JUDGMENT OF THE COURT

22 June 1993 *

In Case C-243/89,

Commission of the European Communities, represented by Hans Peter Hartvig and Richard Wainwright, Legal Advisers, acting as Agents, with an address for service in Luxembourg at the office of Nicola Annecchino, of its Legal Service, Wagner Centre, Kirchberg,

applicant,

v

Kingdom of Denmark, represented by Jørgen Molde, Legal Adviser at the Ministry of Foreign Affairs, acting as Agent, assisted by Gregers Larsen, Advokat, with an address for service in Luxembourg at the Danish Embassy, 4 Boulevard Royal,

defendant,

APPLICATION for a declaration that, since Aktieselskabet Storebæltsforbindelsen invited tenders on the basis of a condition requiring the use to the greatest possible extent of Danish materials, consumer goods, labour and equipment, and negotiations were conducted with the selected consortium on the basis of a tender which did not comply with the tender conditions, the Kingdom of Denmark has failed to fulfil its obligations under Community law and in particular infringed Articles 30, 48 and 59 of the EEC Treaty as well as 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),

* Language of the case: Danish.

THE COURT,

composed of: O. Due, President, C. N. Kakouris, G. C. Rodríguez Iglesias, M. Zuleeg and J. L. Murray (Presidents of Chambers), G. F. Mancini, R. Joliet, F. A. Schockweiler, J. C. Moitinho de Almeida, F. Grévisse and P. J. G. Kapteyn, Judges,

Advocate General: G. Tesauro,
Registrar: H. von Holstein, Deputy Registrar,

having regard to the Report for the Hearing,

after hearing oral argument from the parties at the hearing on 29 September 1992, at which the Kingdom of Denmark was represented by Jørgen Molde, acting as Agent, assisted by Gregers Larsen and Sune F. Svendsen, Advokater,

after hearing the Opinion of the Advocate General at the sitting on 17 November 1992,

gives the following

Judgment

1 By application lodged at the Court Registry on 2 August 1989, the Commission of the European Communities brought an action under Article 169 of the EEC Treaty for a declaration that, since

— Aktieselskabet Storebæltsforbindelsen invited tenders on the basis of a condition requiring the use to the greatest possible extent of Danish materials, consumer goods, labour and equipment, and

— negotiations with the selected consortium were conducted on the basis of a tender which did not comply with the tender conditions,

the Kingdom of Denmark had failed to fulfil its obligations under Community law and in particular infringed Articles 30, 48 and 59 of the EEC Treaty as well as 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, hereinafter 'the directive').

2 Aktieselskabet Storebæltsforbindelsen (hereinafter 'Storebælt') is a company wholly controlled by the Danish State. It is responsible for drawing up the project and, as the contracting authority, for the construction of a road and rail link across the Great Belt. Part of the project involves the construction of a bridge across the Western Channel of the Great Belt. The value of the contract for the construction of the Western Bridge is estimated at DKR 3 billion.

3 On 9 October 1987, Storebælt published in the supplement to the Official Journal of the European Communities (1987 S 196, p. 16) a restricted invitation to tender for the construction of a bridge over the Western Channel. On 28 April 1988 it invited five groups of companies to submit tenders.

4 Condition 6, Clause 2, of the general conditions which form part of the contract documents (hereinafter 'the general conditions') provides as follows:

'The contractor is obliged to use to the greatest possible extent Danish materials, consumer goods, labour and equipment' (hereinafter 'the Danish content clause').

5 Condition 3, Clause 3, of the general conditions sets out the conditions governing alternative tenders for alternative projects instead of the three different projects for the bridge which Storebælt itself had designed and which serve as a basis for assessment of those tenders. Condition 3, Clause 3, provides that the tender price for an alternative project is to be based on the assumption that the contractor will

undertake the detailed design of the project which it will submit to the contracting authority for approval and that it will assume full responsibility for the project and for its execution. That condition also specifies that the contractor is to accept the risk of variations in the quantities on which the alternative tender is based. Lastly, according to that condition,

'if the contractor submits a tender for an alternative project for which he assumes responsibility, he must state a price allowing for a reduction in the event that the contracting authority decides to take over the detailed planning of the project'.

6 Five international consortia, comprising a total of 28 undertakings, were invited to submit tenders. One of those five consortia was the European Storebælt Group (hereinafter 'ESG'), whose members were Ballast Nedam from the Netherlands, Losinger Ltd from Switzerland, Taylor Woodrow Construction Ltd from the United Kingdom and three Danish contracting firms. ESG submitted an alternative tender to Storebælt for the construction of a concrete bridge.

7 Storebælt then entered into discussions with the various tenderers in order to compare and assess their respective tenders and to quantify the cost of the numerous reservations which they contained. After cutting down the number of tenders, Storebælt continued negotiations with ESG regarding its alternative tender. Those negotiations culminated in the signature, on 26 June 1989, of a contract between ESG and Storebælt.

8 Reference is made to the Report for the Hearing for a fuller account of the facts of the case, the course of the procedure and the pleas in law and the arguments of the parties, which are mentioned or discussed below only in so far as is necessary for the reasoning of the Court.

Admissibility

9 Having reserved the right, at the end of its application, to supplement and develop if necessary the two grounds of its application, the Commission, in its reply, elaborated its arguments on the basis of information provided by the Danish Government in its statement of defence. The Commission also made two amendments to the forms of order sought in its application.

10 In the first place it seeks a declaration from the Court, in relation to its second ground of application, set out above (paragraph 1), that Denmark had failed to fulfil its obligations since Storebælt had, on the basis of a tender which did not comply with the tender conditions, conducted with ESG negotiations resulting in a final contract which contained amendments to the conditions of tender favouring that tenderer alone and relating in particular to price-related factors.

11 Secondly, on the question of the legal rules allegedly infringed by the defendant, the Commission claims that the Kingdom of Denmark infringed Directive 71/305, 'including the principle of equal treatment which underlies that directive'.

12 The Danish Government seeks from the Court a declaration that the application is inadmissible in so far as the Commission extended the subject-matter of the action beyond that of the pre-litigation procedure.

13 Before considering that claim, it should be recalled that, according to the case-law of the Court (see the judgment in Case C-306/91 *Commission* v *Italy* [1993] ECR I-2151, paragraph 22), in actions brought under Article 169 the pre-litigation stage defines the subject-matter of the proceedings and this cannot subsequently be widened. The possibility for the Member State concerned to submit its observations constitutes an indispensable guarantee required by the Treaty and observance of that guarantee is an essential formal requirement of the procedure for establishing that a Member State has failed to fulfil its obligations.

14 The Danish Government contends, first, that the Commission may not widen the subject-matter of the proceedings, either in its application or, in particular, in its reply, beyond the matters of fact and law mentioned in the letter of formal notice and the reasoned opinion.

15 On this issue the Court must find that the only matters at issue at the pre-litigation stage were Condition 6, Clause 2, of the general conditions, that is to say, the Danish content clause, and the commencement of negotiations on the basis of a tender which did not comply with Condition 3, Clause 3, of those conditions, concerning the tenderer's responsibilities where an alternative project was tendered for.

16 It follows that the action is admissible only in so far as the two grounds of application relate to those two provisions of the general conditions.

17 As regards the ground of application relating to the Danish content clause, the Commission is not, however, barred from supporting its arguments in that regard by referring to other provisions of the contract documents which amplify that clause on specific points.

18 The Danish Government further contends that, by altering in the course of the proceedings the terms of the form of order sought, the Commission changed the subject-matter of the proceedings and infringed the rights of the defence in so far as it had no opportunity, as the defendant State, to submit its observations on the new points in good time and in the prescribed manner. Consequently, according to the Danish Government, the question whether the action is well founded must be considered only in relation to the form of order sought in the application initiating the proceedings.

19 That plea in law raises the question whether the re-wording of the second part of the form of order sought widens its scope and, secondly, the question whether the reference, in the reply, to the 'principle of equal treatment underlying that

directive' introduces a new element into the legal basis of the alleged failure to fulfil obligations.

20 With respect to the first point, it need only be observed that the Commission was entitled to clarify the form of order sought in order to take into account the information, furnished by the Danish Government in its defence, concerning the conduct of the tendering procedure and the negotiations between Storebælt and ESG.

21 With regard to the second point, first of all, as the Advocate General points out in point 13 of his Opinion, the Commission had already complained in the course of the pre-litigation procedure that the Danish Government had acted in breach of that principle and both the reasoned opinion and the application make express mention of this. It follows that the Danish Government had the opportunity to submit observations in that connection, as is evident from its reply to the reasoned opinion and from the terms of its defence.

22 Secondly, the Danish Government's argument that the principle of equal treatment constitutes a new legal basis for the charge of failure to fulfil obligations raises a question concerning the interpretation of the directive which will be examined together with the issues of substance.

Substance

The first ground of application, concerning the Danish content clause

23 The Danish content clause, as set out in Condition 6, Clause 2, of the general conditions, is incompatible with Articles 30, 48 and 59 of the Treaty, a fact which is moreover undisputed by the Danish Government.

24 However, the Danish Government contends, first, that it deleted the clause in question before the signature of the contract with ESG on 26 June 1989 and that it thereby complied with the reasoned opinion even before it was notified on 14 July 1989. At the hearing, the Danish Government, relying on the judgment in Case C-362/90 *Commission* v *Italy* [1992] ECR I-2353 also argued that the Commission had failed to act in good time to prevent, by the procedures available to it, the infringement complained of from producing legal effects.

25 That argument cannot be accepted.

26 In the first place, even though the clause in question was deleted shortly before signature of the contract with ESG and consequently before notification of the reasoned opinion, the fact remains that the tendering procedure was conducted on the basis of a clause which was not in conformity with Community law and which, by its nature, was likely to affect both the composition of the various consortia and the terms of the tenders submitted by the five preselected consortia. It follows that the mere deletion of that clause at the final stage of the procedure cannot be regarded as sufficient to make good the breach of obligations alleged by the Commission.

27 It should also be noted that, in its letter of formal notice of 21 June 1989, the Commission requested the Danish Government to arrange for signature of the contract in dispute to be postponed and that if the Danish Government had acceded to that request the breach of obligations complained of would not have produced any legal effects.

28 The Danish Government contends, secondly, that in its statement of 22 September 1989, delivered to the Court at the hearing of the application for interim measures, it not only recognized that the Danish content clause constituted an infringement of Community law but also accepted liability towards the tenderers, so that the action on this point is devoid of purpose.

29 That argument must also be rejected.

30 In an action for failure to fulfil obligations, brought by the Commission under Article 169 of the Treaty, whose expediency only the Commission decides, it is for the Court to determine whether or not the alleged breach of obligations exists, even if the State concerned no longer denies the breach and recognizes that any individuals who have suffered damage because of it have a right to compensation. Otherwise, by admitting their breach of obligations and accepting any ensuing liability, Member States would be at liberty at any time during Article 169 proceedings before the Court to have them brought to an end without any judicial determination of the breach of obligations and of the basis of their liability.

31 It follows from those considerations that the Commission's application is well founded in relation to the first ground of application, concerning the Danish content clause.

The second ground of application, concerning negotiations on the basis of a tender which did not comply with the tender conditions

32 Since the Commission claims in its pleadings, which were re-worded in its reply, that Storebælt acted in breach of the principle that all tenderers should be treated alike, the Danish Government's argument that that principle is not mentioned in the directive and therefore constitutes a new legal basis for the complaint of breach of State obligations must be considered first.

33 On this issue, it need only be observed that, although the directive makes no express mention of the principle of equal treatment of tenderers, the duty to observe that principle lies at the very heart of the directive whose purpose is, according to the ninth recital in its preamble, to ensure in particular the

development of effective competition in the field of public contracts and which, in Title IV, lays down criteria for selection and for award of the contracts, by means of which such competition is to be ensured.

34 In its reply the Commission based its claims on a series of provisions in the final version of the contract which, in its view, constituted amendments to the tender conditions and had some effect on prices. However, as was explained above (paragraphs 14 and 15), only the amendments relating to Condition 3, Clause 3, of the general conditions may be taken into consideration by the Court.

35 The Commission's second ground of application, so defined, is essentially that the Kingdom of Denmark infringed the principle of equal treatment of tenderers by reason of the fact that Storebælt, on the basis of a tender which did not comply with the tender conditions, conducted negotiations with ESG, which, in the final version of the contract, led to amendments to Condition 3, Clause 3, concerning price-related factors which favoured that tenderer alone.

36 In order to assess the compatibility of the negotiations so conducted by Storebælt with the principle of equal treatment of tenderers, it must first be considered whether that principle precluded Storebælt from taking ESG's tender into consideration.

37 In this regard, it must be stated first of all that observance of the principle of equal treatment of tenderers requires that all the tenders comply with the tender conditions so as to ensure an objective comparison of the tenders submitted by the various tenderers.

38 This is confirmed by Article 11 of the directive, which, whilst allowing a tenderer, where there is the option of submitting variations on a project of the administration, to use a method for pricing the works which differs from that used in the country where the contract is being awarded, nevertheless requires that the tender accord with the tender conditions.

39 With regard to the Danish Government's argument that Danish legislation governing the award of public contracts allows reservations to be accepted, it should be observed that when that legislation is applied, the principle of equal treatment of tenderers, which lies at the heart of the directive and which requires that tenders accord with the tender conditions, must be fully respected.

40 That requirement would not be satisfied if tenderers were allowed to depart from the basic terms of the tender conditions by means of reservations, except where those terms expressly allow them to do so.

41 The tender submitted by ESG, concerning an alternative project for the construction of a concrete bridge, did not comply with Condition 3, Clause 3, of the general conditions in so far as it failed to satisfy the requirements stipulated therein, that is to say that the proposed price was not based on the fact that, as tenderer, it had to undertake the detailed design of a project and assume full responsibility for it, as regards both its planning and its execution, as well as accept the risk of variation in quantities in relation to those envisaged.

42 Lastly, it should be noted that Condition 3, Clause 3, of the general conditions constitutes a fundamental requirement of the tender conditions, since it specifies the conditions governing the calculation of prices, taking into account the

tenderer's responsibility for the detailed design and execution of the project and for accepting the risks.

43 In those circumstances, and since the condition in question did not give tenderers the option of incorporating reservations into their tenders, the principle of equal treatment precluded Storebælt from taking into consideration the tender submitted by ESG.

44 Consequently, the second ground of application concerning the conduct of negotiations on the basis of a tender which did not comply with the tender conditions is well founded.

45 It follows from all the foregoing considerations that, by reason of the fact that Aktieselskabet Storebæltsforbindelsen invited tenders on the basis of a condition requiring the use to the greatest possible extent of Danish materials, consumer goods, labour and equipment and the fact that negotiations with the selected consortium took place on the basis of a tender which did not comply with the tender conditions, the Kingdom of Denmark failed to fulfil its obligations under Community law and in particular infringed Articles 30, 48 and 59 of the Treaty as well as Council Directive 71/305/EEC.

Costs

46 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs. Since the Kingdom of Denmark has been unsuccessful, it must be ordered to pay the costs.

On those grounds,

THE COURT

hereby:

1. **Declares that, by reason of the fact that Aktieselskabet Storebæltsforbindelsen invited tenders on the basis of a condition requiring the use to the greatest possible extent of Danish materials, consumer goods, labour and equipment and the fact that negotiations with the selected consortium took place on the basis of a tender which did not comply with the tender conditions, the Kingdom of Denmark failed to fulfil its obligations under Community law and in particular infringed Articles 30, 48 and 59 of the Treaty as well as Council Directive 71/305/EEC;**

2. **Orders the Kingdom of Denmark to pay the costs.**

Due Kakouris Rodríguez Iglesias Zuleeg

Murray Mancini Joliet

Schockweiler Moitinho de Almeida Grévisse Kapteyn

Delivered in open court in Luxembourg on 22 June 1993.

J.-G. Giraud — O. Due

Registrar — President