

JUDGMENT OF THE COURT (Grand Chamber)

13 November 2007\*

In Case C-507/03,

ACTION under Article 226 EC for failure to fulfil obligations, brought on 1 December 2003,

**Commission of the European Communities**, represented by X. Lewis and K. Wiedner, acting as Agents, and J. Flynn QC, with an address for service in Luxembourg,

applicant,

v

**Ireland**, represented by D. O'Hagan, acting as Agent, E. Regan and B. O'Moore SC and C. O'Toole, Barrister, with an address for service in Luxembourg,

defendant,

\* Language of the case: English.

supported by:

**Kingdom of Denmark**, represented by J. Molde and A. Jacobsen, acting as Agents,

**French Republic**, represented by G. de Bergues, D. Petrausch and S. Ramet, acting as Agents,

**Kingdom of the Netherlands**, represented by H.G. Sevenster, C. Wissels and P. van Ginneken, acting as Agents,

**Republic of Finland**, represented by A. Guimaraes-Purokoski, acting as Agent,

interveners,

THE COURT (Grand Chamber),

composed of V. Skouris, President, P. Jann, C.W.A. Timmermans, A. Rosas, G. Arestis and U. Löhmus, Presidents of Chambers, J.N. Cunha Rodrigues, R. Silva de Lapuerta, J. Makarczyk (Rapporteur), A. Borg Barthet, M. Ilešič, J. Malenovský and J. Klučka, Judges,

Advocate General: C. Stix-Hackl,  
Registrar: K. Sztranc-Sławiczek, Administrator,

having regard to the written procedure and further to the hearing on 4 April 2006,

after hearing the Opinion of the Advocate General at the sitting on 14 September 2006,

gives the following

### **Judgment**

- 1 By its application, the Commission of the European Communities seeks a declaration from the Court that, in deciding to entrust the provision of services relating to the payment of social welfare benefits to An Post, the Irish postal service, without undertaking any prior advertising, Ireland has failed to fulfil its obligations under Articles 43 EC and 49 EC and the general principles of Community law in connection with a contract for the supply of such services.

### **Legal framework**

- 2 The 20th recital in the preamble to Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts (OJ 1992 L 209, p. 1) states the following:

‘... to eliminate practices that restrict competition in general and participation in contracts by other Member States’ nationals in particular, it is necessary to improve the access of service providers to procedures for the award of contracts’.

3 Under Article 3(2) of Directive 92/50:

‘Contracting authorities shall ensure that there is no discrimination between different service providers.’

4 Title II of Directive 92/50 defines a so-called ‘two-tier’ application. Under Article 8, contracts which have as their object services listed in Annex I A to the directive are to be awarded in accordance with the provisions of Titles III to VI thereof, that is, Articles 11 to 37. By contrast, under Article 9 of that directive, ‘[c]ontracts which have as their object services listed in Annex I B shall be awarded in accordance with Articles 14 and 16’.

5 Article 14 of Directive 92/50 lays down the detailed rules for the technical specifications which are to be included in the contractual documents.

6 Article 16 of that directive provides:

‘1. Contracting authorities who have awarded a public contract or have held a design contest shall send a notice of the results of the award procedure to the Office for Official Publications of the European Communities [the Publications Office].

...

3. In the case of public contracts for services listed in Annex I B, the contracting authorities shall indicate in the notice whether they agree on its publication.

4. The Commission shall draw up the rules for establishing regular reports on the basis of the notices referred to in paragraph 3, and for the publication of such reports in accordance with the procedure laid down in Article 40(3).

...'

7 Article 43 of Directive 92/50 provides:

'Not later than three years after the time-limit for compliance with this Directive, the Commission, acting in close cooperation with the Committees referred to in Article 40(1) and (2), shall review the [manner] in which this Directive has operated, including the effects of the application of the Directive to procurement of the services listed in Annex I A and the provisions concerning technical standards. It shall evaluate, in particular, the prospects for the full application of the Directive to procurement of the other services listed in Annex I B, and the effects of in-house performance of services on the effective opening-up of procurement in this area. It shall make the necessary proposals to adapt the Directive accordingly.'

8 Annex I B to Directive 92/50 lists a series of categories of services.

### **Facts and pre-litigation procedure**

- 9 On 4 December 1992, without following any competitive tendering process, the Irish Minister for Social Welfare entered into a contract with An Post, pursuant to which those entitled under various social benefit schemes could collect their payments from post offices.
- 10 The original term of the agreement was from 1 January 1992 until 31 December 1996. In May 1997, it was extended to 31 December 1999. In May 1999, the Irish authorities approved a further extension of that contract for the period between 1 January 2000 and 31 December 2002.
- 11 Following a complaint, the Commission entered into correspondence with Ireland in October 1999.
- 12 Following the Commission's intervention, Ireland did not formally extend the contract with An Post, pending resolution of the issues raised by the Commission. An Post has continued to provide the relevant services on an ad hoc basis so as to ensure continuity of social welfare payments.

- 13 In the context of the Article 226 EC procedure Ireland has not, according to the Commission, provided any solution to the problems raised. The Commission takes the view, having regard to the Member State's replies to its letter of formal notice of 26 June 2002 and its reasoned opinion of 17 December 2002, that the award of a new contract to An Post without any prior advertising is contrary to the EC Treaty, and it therefore brought the present action.

## **The action**

### *Arguments of the parties*

- 14 The Commission submits that Ireland has infringed Articles 43 EC and 49 EC as well as the general principles of transparency, equality and non-discrimination. In its application, the Commission submits that these provisions are binding on the Member States, in addition to the obligations laid down by Articles 14 and 16 of Directive 92/50.
- 15 It bases its analysis on several judgments of the Court which, in its view, demonstrate that primary law can be invoked in addition to the obligations laid down by a directive (judgment in Case C-324/98 *Telaustria and Telefonadress* [2000] ECR I-10745; order in Case C-59/00 *Vestergaard* [2001] ECR I-9505; and judgment in Case C-92/00 *HI* [2002] ECR I-5553).
- 16 Ireland contests the Commission's analysis and submits that, where the Community legislature adopts express provisions governing specific subject-matter, those provisions cannot be overlooked, disregarded or ignored through the application

of general rules. Special rules, it submits, must take precedence over general rules. By its action, the Commission thus seeks to extend the obligations of the Member States in the field of public service contracts.

17 Ireland also submits that, although the Commission initiated several consultations on the reform of Directive 92/50 and several amendments have been made since it was adopted, it failed to take legislative action on this issue. The Commission's approach, it argues, is contrary to the general principles of legitimate expectation and legal certainty.

18 The Commission contests this line of argument by making reference to the principle that secondary legislation is ancillary to primary law, with the result that any amendment to Directive 92/50 would not have affected Ireland's obligations.

19 The Kingdom of Denmark, the French Republic, the Kingdom of the Netherlands and the Republic of Finland have intervened in support of Ireland.

20 According to the Kingdom of the Netherlands, the contracting authorities are subject only to a limited obligation of transparency. For the Kingdom of Denmark and the Republic of Finland, there is a linguistic difference between the language versions of the judgments referred to by the Commission which allows their scope to be modified. According to the French Republic, the limitation on the Member States' obligations is confirmed by Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (OJ 2004 L 134, p. 114), which maintains the distinction laid down by Directive 92/50.



*Findings of the Court*

- 21 The first point to be noted here is that none of the parties denies that, in the present case, the contract in question does indeed come within the scope of application of Directive 92/50 and that the services relating to social benefit payments in question belong to the non-priority category of services listed in Annex I B thereto.
- 22 According to the wording of Article 9 of Directive 92/50, '[c]ontracts which have as their object services listed in Annex I B shall be awarded in accordance with Articles 14 and 16'.
- 23 Those specific provisions, in Articles 14 and 16 of Directive 92/50 respectively, require contracting authorities to define the technical specifications by reference to national standards implementing European standards which must be given in the general or contractual documents relating to each contract and to send a notice of the results of the award procedure to the Publications Office.
- 24 It is thus clear from a combined reading of Articles 9, 14 and 16 of Directive 92/50 that when, as in the present case, contracts concern services which fall under Annex I B, the contracting authorities are bound only by the obligations to define the technical specifications by reference to national standards implementing European standards which must be given in the general or contractual documents relating to each contract and to send a notice of the results of the award procedure to the Publications Office. The other procedural rules provided for by that directive, including those relating to the obligations to invite competing bids by means of prior advertising, are, by contrast, not applicable to those contracts.

- 25 For the services coming within the ambit of Annex I B to Directive 92/50, and subject to a subsequent evaluation as referred to in Article 43 of that directive, the Community legislature based itself on the assumption that contracts for such services are not, in the light of their specific nature, of cross-border interest such as to justify their award being subject to the conclusion of a tendering procedure intended to enable undertakings from other Member States to examine the contract notice and submit a tender. For that reason, Directive 92/50 merely imposes a requirement of publicity after the fact for that category of services.
- 26 It is common ground, however, that the award of public contracts is to remain subject to the fundamental rules of Community law, and in particular to the principles laid down by the Treaty on the right of establishment and the freedom to provide services (see, to that effect, *HI*, paragraph 42).
- 27 In this regard, according to settled case-law, the purpose of coordinating at Community level the procedures for the award of public contracts is to eliminate barriers to the freedom to provide services and goods and therefore to protect the interests of traders established in a Member State who wish to offer goods or services to contracting authorities established in another Member State (see, inter alia, Case C-380/98 *University of Cambridge* [2000] ECR I-8035, paragraph 16; Case C-19/00 *SIAC Construction* [2001] ECR I-7725, paragraph 32; and *HI*, paragraph 43).
- 28 Directive 92/50 pursues just such an objective. As the 20th recital in its preamble shows, it is designed to eliminate practices that restrict competition in general, and participation in contracts by other Member States' nationals in particular, by improving the access of service providers to procedures for the award of contracts (see *HI*, paragraph 44).

- 29 It follows that the advertising arrangement, introduced by the Community legislature for contracts relating to services coming within the ambit of Annex I B, cannot be interpreted as precluding application of the principles resulting from Articles 43 EC and 49 EC, in the event that such contracts nevertheless are of certain cross-border interest.
- 30 Also, in so far as a contract relating to services falling under Annex I B is of such interest, the award, in the absence of any transparency, of that contract to an undertaking located in the same Member State as the contracting authority amounts to a difference in treatment to the detriment of undertakings which might be interested in that contract but which are located in other Member States (see, to that effect, *Telaustria and Telefonadress*, paragraphs 60 and 61, and Case C-231/03 *Coname* [2005] ECR I-7287, paragraph 17).
- 31 Unless it is justified by objective circumstances, such a difference in treatment, which, by excluding all undertakings located in another Member State, operates mainly to the detriment of the latter undertakings, amounts to indirect discrimination on the basis of nationality, prohibited under Articles 43 EC and 49 EC (*Coname*, paragraph 19 and case-law cited).
- 32 In those circumstances, it is for the Commission to establish that, notwithstanding the fact that the contract in question relates to services coming within the scope of Annex I B to Directive 92/50, that contract was of certain interest to an undertaking located in a different Member State to that of the relevant contracting authority, and that that undertaking was unable to express its interest in that contract because it did not have access to adequate information before the contract was awarded.

33 According to settled case-law, it is the Commission's responsibility to provide the Court with the evidence necessary to enable it to establish that an obligation has not been fulfilled and, in so doing, the Commission may not rely on any presumption (see, to that effect, *inter alia*, Case C-434/01 *Commission v United Kingdom* [2003] ECR I-13239, paragraph 21; Case C-117/02 *Commission v Portugal* [2004] ECR I-5517, paragraph 80; and Case C-135/05 *Commission v Italy* [2007] ECR I-3475, paragraph 26), in this case a presumption that a contract relating to services coming within the scope of Annex I B to Directive 92/50 and subject to the rules described in paragraph 24 of this judgment necessarily is of certain cross-border interest.

34 In the present case, that evidence has not been provided by the Commission. A mere statement by it that a complaint was made to it in relation to the contract in question is not sufficient to establish that the contract was of certain cross-border interest and that there was therefore a failure to fulfil obligations.

35 The Court accordingly finds that, in entrusting the provision of social benefit payment services to An Post without undertaking any prior advertising, Ireland has not failed to fulfil its obligations under Articles 43 EC and 49 EC and the general principles of Community law in connection with a contract for the supply of such services.

36 The Commission's action must therefore be dismissed.

**Costs**

<sup>37</sup> 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 Ireland has applied for costs to be awarded against the Commission and the latter has been unsuccessful, the Commission must be ordered to pay the costs. Pursuant to the first subparagraph of Article 69(4) of the Rules of Procedure, the Kingdom of Denmark, the French Republic, the Kingdom of the Netherlands and the Republic of Finland, which have intervened in the proceedings, are to bear their own costs.

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

- 1. Dismisses the action;**
- 2. Orders the Commission of the European Communities to pay the costs;**
- 3. Orders the Kingdom of Denmark, the French Republic, the Kingdom of the Netherlands and the Republic of Finland to bear their own costs.**

[Signatures]

