JUDGMENT OF THE COURT (First Chamber)

10 January 2008 *

In Case C-70/06,

ACTION under Article 228 EC for failure to fulfil obligations, brought on 7 February 2006,

Commission of the European Communities, represented by X. Lewis, A. Caeiros and P. Andrade, acting as Agents, with an address for service in Luxembourg,

applicant,

v

Portuguese Republic, represented by L. Fernandes, P. Fragoso Martins and J. de Oliveira, acting as Agents, with an address for service in Luxembourg,

defendant,

* Language of the case: Portuguese.

THE COURT (First Chamber),

composed of P. Jann, President of the Chamber, A. Tizzano (Rapporteur), R. Schintgen, A. Borg Barthet and E. Levits, Judges,

Advocate General: J. Mazák,
Registrar: M. Ferreira, Principal Administrator,

having regard to the written procedure and further to the hearing on 5 July 2007,

after hearing the Opinion of the Advocate General at the sitting on 9 October 2007,

gives the following

Judgment

1 By its application the Commission of the European Communities claims that the Court should:

— declare that, by having failed to take the measures necessary to comply with the judgment of 14 October 2004 in Case C-275/03 *Commission* v *Portugal*, not published in the ECR, the Portuguese Republic has failed to fulfil its obligations under Article 228(1) EC;

— order the Portuguese Republic to pay to the Commission, into the account 'European Community own resources', a penalty payment of EUR 21 450 for every day of delay in complying with the judgment in *Commission* v *Portugal*, from the day on which the Court of Justice delivers judgment in the present case until the day on which the judgment in *Commission* v *Portugal* is complied with;

— order the Portuguese Republic to pay the costs.

Legal framework

2 The third, fourth and sixth recitals in the preamble to 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) state the following:

'Whereas the opening-up of public procurement to Community competition necessitates a substantial increase in the guarantees of transparency and non-discrimination; whereas, for it to have tangible effects, effective and rapid remedies must be available in the case of infringements of Community law in the field of public procurement or national rules implementing that law;

Whereas in certain Member States the absence of effective remedies or inadequacy of existing remedies deter Community undertakings from submitting tenders in the

Member State in which the contracting authority is established; whereas, therefore, the Member States concerned must remedy this situation;

Whereas it is necessary to ensure that adequate procedures exist in all the Member States to permit the setting aside of decisions taken unlawfully and compensation of persons harmed by an infringement.'

3 Article 1(1) of Directive 89/665 states:

'The Member States shall take the measures necessary to ensure that, as regards contract award procedures falling within the scope of Directives 71/305/EEC and 77/62/EEC, decisions taken by the contracting authorities may be reviewed effectively and, in particular, as rapidly as possible … on the grounds that such decisions have infringed Community law in the field of public procurement or national rules implementing that law.'

4 Pursuant to Article 2(1) of Directive 89/665:

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

…

(c) award damages to persons harmed by an infringement.'

Background to the dispute

The judgment in Commission v *Portugal*

5 In point 1 of the operative part of the judgment in *Commission* v *Portugal* the Court declared that:

'By failing to repeal … Decree-Law No 48 051 of 21 November 1967, making the award of damages to persons harmed by a breach of Community law relating to public contracts, or the national laws implementing it, conditional on proof of fault or fraud, the Portuguese Republic has failed to fulfil its obligations under Article 1(1) and Article 2(1)(c) of … Directive 89/665 …'

Pre-litigation procedure

6 By letter of 4 November 2004 the Commission requested the Portuguese Republic to inform it of the measures which it had adopted or which it intended to adopt in order to amend its domestic law and, thus, to comply with the judgment in *Commission* v *Portugal*.

7 In its reply of 19 November 2004 the Portuguese Republic claimed, in essence, that a recent change of government had led to a delay in the adoption of the measures necessary to comply with the judgment in *Commission* v *Portugal*. That Member State also sent the Commission a draft law repealing Decree-Law No 48 051 and laying down new legal rules governing the non-contractual liability of the Portuguese State and the other public bodies concerned, while requesting the Commission to indicate whether it considered that the draft law would ensure the correct and complete transposition of Directive 89/665.

8 On 21 March 2005, the Commission sent a formal letter of notice to the Portuguese authorities in which it informed them, first, that the changes in government which had taken place did not, in accordance with the case-law of the Court, justify the failure to comply with the obligations and the time-limits laid down in Directive 89/665. Second, the Commission stated in that letter that the draft law — which had not, moreover, yet been approved by the Assembleia da República (Parliament) — did not, in any event, comply with Directive 89/665.

9 Dissatisfied with the response provided on 25 May 2005 by the Portuguese Republic, the Commission sent the latter a reasoned opinion on 13 July 2005 in which it stated that, having still failed to take the measures necessary to comply with the judgment in *Commission* v *Portugal*, that Member State had failed to fulfil its obligations under Article 228(1) EC. The Commission requested the Portuguese Republic to comply with that reasoned opinion within a time-limit of two months from receipt thereof.

10 In its response of 12 December 2005 to the reasoned opinion, the Portuguese Republic explained that draft law No 56/X of 7 December 2005 on the non-contractual liability of the State and other public bodies ('draft law No 56/X'), repealing Decree-Law No 48 051, had already been submitted to Parliament for final approval and that it had been requested that it be given priority and dealt with urgently on the agenda of that assembly.

11 Considering that the Portuguese Republic had still not complied with the judgment in *Commission* v *Portugal*, on 7 February 2006 the Commission brought the present action.

The alleged failure to fulfil obligations

Arguments of the parties

12 The Commission considers that, since it has not repealed Decree-Law No 48 051, the Portuguese Republic has not taken the measures necessary to ensure compliance with the judgment in *Commission* v *Portugal*. In order to comply with that judgment the Portuguese Government has merely adopted draft law No 56/X. However, the latter has not yet been approved by the parliament and its content does not, in any event, ensure the correct and complete transposition of Directive 89/665.

13 The Portuguese Republic submits, by contrast, that the action is unfounded in so far as the body of rules set out in draft law No 56/X, although not yet definitely approved by the parliament, constitutes adequate transposition of the provisions of Directive 89/665 and ensures full compliance with the obligations under the judgment in *Commission* v *Portugal*.

14 That Member State submits, in addition, that it has always 'fully intended' to introduce a body of rules governing the non-contractual liability of public law entities in accordance with the requirements of Directive 89/665, but that the constitutional difficulties involved, the nature and importance of which should, at the very least, mitigate its liability, prevented it from attaining that result.

15 Finally, the Portuguese Republic submits that, in any case, Articles 22 and 271 of its Constitution and the new code of procedure of administrative courts sufficiently ensure compliance with the judgment in *Commission* v *Portugal* in so far as they already provide for State liability as a result of damage caused by acts committed by its officials and agents.

Findings of the Court

16 In point 1 of the operative part of the judgment in *Commission* v *Portugal*, the Court held that, by failing to repeal Decree-Law No 48 051, the Portuguese Republic had failed to fulfil its obligations under Article 1(1) and Article 2(1)(c) of Directive 89/665.

17 In the context of the present proceedings for failure to comply with obligations, in order to check whether the Portuguese Republic has adopted the measures necessary to comply with the judgment at issue, it needs to be determined whether Decree-Law No 48 051 has been repealed.

18 In that regard, according to settled case-law, the reference date for assessing whether there has been a failure to fulfil obligations under Article 228 EC is the date of expiry of the period prescribed in the reasoned opinion issued under that provision (see Case C-304/02 *Commission* v *France* [2005] ECR I-6263, paragraph 30; Case C-119/04 *Commission* v *Italy* [2006] ECR I-6885, paragraph 27; and Case C-503/04 *Commission* v *Germany* [2007] ECR I-6153, paragraph 19).

19 In the present case, it is common ground that, on the date of expiry of the period laid down in the reasoned opinion addressed to it on 13 July 2005, the Portuguese Republic had not yet repealed Decree-Law No 48 051.

20 In the light of the above, it must be found that, by failing to adopt the measures necessary to ensure compliance with the judgment in *Commission* v *Portugal*, the Portuguese Republic has failed to fulfil its obligations under Article 228(1) EC.

21 That finding cannot be called into question by the argument raised by the Portuguese Republic that constitutional difficulties have prevented it from passing a definitive text repealing Decree-Law No 48 051 and, thus, from complying with the judgment in *Commission* v *Portugal*.

22 According to settled case-law, a Member State cannot plead provisions, practices or situations prevailing in its domestic legal order to justify the failure to observe obligations arising under Community law (see *Commission* v *Germany*, paragraph 38 and the case-law cited).

23 Similarly, the argument of the Portuguese Republic that State liability for damage caused by acts committed by its officials and agents is already laid down in other provisions of national law cannot be accepted. As the Court held in paragraph 33 of its judgment in *Commission* v *Portugal*, that fact has no bearing on the failure to fulfil obligations constituted by maintaining Decree-Law No 48 051 in force in the national legal system. The existence of such provisions cannot, therefore, ensure compliance with that judgment.

24 Consequently, it must be found that, by failing to repeal Decree-Law No 48 051 making the award of damages to persons harmed by a breach of Community law relating to public contracts, or the national laws implementing it, conditional on proof of fault or fraud, the Portuguese Republic has failed to adopt the measures necessary to comply with the judgment in *Commission* v *Portugal* and has thereby failed to fulfil its obligations under Article 228(1) EC.

The financial penalty

Arguments of the parties

25 On the basis of the method of calculation set out in Communication 96/C 242/07 of 21 August 1996 on applying Article [228] of the EC Treaty (OJ 1996 C 242, p. 6; 'the Communication of 1996'), and Communication 97/C 63/02 of 28 February 1997 concerning the method of calculating the penalty payments provided for pursuant to Article [228] of the EC Treaty (OJ 1997 C 63, p. 2; 'the Communication of 1997'), the Commission proposes that the Court impose a penalty payment on the Portuguese Republic of EUR 21 450 per day of delay in complying with the judgment in *Commission* v *Portugal*, from the day on which the Court of Justice delivers judgment in the present case until the day on which the breach of obligations is brought to an end.

26 The Commission considers that the imposing of a penalty payment constitutes the most appropriate sanction for bringing the breach of obligations to an end as quickly as possible. The amount of that penalty payment is calculated by multiplying a uniform base of EUR 500 by a coefficient of 11 (on a scale of 1 to 20) for the seriousness of the infringement, a coefficient of 1 (on a scale of 1 to 3) for the duration of the

infringement and a coefficient of 3.9 calculated on the basis of the Portuguese Republic's gross domestic product and the weighting of the votes which that Member State has in the Council of the European Union, which reflects that Member State's ability to pay.

27 The Portuguese Republic considers that the amount of the penalty payment suggested by the Commission is manifestly disproportionate in the light of the circumstances of the present case and is not consistent with the Court's well-established case-law in the field.

28 The objections raised by that Member State concern two aspects of the methods of calculation of the penalty payment in particular. First, the coefficient of 11 for seriousness applied by the Commission is excessive to sanction an alleged partial failure of a Member State to fulfil obligations in the area of public procurement since, in respect of actions for failure to act concerning areas which are more sensitive than the present one, such as public health (Case C-387/97 *Commission* v *Greece* [2000] ECR I-5047) or the environment (Case C-278/01 *Commission* v *Spain* [2003] ECR I-14141), the Commission suggested coefficients for seriousness of 6 and 4 respectively. Consequently, the coefficient for seriousness fixed by the Court in the present case should not exceed 4. Second, in accordance with point 13.3 of the Commission's Communication implementing Article 228 of the EC Treaty (SEC(2005) 1658; 'the Communication of 2005'), the reference period to be used in these circumstances to assess whether the national legislation at issue is compatible with Directive 89/665 must be calculated on an annual basis and not, as proposed by the Commission, on a daily basis.

29 In addition, the Portuguese Republic submits that, irrespective of the reduction of the amount of that penalty payment and the setting of the frequency of that penalty on an annual basis, the Court should order the suspension of the application of that sanction until the entry into force of draft law No 56/X. That possibility is in fact

provided for in point 13.4 of the Communication of 2005, in consideration of which the Court may, in exceptional cases, order the suspension of the penalty payment when a Member State has already adopted the measures necessary to comply with a judgment finding there to be a failure to comply with obligations, but a certain amount of time must inevitably pass before the desired result is achieved. The Portuguese Republic considers that to be the case here.

Findings of the Court

30 Having recognised that the Portuguese Republic has not complied with its judgment in *Commission* v *Portugal*, the Court may, pursuant to the third subparagraph of Article 228(2) EC, impose a lump sum or penalty payment on it.

31 In that regard, it should be pointed out that it is for the Court to assess in each case, in the light of the circumstances of the case, the financial penalties to be imposed (Case C-304/02 *Commission* v *France*, paragraph 86, and Case C-177/04 *Commission* v *France* [2006] ECR I-2461, paragraph 58)

32 In the present case, as pointed out in paragraph 25 of this judgment, the Commission suggests that the Court should impose a penalty payment on the Portuguese Republic.

33 That suggestion is based on the method of calculation which the Commission defined in its Communications of 1996 and 1997. It should also be made clear that those two communications were replaced by the Communication of 2005 which, pursuant to point 25 thereof, applies to decisions taken by the Commission from 1 January 2006 to refer a matter to the Court of Justice under Article 228 EC.

34 In that regard, it must, first, be pointed out that the Commission's suggestions cannot bind the Court and merely constitute a useful point of reference (see *Commission* v *Greece*, paragraph 80, and *Commission* v *Spain*, paragraph 41). Similarly, guidelines such as those contained in the communications of the Commission are not binding on the Court but contribute to ensuring that that institution's actions are transparent, foreseeable and consistent with legal certainty (see, to that effect, Case C-304/02 *Commission* v *France*, paragraph 85, and Case C-177/04 *Commission* v *France*, paragraph 70).

35 The Court has also stated that the order imposing a penalty payment and/or a lump sum is intended to place a defaulting Member State under economic pressure which induces it to put an end to the breach established. The financial penalties imposed must therefore be decided upon according to the degree of persuasion needed in order for the Member State in question to alter its conduct (see, to that effect, Case C-304/02 *Commission* v *France*, paragraph 91, and Case C-177/04 *Commission* v *France*, paragraphs 59 and 60).

36 It must be found, in the present case, that, during the hearing at the Court on 5 July 2007, the agent of the Portuguese Republic confirmed that Decree-Law No 48 051 was still in force on that date.

37 Given that it must be considered that the failure to fulfil obligations at issue was still apparent when the Court examined the facts, it must be found that, as suggested by the Commission, the order imposing a penalty payment on the Portuguese Republic constitutes a means adapted in order to induce that Member State to take the meas-

ures necessary to ensure compliance with the judgment in *Commission* v *Portugal* (see, to that effect, Case C-304/02 *Commission* v *France*, paragraph 31; Case C-177/04 *Commission* v *France*, paragraph 21; and *Commission* v *Italy*, paragraph 33).

38 Next, as regards the method of calculation of the amount of such a penalty payment, it is for the Court, in exercising its discretion, to set the penalty payment so that it is appropriate to the circumstances and proportionate both to the breach that has been established and to the ability to pay of the Member State concerned (see, inter alia, Case C-304/02 *Commission* v *France*, paragraph 103, and Case C-177/04 *Commission* v *France*, paragraph 61).

39 In that light, the basic criteria which must be taken into account in order to ensure that penalty payments have coercive force and Community law is applied uniformly and effectively are, in principle, the duration of the infringement, its degree of seriousness and the ability of the Member State to pay. In applying those criteria, regard should be had in particular to the effects of failure to comply on private and public interests and to the urgency of inducing the Member State concerned to fulfil its obligations (see, inter alia, Case C-304/02 *Commission* v *France*, paragraph 104, and Case C-177/04 *Commission* v *France*, paragraph 62).

40 As regards, first, the seriousness of the infringement and, in particular, the consequences of the failure to comply with the judgment in *Commission* v *Portugal* on private and public interests, it should be pointed out that, pursuant to the third recital in the preamble to Directive 89/665, the opening-up of public procurement to Community competition necessitates a substantial increase in the guarantees of transparency and non-discrimination. In order for that opening-up to have tangible effects, effective and rapid remedies must be available in the case of infringements of Community law in the field of public procurement or national rules implementing that law.

41 To that end, Article 1(1) of that directive requires the Member States to ensure that unlawful decisions taken by the contracting authorities may be reviewed effectively and as rapidly as possible, whereas Article 2(1)(c) thereof emphasis the fact that it is important that national procedures be laid down for awarding damages to persons harmed by such an infringement.

42 The failure by the Portuguese Republic to repeal Decree-Law No 48 051, which makes the award of damages to individuals subject to the furnishing of proof of fault or fraud on the part of the Portuguese State or public entities concerned, must be regarded as serious since, although it does not render it impossible for individuals to bring judicial actions, it would appear, none the less, as also pointed out by the Advocate General in paragraph 51 of his Opinion, to render those actions more difficult and costly, so impairing the full effectiveness of the Community's public procurement policy.

43 It must none the less be found that the coefficient of 11 (on a scale of 1 to 20) suggested by the Commission appears, in the present case, to be too severe; a coefficient of 4 would be more suited, by contrast, to the seriousness of the infringement at issue.

44 As regards, second, the coefficient relating to the duration of the infringement, the Commission's suggestion that it be set at 1 cannot be upheld. It is apparent from the documents before the Court that that coefficient was calculated on the basis of the time which elapsed between the date of delivery of the judgment in *Commission* v *Portugal* and the date on which the present action was brought.

45 It should be recalled that the duration of the infringement must be assessed by reference to the time when the Court assesses the facts, not the time at which the case is brought before it by the Commission (see, to that effect, Case C-177/04 *Commission* v *France*, paragraph 71).

46 In the present case, the failure of the Portuguese Republic to comply with the judgment in *Commission* v *Portugal* has persisted for more than three years in the light of the considerable period of time which has elapsed since the date of delivery of that judgment, namely 14 October 2004.

47 In those circumstances, a coefficient of 2 (on a scale of 1 to 3) would appear to be more appropriate to take account of the duration of the infringement.

48 As regards, third, the Commission's suggestion of multiplying a basic amount by a coefficient based on the gross domestic product of the Member State concerned and on the number of votes which it has in the Council, that suggestion is an appropriate way, in principle, of reflecting that Member State's ability to pay, while keeping the variation between Member States within a reasonable range (see, to that effect, *Commission* v *Greece*, paragraph 88; *Commission* v *Spain*, paragraph 59; and Case C-304/02 *Commission* v *France*, paragraph 109).

49 However, in the present case, the coefficient of 3.9 suggested by the Commission does not adequately reflect the evolution of the factors which are at the basis of the evaluation of the Portuguese Republic's ability to pay, in particular, as regards the growth of its gross domestic product. Therefore, as is apparent from point 18.1 of the Communication of 2005, that coefficient must be raised from 3.9 to 4.04.

50 Similarly, the basic amount to which the multiplier coefficients are applied must be fixed at EUR 600, in accordance with the indexing of the amount of EUR 500 set by the Commission in point 15 of that communication, in order to take account of movements in inflation since the publication of the Communication of 1997.

51 In the light of all the above, the multiplication of the basic amount of EUR 600 by coefficients, set at 4 for the seriousness of the infringement, by 2 for the duration of that infringement, and at 4.04 for the ability to pay of the Member State concerned, amounts, in the present case, to a total of EUR 19 392 per day of delay. That amount must be regarded as adequate in the light of the purposes of the penalty payment as referred to in paragraph 35 above.

52 As regards the frequency of the penalty payment, in a case such as the present one concerning compliance with a judgment of the Court which involves the adoption of a legislative amendment, a penalty imposed on a daily basis should be chosen (see, to that effect, Case C-177/04 *Commission* v *France*, paragraph 77).

53 Finally, the Portuguese Republic's arguments claiming that it is possible for the Court to order, in the present case, the suspension of the penalty payment within the meaning of point 13.4 of the Communication of 2005 cannot be upheld. Irrespective of the fact that, as was pointed out in paragraph 34 of the present judgment, that communication is not binding on the Court, it is sufficient to point out that, in any event, contrary to what is required in point 13.4 of that communication for such a suspension to be granted, the measures necessary to comply with the judgment in *Commission* v *Portugal* have not been adopted.

54 In the light of all of the foregoing, it is necessary to order the Portuguese Republic to pay to the Commission, into the account 'European Community own resources', a penalty payment of EUR 19 392 for every day of delay in implementing the measures necessary to comply with the judgment in *Commission* v *Portugal*, from the day of delivery of judgment in the present case until the day on which the judgment in *Commission* v *Portugal* is complied with.

Costs

55 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Commission has applied for costs and the Portuguese Republic has been unsuccessful in its submissions, the latter must be ordered to pay the costs.

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

1. **Declares that, by failing to repeal Decree-Law No 48 051 of 21 November 1967, making the award of damages to persons injured by a breach of Community law relating to public contracts, or the national laws implementing it, conditional on proof of fault or fraud, the Portuguese Republic has failed to adopt the measures necessary to comply with the judgment of 14 October 2004 in Case C-275/03 *Commission* v *Portugal* and has thereby failed to fulfil its obligations under Article 228(1) EC;**

2. **Orders the Portuguese Republic to pay to the Commission of the European Communities, into the account 'European Community own resources', a penalty payment of EUR 19 392 for every day of delay in implementing the measures necessary to comply with the judgment in Case C-275/03 *Commission* v *Portugal*, from the day on which the Court of Justice delivers judgment in the present case until the day on which the judgment in Case C-275/03 *Commission* v *Portugal* is complied with;**

3. **Orders the Portuguese Republic to pay the costs.**

[Signatures]