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

In Case C-306/97,

REFERENCE to the Court under Article 177 of the EC Treaty by the High Court (Ireland) for a preliminary ruling in the proceedings pending before that court between

Connemara Machine Turf Co. Ltd

and

Coillte Teoranta

on the interpretation of Article 1 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 of Article 1 of Council Directive 93/36/EEC of 14 June 1993 coordinating procedures for the award of public supply contracts (OJ 1993 L 199, p. 1),

* 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: H. von Holstein, Deputy Registrar,

after considering the written observations submitted on behalf of:

— Connemara Machine Turf Co. Ltd, by Philip Lee and Lee McEvoy, Solicitors,

— Coillte Teoranta, by Philippa Watson, Barrister, instructed by Denis Cagney, Solicitor,

— the Irish Government, by Michael A. Buckley, Chief State Solicitor, acting as Agent, and Patrick Mooney BL,

— the United Kingdom Government, by John E. Collins, Assistant Treasury Solicitor, acting as Agent, and Paul Lasok QC and Rhodri Williams, Barrister,

— the Commission of the European Communities, by Richard Wainwright, Principal Legal Adviser, acting as Agent,

having regard to the Report for the Hearing,

after hearing the oral observations of Connemara Machine Turf Co. Ltd, represented by Bill Shipsey SC and Philip Lee, Solicitor; Coillte Teoranta, represented by Philippa Watson; the Irish Government, represented by Michael A. Buckley and Donal O'Donnell SC; the French Government, represented by Philippe Lalliot, Secretary for Foreign Affairs in the Legal Department of the Ministry of Foreign Affairs, acting as Agent; the United Kingdom Government, represented by Paul Lasok and Rhodri Williams; and the Commission, represented by Richard Wainwright, at the hearing on 28 May 1998,

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

gives the following

Judgment

1 By order of 29 May 1997, received at the Court on 2 September 1997, the High Court (Ireland) referred to the Court for a preliminary ruling under Article 177 of the EC Treaty two questions on the interpretation of Article 1 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 of Article 1 of Council Directive 93/36/EEC of 14 June 1993 coordinating procedures for the award of public supply contracts (OJ 1993 L 199, p. 1).

2 Those questions were raised in proceedings between Connemara Machine Turf Co. Limited (hereinafter 'Connemara'), a company incorporated under Irish law engaged in the production of machine-cut turf and the sale of chemical fertilisers, and Coillte Teoranta (The Irish Forestry Board Limited) concerning the award by the latter of two public supply contracts.

3 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.

4 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;

...'.

5 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'.

6 Directive 77/62 was repealed by Directive 93/36. That directive's provisions were to be transposed into national law by 14 June 1994 at the latest; Ireland had not yet done so on that date.

7 Under Article 1 of Directive 93/36,

'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 ...'.

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 Under 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 12 March 1993 and 10 March 1994 Coillte Teoranta called for tenders for fertiliser supply contracts worth over ECU 200 000 in each case, without publishing a notice of tender in the *Official Journal of the European Communities*.

16 Connemara submitted tenders in each procedure, but they were not accepted.

17 On 21 June 1994 Connemara brought proceedings in the High Court *inter alia* for a declaration that the tender and award procedure of Coillte Teoranta was contrary to Directive 77/62. Coillte Teoranta submitted in this respect that it was not a contracting authority within the meaning of that directive.

18 In these circumstances, the High Court referred the following questions to the Court of Justice for a preliminary ruling:

'1. Is the defendant a "contracting authority" within the definition of the term "contracting authorities" contained in Article 1(b) of Council Directive 77/62/EEC of 21 December 1976?

2. Is the defendant a "contracting authority" within the definition of the term "contracting authorities" contained in Article 1(b) of Council Directive 93/36/EEC of 14 June 1993?'

19 Connemara and the Commission consider 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.

20 In that judgment, they claim, 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.

21 Connemara and the Commission further consider 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.

22 The Irish Government and Coillte Teoranta, on the other hand, consider that the latter is not a contracting authority within the meaning of either Directive 77/62 or Directive 93/36.

23 They submit 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 com-

pany 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.

24 The French and United Kingdom Governments concentrate their observations on the question whether Coillte Teoranta is a body governed by public law within the meaning of Article 1(b) of Directive 93/36.

25 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.

26 It follows that the Court must confine itself to answering the question whether a body such as Coillte Teoranta is a contracting authority within the meaning of Directive 77/62.

27 On this point, 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.

28 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.

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

30 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.

31 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).

32 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.

33 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.

34 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.

35 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.

36 The answer to the questions referred for a preliminary ruling must therefore be that a body such as Coillte Teoranta is a contracting authority within the meaning of Article 1(b) of Directive 77/62, as amended by Directive 88/295.

Costs

37 The costs incurred by the Irish, French and United Kingdom Governments and by the Commission, which have submitted observations to the Court, are not recoverable. 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.

On those grounds,

THE COURT (Fifth Chamber),

in answer to the questions referred to it by the High Court by order of 20 May 1997, hereby rules:

A body such as Coillte Teoranta is a contracting authority within the meaning of Article 1(b) of 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.

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