

## Case C-87/94

### Commission of the European Communities

v

### Kingdom of Belgium

(Public contracts — Transport sector — Directive 90/531/EEC)

Opinion of Advocate General Lenz delivered on 12 September 1995 ..... I - 2045

Judgment of the Court (Fifth Chamber), 25 April 1996 ..... I - 2071

#### Summary of the Judgment

- 1. Approximation of laws — Procurement procedures of entities operating in the water, energy, transport and telecommunications sectors — Directive 90/531 — Scope — Absence of a condition concerning the nationality or seat of tenderers — Obligation on contracting entities to apply the rules applicable to the type of procedure chosen  
(Council Directive 90/531, Art. 4(1) and 15(1))*
- 2. Approximation of laws — Procurement procedures of entities operating in the water, energy, transport and telecommunications sectors — Directive 90/531 — Award of contracts — Principle of equal treatment of tenderers and principle of transparency — Taking into account, after the opening of tenders, amendments made to one of them — Contract awarded on the basis of figures not corresponding to the prescriptive requirements of the contract documents — Taking into account variants of the award criteria not mentioned either in the contract documents or in the tender notice — Breach  
(Council Directive 90/531)*

1. The procedure laid down by Directive 90/531 on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors must be observed irrespective of the nationality or seat of the tenderers. The obligation, imposed on contracting entities by Article 4(1) of the directive, to apply procedures which are adapted to the provisions of the directive is not subject to any such condition and it is always possible that undertakings established in other Member States may be concerned directly or indirectly by the award of a contract.

Although under Article 15(1) of the directive contracting entities obliged to apply the procedures in the directive do indeed have a degree of choice regarding the procedure to be applied to a contract, once they have issued an invitation to tender under one particular procedure they are required to observe the rules applicable to it, until the contract has been finally awarded.

2. It follows from the terms of Directive 90/531 on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors that the contracting entity's procedure for comparing tenders has to comply at every stage with both the principle of the equal treatment of tenderers and the principle of transparency.

A Member State which, in the procedure for the award of a public contract by a public undertaking operating a bus service,

- takes into account fuel consumption figures submitted by a tenderer after the opening of tenders, where those figures exceed a limit which the tenderer himself stipulated in his initial tender in regard to any change in fuel consumption figures,

- awards the contract to the same tenderer on the basis of figures which do not correspond to the prescriptive requirements of the contract documents for calculating the notional penalty of the tenderer in question for maintenance costs in respect of engine and gear box replacement,

- takes into account, when comparing tenders for certain lots, the cost-saving features suggested by the same tenderer, without having referred to them in the contract documents or in the tender notice, uses them to offset the financial differences between the tenders in first place and those of the tenderer in question and accepts some of the same tenderer's tenders as a result of taking those features into account,

fails to fulfil that obligation.