the award of contracts.

30 On the other hand, Ireland does not dispute that if Coillte Teoranta were to be classified as a contracting authority, it should have published a notice of tender for the public contract in question.

31 It must first be stated that the facts of the present case fall exclusively within the scope of Directive 77/62. At the time when the invitation to tender was issued, and

even when the contract in question was awarded, the period for transposing Directive 93/36 had not yet expired, and Ireland had not yet transposed it.

32 On the question whether Coillte Teoranta is a contracting authority for the purposes of Directive 77/62, it must be noted that, unlike the body concerned in *Beentjes*, Coillte Teoranta has legal personality. Moreover, it is common ground that it does not award public contracts on behalf of the State or a regional or local authority.

33 In those circumstances, Coillte Teoranta cannot be regarded as being the State or a regional or local authority within the meaning of Article 1(b) of Directive 77/62. It must still be considered, however, whether it is one of the bodies corresponding to legal persons governed by public law listed in Annex I to Directive 77/62.

34 With reference to Ireland, that annex describes as contracting authorities other public authorities whose public supply contracts are subject to control by the State.

35 It must be borne in mind that the purpose of coordinating at Community level the procedures for the award of public supply contracts is to eliminate barriers to the free movement of goods.

36 In order to give full effect to the principle of free movement, the term 'contracting authority' must be interpreted in functional terms (see, to that effect, the judgment of 10 November 1998 in Case C-360/96 *Gemeente Arnhem and Gemeente Rheden* v *BFI Holding* [1998] ECR I-6821, paragraph 62).

37 It must be emphasised here that it is the State which set up Coillte Teoranta and entrusted specific tasks to it, consisting principally of managing the national forests and woodland industries, but also of providing various facilities in the public interest. It is also the State which has power to appoint the principal officers of Coillte Teoranta.

38 Moreover, the Minister's power to give instructions to Coillte Teoranta, in particular requiring it to comply with State policy on forestry or to provide specified services or facilities, and the powers conferred on that Minister and the Minister for Finance in financial matters give the State the possibility of controlling Coillte Teoranta's economic activity.

39 It follows that, while there is indeed no provision expressly to the effect that State control is to extend specifically to the awarding of public supply contracts by Coillte Teoranta, the State may exercise such control, at least indirectly.

40 Consequently, Coillte Teoranta must be regarded as a 'public authority whose public supply contracts are subject to control by the State' within the meaning of Point VI of Annex I to Directive 77/62.

41 Coillte Teoranta is therefore a contracting authority within the meaning of Directive 77/62. It was consequently obliged in the present case to have a notice of tender published in the *Official Journal of the European Communities*.

42 It must therefore be held that, since Coillte Teoranta failed to have a notice of tender for a contract for the supply of fertiliser published in the *Official Journal of the European Communities*, Ireland has failed to fulfil its obligations under Directive 77/62, as amended by Directive 88/295.

Costs

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

On those grounds,

THE COURT (Fifth Chamber)

hereby:

1. **Declares that, since Coillte Teoranta failed to have a notice of tender for a contract for the supply of fertiliser published in the *Official Journal of the European Communities*, Ireland has failed to fulfil its obligations under Council Directive 77/62/EEC of 21 December 1976 coordinating procedures for the award of public supply contracts, as amended by Council Directive 88/295/EEC of 22 March 1988;**

2. **Orders Ireland to pay the costs.**

Puissochet Jann Moitinho de Almeida

Gulmann Wathelet

Delivered in open court in Luxembourg on 17 December 1998.

R. Grass J.-P. Puissochet

Registrar President of the Fifth Chamber