ORDER OF THE COURT (Second Chamber)
3 December 2001 *

In Case C-59/00,

REFERENCE to the Court under Article 234 EC by the Vestre Landsret (Denmark) for a preliminary ruling in the proceedings pending before that court between

Bent Mousten Vestergaard

and

Spøttrup Boligselskab,

on the interpretation of Articles 6 and 30 of the EC Treaty (now, after amendment, Articles 12 EC and 28 EC),

* Language of the case: Danish.

THE COURT (Second Chamber),

composed of: N. Colneric, President of the Chamber, R. Schintgen and V. Skouris (Rapporteur), Judges,

Advocate General: P. Léger,
Registrar: R. Grass,

after informing the referring court of its intention to give its decision by reasoned order in accordance with Article 104(3) of the Rules of Procedure,

after inviting the parties referred to in Article 20 of the EC Statute of the Court of Justice to submit observations,

after hearing the Opinion of the Advocate General,

makes the following

Order

1 By order of 14 February 2000, received at the Court on 23 February 2000, the Vestre Landsret (Western Regional Court) referred for a preliminary ruling under Article 234 EC three questions on the interpretation of Articles 6 and 30 of the EC Treaty (now, after amendment, Articles 12 EC and 28 EC).

2 The questions were raised in proceedings between Mr Vestergaard and Spøttrup Boligselskab concerning the compatibility with Community law of a clause in the general conditions of the contract documents of a public works contract relating to the construction of 20 housing units in Spøttrup, Denmark, specifying that windows of a particular make should be used for the contract.

The main proceedings and the questions referred for a preliminary ruling

3 Spøttrup Boligselskab is a Danish public housing body. In spring 1997 it called for tenders, in an open procedure, for the construction of 20 social housing units in the municipality of Spøttrup. The 20 units were to be built on four separate sites, which constituted separate legal entities.

4 As the total budget amount for the contract was DKK 9 643 000, below the threshold of EUR 5 000 000 laid down in Article 6 of Council Directive 93/37/EEC of 14 June 1993 concerning the coordination of procedures for the award of public works contracts (OJ 1993 L 199, p. 54), Spøttrup Boligselskab did not follow the procedure under Directive 93/37. However, the conditions of tender were sent to those artisans who so wished.

5 For the 'carpentry' lot for each site, which included the outside doors and windows, the contract documents contained the following clause: 'PVC windows and doors. Outside doors and windows shall be supplied by: Hvidbjerg Vinduet, Østergade 24, 7790 Hvidberg (Denmark)...'.

6 Mr Vestergaard, a master carpenter, submitted tenders for all the 'carpentry' lots. As his tenders for two of the sites were the lowest, they were accepted. However, in connection with the signature of the contract, Mr Vestergaard made a reservation concerning the provision of windows of the Hvidbjerg Vinduet make, since he had calculated his tenders on the basis of providing windows of the Trokal make, which are made in Germany. The additional price if windows of the Hvidbjerg Vinduet make were used was DKK 23 743 excluding VAT. When signing the contract on 31 July 1997, Spøttrup Boligselskab stated that it could not accept that reservation.

7 The work was carried out. Mr Vestergaard used Hvidbjerg Vinduet windows, as required by Spøttrup Boligselskab. However, he maintained his claim for payment of DKK 23 743. Spøttrup Boligselskab rejected that claim.

8 On 29 October 1997 Mr Vestergaard made an application to the Klagenævnet for Udbud (Procurement Review Board, 'the Review Board'), asking it to find that, by requiring in the call for tenders the use of a specified product for the outside doors and windows, Spøttrup Boligselskab had infringed Articles 6 and 30 of the Treaty.

9 The Bolig- og Byministeriet (Ministry of Housing and Urban Affairs, 'the Ministry') intervened in support of Mr Vestergaard. According to the Ministry, the disputed clause in the contract documents was contrary to its recommendations to contracting authorities.

10 The Bygge- og Boligstyrelsen (Construction and Housing Authority, now the Ministry) had stated in a memorandum of 2 May 1995 that it followed from the

EC Treaty that, even if a call for tenders for public works contracts is not covered by the 'public procurement' directives, the tenderers must be chosen on the basis of objective criteria and contracts concluded in a non-discriminatory manner. In addition, in a letter of 4 June 1997, that authority had stated that no contract concerning *inter alia* public works should contain terms which amounted to discrimination against suppliers on grounds of nationality or of the origin of the goods within the European Union.

11 Before the Review Board, the Ministry referred *inter alia* to the judgment in Case 45/87 *Commission* v *Ireland* [1988] ECR 4929.

12 By decision of 11 November 1988, the Review Board dismissed Mr Vestergaard's application.

13 It considered that *Commission* v *Ireland* concerned a large-scale project whose value exceeded the threshold laid down in 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) — since repealed and replaced by Directive 93/37 —, so that that judgment was of no relevance for the application before it.

14 The Review Board decided that public works contracts of low value which, unlike that at issue in *Commission* v *Ireland*, do not exceed the threshold in Directive 93/37, are generally of no interest or importance in the Community context, and that for such contracts the cost to the contracting authorities of complying with the provisions of Directive 93/37 on technical specifications

would be disproportionate. It therefore concluded that Articles 6 and 30 of the Treaty do not, at least generally, impose an obligation to have the indication of a specified make required by the contracting authority followed by the words 'or equivalent' for contracts below the threshold laid down in Directive 93/37.

15 Mr Vestergaard brought the matter before the Vestre Landsret, which stayed the proceedings and referred the following questions to the Court for a preliminary ruling:

'1. Is a public body which invites tenders for works which are not covered by Council Directive 93/37/EEC, inasmuch as the threshold value is not exceeded, entitled to stipulate in the tender documents that a specified Danish make must be used, where that requirement in the tender documents is not accompanied by the words "or an equivalent make"?

2. Is a public body which invites tenders for works which are not covered by Council Directive 93/37/EEC, inasmuch as the threshold value is not exceeded, entitled to stipulate in the tender documents that a specified make must be used, where that requirement in the tender documents is not accompanied by the words "or an equivalent make"?

3. If Question 1 or Question 2 is answered in the negative, can such wording of tender documents as described in Questions 1 and 2 be regarded as constituting an infringement of Article 12 EC or Article 28 EC?'

Findings of the Court

16 By its three questions, which should be examined together, the Vestre Landsret essentially asks whether the inclusion by a contracting authority in the contract documents for a public works contract not exceeding the threshold laid down in Directive 93/37 of a clause requiring the use of a product of a specified make is contrary to the fundamental rules of the Treaty, in particular Articles 6 and 30, where that requirement is not followed by the words 'or equivalent'.

17 Since it considered that the answer to the questions, as reformulated, was clear from the case-law, in particular Case C-359/93 *Commission* v *Netherlands* [1995] ECR I-157, the Court, in accordance with Article 104(3) of the Rules of Procedure, informed the national court that it intended to give its decision by reasoned order and invited the parties referred to in Article 20 of the EC Statute of the Court of Justice to submit observations.

18 None of those parties raised any objection to the Court's intention to give its decision by reasoned order referring to the existing case-law.

19 To rule on the questions, it should be noted, to begin with, that the Community directives coordinating public procurement procedures apply only to contracts whose value exceeds a threshold laid down expressly in each directive. However, the mere fact that the Community legislature considered that the strict special procedures laid down in those directives are not appropriate in the case of public contracts of small value does not mean that those contracts are excluded from the scope of Community law.

20 Although certain contracts are excluded from the scope of the Community directives in the field of public procurement, the contracting authorities which conclude them are nevertheless bound to comply with the fundamental rules of the Treaty (see, to that effect, Case C-324/98 *Telaustria and Telefonadress* [2000] ECR I-10745, paragraph 60).

21 Consequently, notwithstanding the fact that a works contract is below the threshold laid down in Directive 93/37 and thus not within the scope of that directive, the lawfulness of a clause in the contract documents for that contract must be assessed by reference to the fundamental rules of the Treaty, which include the free movement of goods set out in Article 30 of the Treaty.

22 In the light of that finding, it must be observed, next, that according to the case-law on public supply contracts the failure to add the words 'or equivalent' after the designation in the contract documents of a particular product may not only deter economic operators using systems similar to that product from taking part in the tendering procedure, but may also impede the flow of imports in intra-Community trade, contrary to Article 30 of the Treaty, by reserving the contract exclusively to suppliers intending to use the product specifically indicated (see, to that effect, *Commission* v *Netherlands*, paragraph 27).

23 Moreover, in paragraph 22 of *Commission* v *Ireland*, which concerned a public works contract which did not fall within the scope of Directive 71/305, the Court considered, with reference to the conformity with Article 30 of the Treaty of a clause requiring asbestos cement pressure pipes to be certified as complying with Irish standard 188:1975, that by incorporating in the notice in question the words 'or equivalent' after the reference to the Irish standard, the Irish authorities could have verified compliance with the technical conditions without from the outset restricting the contract solely to tenderers proposing to utilise Irish materials.

24 It is therefore clear from the case-law that, notwithstanding the fact that a public works contract does not exceed the threshold laid down in Directive 93/37 and does not thus fall within its scope, Article 30 of the Treaty precludes a contracting authority from including in the contract documents for that contract a clause requiring the use in carrying out the contract of a product of a specified make, without adding the words 'or equivalent'.

25 In the light of the above considerations, there is no need to rule on the possible incompatibility of a clause such as that at issue in the main proceedings with Article 6 of the Treaty.

26 In those circumstances, the answer to the national court's questions must be that Article 30 of the Treaty precludes a contracting authority from including in the contract documents for a public works contract which does not exceed the threshold laid down in Directive 93/37 a clause requiring the use in carrying out the contract of a product of a specified make, where that clause does not include the words 'or equivalent'.

Costs

27 The costs incurred by the Austrian Government 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 (Second Chamber)

hereby orders:

Article 30 of the EC Treaty (now, after amendment, Article 28 EC) precludes a contracting authority from including in the contract documents for a public works contract which does not exceed the threshold laid down in Council Directive 93/37/EEC of 14 June 1993 concerning the coordination of procedures for the award of public works contracts a clause requiring the use in carrying out the contract of a product of a specified make, where that clause does not include the words 'or equivalent'.

Luxembourg, 3 December 2001.

R. Grass

Registrar

N. Colneric

President of the Second Chamber