JUDGMENT OF THE COURT (Sixth Chamber)
19 May 1999 *

In Case C-225/97,

Commission of the European Communities, represented by Hendrik van Lier, 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

French Republic, represented by Kareen Rispal-Bellanger, Head of the Subdirectorate for International Economic Law and Community Law in the Legal Affairs Directorate of the Ministry of Foreign Affairs, and Philippe Lalliot, Secretary for Foreign Affairs in the same Directorate, acting as Agents, with an address for service in Luxembourg at the French Embassy, 8B Boulevard Joseph II,

defendant,

* Language of the case: French.

APPLICATION for a declaration that, by not adopting all the measures necessary to comply with Council Directive 92/13/EEC of 25 February 1992 coordinating the laws, regulations and administrative provisions relating to the application of Community rules on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors (OJ 1992 L 76, p. 14), the French Republic has failed to fulfil its obligations under Articles 1(2), 2(1)(c) and 2(5) of that Directive, and under Chapters 2 and 4 thereof,

THE COURT (Sixth Chamber),

composed of: P. J. G. Kapteyn (Rapporteur), President of the Chamber, G. Hirsch and G. F. Mancini, Judges,

Advocate General: A. La Pergola,
Registrar: L. Hewlett, Administrator,

having regard to the Report for the Hearing,

after hearing oral argument from the parties at the hearing on 22 October 1998, at which the Commission was represented by Hendrik van Lier and the French Government by Anne Viéville-Bréville, *chargé de mission* in the Legal Affairs Directorate of the Ministry of Foreign Affairs, acting as Agent,

after hearing the Opinion of the Advocate General at the sitting on 19 January 1999,

gives the following

Judgment

1 By application lodged at the Court Registry on 17 June 1997, the Commission of the European Communities brought an action under Article 169 of the EC Treaty (now Article 226 EC) for a declaration that, by not adopting all the measures necessary to comply with Council Directive 92/13/EEC of 25 February 1992 coordinating the laws, regulations and administrative provisions relating to the application of Community rules on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors (OJ 1992 L 76, p. 14; hereinafter 'the Directive'), the French Republic has failed to fulfil its obligations under Articles 1(2), 2(1)(c) and 2(5) of that Directive, and under Chapters 2 and 4 thereof.

Community law

2 Article 13 of the Directive provides that the Member States are to take the measures necessary to comply with the Directive before 1 January 1993 and to inform the Commission thereof immediately.

Penalty payments

3 Chapter 1 of the Directive (Articles 1 and 2) concerns remedies at national level.

4 Article 1 provides:

'1. The Member States shall take the measures necessary to ensure that decisions taken by contracting entities may be reviewed effectively and, in particular, as rapidly as possible in accordance with the conditions set out in the following Articles and, in particular, Article 2(8), on the grounds that such decisions have infringed Community law in the field of procurement or national rules implementing that law as regards:

(a) contract award procedures falling within the scope of Council Directive 90/531/EEC; and

(b) compliance with Article 3(2)(a) of that Directive in the case of the contracting entities to which that provision applies.

2. Member States shall ensure that there is no discrimination between undertakings likely to make a claim for injury in the context of a procedure for the award

of a contract as a result of the distinction made by this Directive between national rules implementing Community law and other national rules.

...'

5 Article 2 of the Directive provides:

'1. The Member States shall ensure that the measures taken concerning the review procedures specified in Article 1 include provision for the powers:

either

(a) to take, at the earliest opportunity and by way of interlocutory procedure, interim measures with the aim of correcting the alleged infringement or preventing further injury to the interests concerned, including measures to suspend or to ensure the suspension of the procedure for the award of a contract or the implementation of any decision taken by the contracting entity;

and

(b) to set aside or ensure the setting aside of decisions taken unlawfully, including the removal of discriminatory technical, economic or financial specifications in the notice of contract, the periodic indicative notice, the notice on the existence of a system of qualification, the invitation to tender, the contract documents or in any other document relating to the contract award procedure in question;

or

(c) to take, at the earliest opportunity, if possible by way of interlocutory procedures and if necessary by a final procedure on the substance, measures other than those provided for in points (a) and (b) with the aim of correcting any identified infringement and preventing injury to the interests concerned; in particular, making an order for the payment of a particular sum, in cases where the infringement has not been corrected or prevented.

Member States may take this choice either for all contracting entities or for categories of entities defined on the basis of objective criteria, in any event preserving the effectiveness of the measures laid down in order to prevent injury being caused to the interests concerned;

(d) and, in both the above cases, to award damages to persons injured by the infringement.

Where damages are claimed on the grounds that a decision has been taken unlawfully, Member States may, where their system of internal law so requires and provides bodies having the necessary powers for that purpose, provide that the contested decision must first be set aside or declared illegal.

2. The powers referred to in paragraph 1 may be conferred on separate bodies responsible for different aspects of the review procedure.

3. Review procedures need not in themselves have an automatic suspensive effect on the contract award procedures to which they relate.

4. The Member States may provide that, when considering whether to order interim measures, the body responsible may take into account the probable consequences of the measures for all interests likely to be harmed, as well as the public interest, and may decide not to grant such measures where their negative consequences could exceed their benefits. A decision not to grant interim measures shall not prejudice any other claim of the person seeking these measures.

5. The sum to be paid in accordance with paragraph 1(c) must be set at a level high enough to dissuade the contracting entity from committing or persisting in an infringement. The payment of that sum may be made to depend upon a final decision that the infringement has in fact taken place.

...'

Attestation

6 Chapter 2 of the Directive (Articles 3 to 7) concerns the attestation system.

7 Article 3 provides that Member States are to give contracting entities the possibility of having recourse to an attestation system in accordance with Articles 4 to 7.

8 Article 4 provides:

'Contracting entities may have their contract award procedures and practices which fall within the scope of Directive 90/531/EEC examined periodically with a view to obtaining an attestation that, at that time, those procedures and practices are in conformity with Community law concerning the award of contracts and the national rules implementing the law.'

9 Article 7 of the Directive provides that the provisions of Articles 4, 5 and 6 are to be considered as essential requirements for the development of European standards on attestation.

The conciliation procedure

10 Chapter 4 of the Directive (Articles 9 to 11) concerns the conciliation procedure.

11 Article 9 provides:

'1. Any person having or having had an interest in obtaining a particular contract falling within the scope of Directive 90/531/EEC and who, in relation to the procedure for the award of that contract, considers that he has been or risks being harmed by an alleged infringement of Community law in the field of procurement

or national rules implementing that law may request the application of the conciliation procedure provided for in Articles 10 and 11.

2. The request referred to in paragraph 1 shall be addressed in writing to the Commission or to the national authorities listed in the Annex. These authorities shall forward requests to the Commission as quickly as possible.'

French law

12 Under cover of a letter of 14 January 1994, the French authorities sent the Commission a copy of Law No 93-1416 of 29 December 1993 on review procedures relating to the award of certain supply and works contracts in the water, energy, transport and telecommunications sectors (JORF of 1 January 1994, p. 10).

13 Article 1 of that Law provides:

'Article 7 of Law No 92-1282 of 11 December 1992 on procedures relating to the award of certain contracts in the water, energy, transport and telecommunications sectors shall be followed by Articles 7-1 and 7-2 which provide as follows:

"Art. 7-1. In the case of failure to comply with the requirements to give notice and put up for tender, which apply to the award of contracts defined in Article 1 and governed by private law, the court may not adjudicate before conclusion of the contract save in the circumstances set out hereunder.

On application by any person with an interest in concluding the contract and likely to be harmed by non-compliance, the President of the appropriate court, or his deputy, may order the defaulting party to comply with its obligations. He shall prescribe the period within which the defaulting party must comply. He may also order a periodic penalty payment to be made as from the expiry of that period. He may nonetheless take into account the probable consequences of such a measure for all interests likely to be harmed, as well as the public interest, and may decide not to order such a measure where its negative consequences could exceed its benefits.

The application may also be submitted by the Ministère Public [Public Prosecutor's Office] where the Commission of the European Communities has notified the State of the reasons for which it maintains that there has been a clear and manifest breach of the obligations referred to in the first paragraph.

In setting the amount of the penalty payment, regard shall be had to the conduct of the party against which the order has been made and to the difficulties which it has encountered in order to comply therewith.

The President of the appropriate court, or his deputy, shall rule on such applications by way of an interlocutory decision which is not open to appeal.

If, on settlement of the periodic penalty payment, the infringement in question has not been corrected, the court may order payment of a fixed sum. In that case, the court's decision shall be by way of an interlocutory decision open to appeal in accordance with the rules governing proceedings for interim relief.

The penalty payment, whether periodic or fixed, shall be wholly distinct from damages. Orders to make periodic or fixed penalty payments shall be cancelled,

wholly or in part, if it is established that the default or delay in implementing the court's order has been caused, wholly or in part, by external factors.

Art. 7-2. In the case of failure to comply with the requirements to give notice and put up for tender, which apply to the award of contracts which are defined in Article 1 and governed by public law, any person with an interest in concluding the contract and who is likely to be harmed by non-compliance may apply to the court, before conclusion of the contract, for the measures provided for in Article L. 23 of the Code des Tribunaux Administratifs et des Cours Administratives d'Appel."'

14 Article 4 of Law No 93-1416 states:

'Article L. 23 of the Code des Tribunaux Administratifs et des Cours Administratives d'Appel provides as follows:

"Art. L. 23. The President of the administrative court, or his deputy, may adjudicate in the case of failure to comply with the requirements to give notice and put up for tender, which apply to the award of contracts falling within the scope of Article 7-2 of Law No 92-1282 of 11 December 1992 concerning the award of certain contracts in the water, energy, transport and telecommunications sectors. The court may adjudicate before conclusion of the contract only in the circumstances set out hereunder.

A right of action lies with those persons who have an interest in concluding the contract and are likely to be harmed by the infringement.

The President of the administrative court, or his deputy, may order the defaulting party to comply with its obligations. He shall prescribe the period within which the defaulting party must comply. He may also order a periodic penalty payment to be made as from the expiry of that period. He may nonetheless take into account the probable consequences of such a measure for all interests likely to be harmed, as well as the public interest, and may decide not to order such a measure where its negative consequences could exceed its benefits.

In setting the amount of the penalty payment, regard shall be had to the conduct of the party against which the order has been made and to the difficulties which it has encountered in order to comply therewith.

Save in the case of procurement contracts awarded by the State, an application may also be submitted by the State where the Commission of the European Communities has notified it of reasons for which it maintains that there has been a clear and manifest breach of the above obligations.

The President of the administrative court, or his deputy, shall rule on such applications by way of an interlocutory decision which is not open to appeal.

If, on settlement of the periodic penalty payment, the infringement identified has not been corrected, the court may order payment of a fixed sum. In that case, the court shall rule by way of an interlocutory decision open to appeal in accordance with the rules governing proceedings for interim relief.

The penalty payment, whether periodic or fixed, shall be wholly distinct from damages. Orders to make periodic or fixed penalty payments shall be cancelled, wholly or in part, if it is established that the default or the delay in implementing the court's order has been caused, wholly or in part, by external factors."'

The pre-litigation procedure

15 By letter of formal notice of 8 September 1995, the Commission informed the French authorities that the transposition into national law of the penalty payment system provided for in the Directive was inadequate, and the provisions of the Directive concerning the attestation system and the conciliation procedure had not been transposed into national law. Pursuant to Article 169 of the Treaty, the Commission called on the French Government to submit its comments within two months and to adopt the necessary amendments.

16 The French authorities replied on 13 November 1995, giving further details concerning the system of penalty payments and commenting on the provisions of the Directive concerning the conciliation procedure, which were not transposed into national law by Law No 93-1416.

17 However, in its reasoned opinion of 8 November 1996, the Commission maintained the charges regarding the penalty payment system and the non-transposition into national law of Chapters 2 and 4 of the Directive.

18 In their reply of 20 February 1997, the French authorities stated that, in their view, the operative part of Law No 93-1416 satisfied the requirements of the Directive; that they proposed shortly to publish a circular to provide individuals with guidance on the operation of the conciliation procedure; and that the departments concerned were studying possible means of ensuring that the Law's requirements concerning attestation were properly implemented.

19 Considering that reply to be unsatisfactory, the Commission brought the present proceedings.

The penalty payment

20 The first point to note is that it is common ground that the Commission does not dispute the French Republic's decision to avail itself of the option provided for in Article 2(1)(c) of the Directive.

21 As regards that choice, however, the Commission maintains, first, that the transposition into national law of Article 2(5) of the Directive — under which the sum to be paid in accordance with Article 2(1)(c) must be set at a level high enough to dissuade the contracting entity from committing or persisting in an infringement — requires a provision relating specifically to the level of penalty payments, either stating that they must be such as to have the dissuasive effect required or limiting the discretion enjoyed by the courts in determining that level. According to the Commission, if no such provision is made, the competent court will be prey to uncertainty.

22 The French Government contends that the Directive is silent as to any obligation on Member States to determine the amount of the payment and, given the diversity of the circumstances which may arise, it is important to allow the courts to set the amount in keeping with their assessment of the facts in each case, since it must be sufficiently high to ensure that the Directive's objectives are attained.

23 Article 2(5) of the Directive expressly provides that the sum to be paid in accordance with Article 2(1)(c) must be set at a level high enough to dissuade the contracting entity from committing or persisting in an infringement, but does not indicate whether the amount is to be fixed by the legislature or by the competent court.

24 As the Advocate General pointed out in point 13 of his Opinion, a penalty payment, being a coercive measure primarily intended to ensure that the court's decisions are complied with, is a deterrent in itself. Consequently, a provision laying down that the sum to be paid in accordance with Article 2(1) of the Directive must be set at a level high enough to be dissuasive does not as such affect or reinforce the latter provision.

25 Furthermore, the French Government contends — and the Commission offers no effective rebuttal — that in French law the penalty payment is by nature a coercive measure and an effective means of preventing non-compliance with court orders.

26 The Commission's next ground of complaint concerns the fact that Articles 1 and 4 of Law No 93-1416 provide, not only that the fixed penalty payment can be ordered only once the periodic penalty payment order has been cancelled, but also that, in setting the level of the fixed payment, account must be taken of the conduct of the party against whom the order was made and the difficulties it may have encountered in complying therewith. According to the Commission, the discretion thus left to the courts is limited by considerations which have been so vaguely defined that the system will be unable to operate properly.

27 On that point, it should be noted first that Article 2(1)(c) of the Directive merely requires the Member States which have chosen that option to take measures so that, in cases where the infringement has not been corrected or prevented, an order may be made under appropriate procedures for payment of a specific sum. Article 2(5) provides that this must be set at a level sufficiently high to dissuade the contracting entity from committing or persisting in an infringement, but does not specify whether the penalty payment must be fixed or periodic. Contrary to the Commission's assertion, Article 2(5) does not provide that the courts may order only fixed penalty payments in order to prevent or correct an infringement.

28 Secondly, as regards the Commission's argument that Articles 1 and 4 of Law No 93-1416 create — wrongly, in its view — a link between the penalty payment and the conduct of the party ordered to pay, it follows by definition from the right to a fair trial that, in procedures of the type laid down in Article 2(1)(c) of the Directive, the courts cannot disregard the conduct of that party or the difficulties which it has encountered in order to comply.

29 Lastly, the Commission submits that in so far as Law No 93-1416 does not really guarantee that the penalty payment will have a deterrent effect, it has established a procedure which is specific and less coercive than that provided for under French civil law, thereby infringing Article 1(2) of the Directive. The Commission maintains that there is a difference between the provisions governing penalty payments set out in Law No 93-1416 and the provisions of Law No 91-650 of 9 July 1991 on the reform of civil enforcement procedures (JORF of 14 July 1991, p. 9228). That difference, according to the Commission, indicates an intention on the part of the French legislature to make the special rules laid down in Law No 93-1416 less coercive than the general rules laid down in Law No 91-650.

30 In this connection it need only be pointed out that — as the French Government has maintained, without any real rebuttal from the Commission — the two Laws in question have different objectives. Law No 91-650, which aims to give a creditor with a right to recovery the means to enforce that right against the debtor's assets — in the context of the settlement of debts which have been acknowledged to be quantified and recoverable — does not confer on the courts any power to intervene in a contracting entity's procurement procedures.

31 As the Advocate General pointed out in point 17 of his Opinion, although Law No 91-650 introduced a penalty payment procedure, it could not provide a basis for the transposition into national law of the Directive.

32 Consequently, the Commission's allegation that the French legislature sought to set up a special procedure distinct from the rules of civil law in force and not providing the guarantees required under the Directive is unfounded.

33 It follows from the above considerations that the Commission's allegation concerning the inadequate transposition into national law of Articles 2(1)(c) and 2(5) of the Directive cannot be upheld.

The attestation

34 The Commission maintains that the attestation system provided for in Chapter 2 of the Directive has not been transposed into French law.

35 The French Government contends that, although the Member States are obliged to transpose Article 3 of the Directive into national law, that obligation may be discharged either by appointing attestators directly, as provided for by Article 6(2) of the Directive, or by entrusting a specialised body to do so, as is indirectly permitted by Article 7 thereof. It claims that the first option does not necessarily entail the adoption of a transposition measure; it merely requires that the contracting entities be informed of the options open to them under Community law. The French Government adds that it accorded the Directive the necessary publicity.

36 On that point, it should be noted that Article 3 of the Directive expressly requires the Member States to give contracting entities the possibility of having recourse to an attestation system in accordance with Articles 4 to 7. As the Commission has

rightly pointed out, the provision made by the Directive for the entities falling within its scope to have recourse to an attestation system in no way signifies that the transposition of that system into national law is optional.

37 So far as concerns the publicity given to the Directive by the French Government, it need merely be recalled that, according to established case-law, the provisions of directives must be implemented with unquestionable binding force, and the specificity, precision and clarity necessary to satisfy the requirements of legal certainty (Case C-59/89 *Commission* v *Germany* [1991] ECR I-2607, paragraph 24).

38 It must therefore be held that the attestation system provided for in Chapter 2 of the Directive has not been transposed into French law within the prescribed period.

The conciliation procedure

39 Lastly, the Commission claims that the French Republic has failed to transpose into national law Articles 9 to 11 of the Directive, concerning the conciliation procedure.

40 The French Government contends that the conciliation procedure provided for in Article 9(2) of the Directive — which does not require Member States to do more than forward immediately to the Commission any request for conciliation made by a person having an interest — does not necessarily require the adoption of an

implementing law or regulation. Moreover, in order to facilitate implementation of the conciliation procedure, the French Government apprised interested undertakings of the Directive's provisions by publishing the text in the April-May issue of *Marchés Publics*, the review to which all the professionals concerned refer.

41 On that point, it is enough to note that Article 9(1) of the Directive provides that any person having or having had an interest in obtaining a particular contract falling within the scope of Council Directive 90/531/EEC of 17 September 1990 on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors (OJ 1990 L 297, p. 1) and who, in relation to the procedure for the award of that contract, considers that he has been or risks being harmed by an alleged infringement of Community law in the field of procurement or national rules impelementing that law may request the application of the conciliation procedure provided for in Articles 10 and 11 of the Directive. Transposition into national law is therefore necessary in order to ensure that persons having an interest know of the existence of such a procedure and may have recourse to it.

42 Accordingly, it must be concluded that Articles 9 to 11 of the Directive, concerning the conciliation procedure, have not been transposed into national law within the prescribed period.

43 In view of all the foregoing, it must be held that, by not adopting within the prescribed period all the measures necessary to comply with the provisions of

Chapters 2 and 4 of Directive 92/13, the French Republic has failed to fulfil its obligations under Article 13(1) thereof.

Costs

44 Under Article 69(3) of the Rules of Procedure, the Court may order that the parties are to bear their own costs if each party succeeds on some and fails on other heads. Since the Commission and the French Republic have been partly unsuccessful in their pleadings, they must be ordered to bear their own costs.

On those grounds,

THE COURT (Sixth Chamber)

hereby:

1. **Declares that, by not adopting within the prescribed period all the measures necessary to comply with the provisions of Chapters 2 and 4 of Council Directive 92/13/EEC of 25 February 1992 coordinating the laws, regulations and administrative provisions relating to the application of Community rules**

on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors, the French Republic has failed to fulfil its obligations under Article 13(1) thereof;

2. Rejects the remainder of the application;

3. Orders each of the parties to bear its own costs.

Kapteyn Hirsch Mancini

Delivered in open court in Luxembourg on 19 May 1999.

R. Grass

Registrar

P. J. G. Kapteyn

President of the Sixth Chamber