

JUDGMENT OF THE COURT

5 October 2000 *

In Case C-16/98,

Commission of the European Communities, represented by H. van Lier, Legal Adviser, and O. Couvert-Castéra, a national civil servant on secondment to the Legal Service, acting as Agents, with an address for service in Luxembourg at the Chambers of C. Gómez de la Cruz, of the same service, Wagner Centre, Kirchberg,

applicant,

v

French Republic, represented by K. Rispal-Bellanger, Head of Subdirectorate in the Legal Affairs Directorate of the Ministry of Foreign Affairs, and P. Lalliot, Secretary for Foreign Affairs in the same Directorate, acting as Agents, with an address for service in Luxembourg at the French Embassy, 8B Boulevard Joseph II,

defendant,

* Language of the case: French.

APPLICATION for a declaration that, in the course of the procurement procedure initiated by the Syndicat Départemental d'Électrification de la Vendée in December 1994 for the award of contracts for electrification and street lighting work, the French Republic failed to fulfil its obligations under Articles 4(2), 14(1), (10) and (13), together with Articles 21, 24 and 25 of Council Directive 93/38/EEC of 14 June 1993 coordinating the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors (OJ 1993 L 199 p. 84),

THE COURT,

composed of: G.C. Rodríguez Iglesias, President, J.C. Moitinho de Almeida, L. Sevón and R. Schintgen (Presidents of Chambers), P.J.G. Kapteyn, C. Gulmann, J.-P. Puissochet, M. Wathelet and V. Skouris (Rapporteur), Judges,

Advocate General: F.G. Jacobs,
Registrar: D. Louterman-Hubeau, Principal Administrator,

having regard to the Report for the Hearing,

after hearing oral argument from the parties at the hearing on 16 November 1999,

after hearing the Opinion of the Advocate General at the sitting on 24 February 2000,

gives the following

Judgment

1 By application lodged at the Court Registry on 22 January 1998, the Commission of the European Communities brought an action under Article 169 of the EC Treaty (now Article 226 EC) for a declaration that, in the course of the procurement procedure initiated by the Syndicat départemental d'Electrification de la Vendée (hereinafter 'Sydev') in December 1994 for the award of contracts for electrification and street lighting work, the French Republic failed to fulfil its obligations under Articles 4(2), 14(1), (10) and (13), together with Articles 21, 24 and 25 of Council Directive 93/38/EEC of 14 June 1993 coordinating the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors (OJ 1993 L 199 p. 84, hereinafter 'the Directive').

Legal background

2 The purpose of the Directive is to open up public procurement markets in the water, energy, transport and telecommunications sectors.

3 Under Article 1(1) and (6) of the Directive:

‘For the purpose of this Directive:

1. “public authorities” shall mean the State, regional or local authorities, bodies governed by public law, or associations formed by one or more of such authorities or bodies governed by public law.

A body is considered to be governed by public law where it:

- is established for the specific purpose of meeting needs in the general interest, not being of an industrial or commercial nature,

- has legal personality, and

- is financed for the most part by the State, or regional or local authorities, or other bodies governed by public law, or is subject to management supervision by those bodies, or has an administrative, managerial or supervisory board more than half of whose members are appointed by the State, regional or local authorities, or other bodies governed by public law;

...

6. “tenderer” shall mean a supplier, contractor or service provider who submits a tender ...’

4 Article 2(1) and (2) of the Directive provides:

‘1. This Directive shall apply to contracting entities which:

- (a) are public authorities or public undertakings and exercise one of the activities referred to in paragraph 2;

...

2. Relevant activities for the purposes of this Directive shall be:

(a) the provision or operation of fixed networks intended to provide a service to the public in connection with the production, transport or distribution of:

(i) drinking water; or

(ii) electricity; or

(iii) gas or heat;

or the supply of drinking water, electricity, gas or heat to such networks;

...’

5 Under Article 4(2) of the Directive:

‘2. Contracting entities shall ensure that there is no discrimination between different suppliers, contractors or service providers.’

6 Article 14(1), (10) and (13) of the Directive provides:

‘1. This Directive shall apply to contracts the estimated value, net of VAT, for which is not less than:

...

(c) ECU 5 000 000 in the case of works contracts.

...

10. The basis for calculating the value of a works contract for the purposes of paragraph 1 shall be the total value of the work. “Work” shall mean the result of building and civil engineering activities, taken as a whole, which are intended to fulfil an economic and technical function by themselves.

In particular, where a supply, work or service is the subject of several lots, the value of each lot shall be taken into account when assessing the value referred to in paragraph 1. Where the aggregate value of the lots equals or exceeds the value laid down in paragraph 1, that paragraph shall apply to all the lots. However, in the case of works contracts, contracting entities may derogate from paragraph 1 in respect of lots the estimated value, net of VAT, for which is less than ECU 1 million, provided that the aggregate value of those lots does not exceed 20% of the overall value of the lots.

...

13. Contracting entities may not circumvent this Directive by splitting contracts or using special methods of calculating the value of contracts.’

7 Article 20(1) of the Directive provides that contracting entities may choose open, restricted or negotiated procedures, ‘provided that, subject to paragraph 2, a call for competition has been made in accordance with Article 21’.

8 Article 21(1) and (5) provides:

‘1. In the case of supplies, works or service contracts, the call for competition may be made:

(a) by means of a notice drawn up in accordance with Annex XII A, B or C; or

(b) by means of a periodic indicative notice drawn up in accordance with Annex XIV; or

(c) by means of a notice on the existence of a qualification system drawn up in accordance with Annex XIII.

...

5. The notices referred to in this Article shall be published in the *Official Journal of the European Communities*.’

9 Article 24(1) and (2) of the Directive provides:

‘1. Contracting entities which have awarded a contract or organised a design contest shall communicate to the Commission, within two months of the award of the contract and under conditions to be laid down by the Commission in accordance with the procedure laid down in Article 40, the results of the awarding procedure by means of a notice drawn up in accordance with Annex XV or Annex XVIII.

2. Information provided under Section I of Annex XV or under Annex XVIII shall be published in the *Official Journal of the European Communities*.

...’

10 Article 25(1) and (5) of the Directive provides:

‘1. The contracting entities must be able to supply proof of the date of dispatch of the notices referred to in Articles 20 to 24.

...

5. Contracts or design contests in respect of which a notice is published in the *Official Journal of the European Communities* pursuant to Article 21(1) or (4)

shall not be published in any other way before that notice has been dispatched to the Office for Official Publications of the European Communities. Such publication shall not contain information other than that published in the *Official Journal of the European Communities*.’

11 Article 45(1) of the Directive provides:

‘Member States shall adopt the measures necessary to comply with the provisions of this Directive and shall apply them by 1 July 1994. They shall forthwith inform the Commission thereof.’

Facts and pre-litigation procedure

12 On 21 December 1994, Sydev, the organisation comprising the various joint municipal groupings responsible for electrification within the French *département* of Vendée, sent for publication in the *Bulletin Officiel des Annonces des Marchés Publics* (the official French bulletin of notices concerning public works and service contracts, hereinafter ‘the BOAMP’) a series of 37 notices of invitation to tender for electrification or street lighting works to be carried out over a three-year period in the *département*. Those notices, published in the BOAMP on 12 January 1995, concerned works amounting in total to FRF 609 000 000 over the three years, FRF 483 000 000 of which was for contracts for electrification and FRF 126 000 000 for contracts for street lighting.

13 In all the notices published in the BOAMP, Sydev was stated to be the ‘body which awards the contract’; tenders were to be sent to the works management office of Sydev, indicating the name of the municipal grouping concerned in each case. The description of the work to be carried out on the electricity supply networks was the same in all the cases: ‘electrification work and associated generated work such as, for example, civil engineering on the telephone network,

civil engineering on the cable television network, the public address system'. The description of the work to be done on the lighting networks was also the same in the relevant notices: 'street lighting work and associated generated work such as, for example, the public address system'.

- 14 Also on 21 December 1994, Sydev sent for publication at Community level the six main contract notices concerning electrification. Those notices, which were published on 6 January 1995 in the *Official Journal of the European Communities* (OJ S 3, p. 211), stated that tenders were to be sent to Sydev, indicating in each case the name of the local entity concerned. In all those notices Sydev was given as the name of the contracting entity, followed in all cases but one by the name of the local entity concerned.
- 15 The contracts were awarded under the restricted tendering procedure on the basis of price lists and order forms. The records of the tendering procedures disclosed by the French Government show that the contracts were awarded in accordance with the following procedure: initially, a shortlist was drawn up of candidates who had produced all the certificates attesting to compliance with administrative requirements and had the capacity to carry out the work in question; subsequently, one of the candidates was selected, probably on the basis of the lowest offer. Tenders were in the form of a percentage difference from the proposed list of prices; the successful candidate was to be given orders to carry out specific items of work over the three-year period.
- 16 Notices of the award of the 37 contracts at issue in this case (hereinafter 'the contested contracts'), including the six contracts published in the *Official Journal of the European Communities* (hereinafter the 'OJEC'), were published in the

BOAMP on 29 September 1995. In those notices Sydev was described as the 'body which awarded the contract'. On the other hand, no notice of award of the contracts was sent to the OJEC for publication.

- 17 The Commission took the view that the contested contracts were lots of a single 'work', which originated with a single contracting entity, that is to say Sydev, and that the rules of the Directive should have been applied to all of them, not merely to the six main lots. On 17 January 1996 it therefore sent a letter of formal notice to the French authorities, objecting to the splitting of the lots into different contracts, the failure to publish two-thirds of the lots at Community level and the use of a formula derived from the procedure for permanent tendering concerning which the Commission had already initiated another infringement procedure.
- 18 By letter of 14 June 1996, the French authorities denied the infringement complained of, contending that the contested contracts had not been artificially split but had genuinely been concluded by each of the joint municipal electrification groupings concerned in the *département* of Vendée and that, therefore, the threshold for publication of a notice in the OJEC had to be applied to each of the contracts individually. The French authorities also contended in their letter that the joint municipal groupings concerned did not use a procedure for permanent tendering during the currency of a contract.
- 19 On 7 April 1997, the Commission sent the French authorities a reasoned opinion alleging that in the procedure initiated by Sydev and its members in December 1994 the French Republic had failed to fulfil its obligations under the Directive, and in particular Articles 1(1), (5) and (7), 4(2), 14(1), (10) and (13), and Articles 21, 24 and 25. The Commission called on the French Government to take the measures necessary to comply with that reasoned opinion within one month of its notification. It also called on that government to provide it, within the same period, in accordance with Article 41 of the Directive, with all the

information necessary to assess the exact position of the contract holders, *inter alia*, records of the award procedure and the contracts themselves.

- 20 By letter of 2 July 1997, the French authorities replied to that reasoned opinion, reiterating their previous arguments. They attached to that letter the records concerning the contested contracts and the tender documents relating to those contracts.
- 21 By note of 16 December 1997, the French authorities sent the Commission additional documentation, namely the schedules of special administrative clauses and the lists of prices for the contested contracts.
- 22 As it was not satisfied with the reply of the French Government to the reasoned opinion, the Commission brought this action.

Applicability of the Directive to the contested contracts given that it had not been transposed at the material time

- 23 It is common ground that at the end of 1994 and the beginning of 1995, when the procedure for the award of the contested contracts was under way, the French Republic had not yet transposed the Directive into its national law (see Case C-311/96 *Commission v France* [1997] ECR I-2939).
- 24 However, that fact does not preclude the applicability of the Directive to the contested contracts since the period prescribed in Article 45(1) for its transposi-

tion expired on 1 July 1994, that is to say before the procedure for the award of those contracts took place.

The complaints relied on

- 25 In support of its action the Commission relies on two series of complaints.
- 26 First, the contested contracts were concluded in breach of Article 14(1), (10) and (13) and Articles 21, 24, 25 and 4(2) of the Directive: although they were in fact lots of a single work, that contract was artificially split on technical and geographical pretexts, in breach of the provisions of the Directive concerning the threshold, publication and equality of treatment between tenderers.
- 27 Second, the contract notices which the French authorities sent for publication in the OJEC were incomplete, which constituted a further instance of failure to fulfil obligations under the Directive.
- 28 In order to rule on the failure to fulfil obligations complained of, it should first be considered whether a single work was artificially split into several contracts within the meaning of Article 14(10), first subparagraph, and (13). If, once this question has been considered, it appears that this was in fact the case, the other instances of failure complained of should be considered in the light of the other provisions of the Directive.

The complaint that a single work was artificially split within the meaning of Article 14(10), first subparagraph, and (13) of the Directive

Preliminary observations

- 29 In order to define the term ‘work’ for the purposes of this dispute, it must first be observed that, under Article 14(10), first subparagraph, of the Directive: ‘The basis for calculating the value of a works contract for the purposes of paragraph 1 shall be the total value of the work. “Work” shall mean the result of building and civil engineering activities, taken as a whole, which are intended to fulfil an economic and technical function by themselves.’
- 30 Article 14(13) provides: ‘Contracting entities may not circumvent this Directive by splitting contracts or using special methods of calculating the value of contracts.’
- 31 That paragraph sets out clearly the specific obligations deriving for contracting entities from Article 14(10), first subparagraph, of the Directive and must, therefore, be taken into account together with that subparagraph in ruling as to whether a work was split.
- 32 The French Government disputes the relevance of the term ‘work’ in this case. It contends that it is not the fact that a work is being carried out which requires the procedures provided for by the Directive to be applied where the threshold laid down in it is reached but the fact that the contracts in question concern ‘building

or civil engineering activities referred to in Annex XI' of that Directive, as specified in Article 1(4)(b) thereof.

- 33 It must be observed that the argument relied on by the French Government concerns the conditions for the application of the Directive to a 'works contract' as defined in Article 1(4)(b) and not the conditions under which works contracts within the meaning of that subparagraph are to be regarded as forming part of a single work for the purpose of ascertaining whether the threshold for the application of the Directive, laid down by Article 14(1)(c), has been reached. Only the latter question is of relevance in the present case, as the Commission claims that the French Republic failed to observe that threshold by artificially splitting the work concerned.
- 34 Accordingly, that argument by the French Republic must be dismissed.
- 35 The criteria for deciding whether there is a work must also be established.
- 36 In that connection, it is clear from the definition of work in Article 14(10), first subparagraph, of the Directive that the existence of a work must be assessed in the light of the economic and technical function of the result of the works concerned.
- 37 The present case concerns a series of specific maintenance and extension works on the existing electricity supply and street lighting networks, the result of which, once completed, will be subsumed within the function fulfilled by the networks concerned.

- 38 It follows that, in the case of that type of works, the question whether there is a work must be assessed in the light of the economic and technical function fulfilled by the electricity supply and street lighting networks in question.
- 39 In the written procedure, both the Commission and the French Government expanded on their arguments concerning the premiss that the existence of a single contracting entity is a necessary condition in order for a series of contracts to be considered to be for the execution of a single work.
- 40 In answer to questions on that subject at the hearing, the Commission stated, however, that the existence of a single contracting entity is not a necessary condition, but merely an indication of the existence of a single work.
- 41 At the hearing the Commission also argued that contracts must be considered to be for the execution of a single work when they are so linked that a Community undertaking is likely to regard them as a single economic operation and tender for the whole operation.
- 42 It should be observed that, while the existence of a single contracting entity and the possibility of a Community undertaking's carrying out the whole of the works described in the contracts concerned may, according to circumstances, constitute corroborative evidence of the existence of a work within the meaning of the Directive, they cannot, on the other hand, constitute decisive criteria on that point. Thus, if there is a number of contracting entities and the whole of the works concerned cannot be carried out by a single undertaking, this will not call into question the existence of a single work where that conclusion results from the application of the criteria concerning function set out in Article 14(10), first subparagraph, second sentence, of the Directive.

- 43 The definition of the term ‘work’ in that subparagraph does not make the existence of a work dependent on matters such as the number of contracting entities or whether the whole of the works can be carried out by a single undertaking.
- 44 That interpretation is consistent with the objective of the Directive which is to ensure that undertakings from other Member States will be able to tender for contracts or bundles of contracts likely to be of interest to them for objective reasons relating to their value.
- 45 First, it is conceivable that, for administrative or other reasons, a programme of works for the execution of a work within the meaning of the Directive might be the subject of several procedures originating with various contracting authorities. This might be so, for example, in the case of the construction of a road crossing the territory of several local authorities, each having administrative responsibility for a section of the road. In such a case, the above objective would be thwarted if the applicability of the Directive were ruled out on the ground that the estimated value of each section of the work was below the threshold of ECU 5 000 000.
- 46 Second, a Community undertaking may wish to be informed of the value of all the lots making up a work, even if it is not in a position to carry out all of them, as it is only in that way that it can assess the exact scope of the contract and adjust its prices according to the number of lots for which it proposes to tender, including, if necessary, those whose value is below the threshold of ECU 5 000 000.
- 47 It follows from the foregoing that in this case the question whether there is a work must be answered on the basis of the criteria laid down by Article 14(10), first subparagraph, second sentence, of the Directive, as set out in paragraph 38 of this judgment.

- 48 As the Commission complained that the French Republic had split the work concerned both on a technical basis (separate contracts for electrification and street lighting) and a geographical basis (separate contracts for each joint municipal grouping), it must first be considered whether electrification work and street lighting work was split, either at the level of the *département* as a whole or of the individual municipal groupings; if that is not the case, it must be ascertained, second, whether there was splitting within each of the two categories of works.

The complaint that the work was artificially split into electrification works and street lighting works

- 49 In support of its complaint, the Commission relies *inter alia* on the fact that the public address network is mentioned both in all the contract notices concerning electrification and in those concerning street lighting. It also cites the contract notices published by the relevant bodies in the *départements* of the Dordogne and Calvados which did not distinguish between street lighting work and electrification work.
- 50 The French Government contends that the present case concerns local electricity supply or street lighting networks which are independent of one another and that, therefore, the works on those networks are not contributing to the execution of a single work with functional or economic continuity.
- 51 In line with the finding at paragraph 38 of this judgment, in order to rule on this complaint, it is necessary to consider the economic and technical function fulfilled by the electricity supply and street lighting networks in question.

- 52 An electricity supply network is intended, from a technical point of view, to transport the electricity produced by a supplier to individual end consumers; in terms of economics, they must pay the supplier for what they consume.
- 53 However, a street lighting network is intended, from a technical point of view, to light public places using the electricity provided by the electricity supply network. The authority providing the street lighting assumes the cost itself, but subsequently recovers the amounts spent from the population served, without adjusting the sums demanded according to the benefit derived by the individuals concerned.
- 54 It follows that an electricity supply network and a street lighting network have a different economic and technical function.
- 55 It should be added that this difference of function is the same, whether at the level of the whole *département* or of the joint municipal groupings.
- 56 Accordingly, works on the electricity supply and street lighting networks cannot be considered to constitute lots of a single work artificially split contrary to Article 14(10), first subparagraph, and (13) of the Directive.
- 57 That finding is not affected by the considerations put forward by the Commission.

- 58 First, the fact that the works on the public address system are mentioned both in the notices concerning electrification and in those concerning street lighting does not mean that the respective networks fulfil the same economic and technical function. Their inclusion might be explained by the fact that parts of a public address network are carried by electricity supply ducts and street lighting masts, so that work on either of those networks entails work on the public address system.
- 59 Second, the fact that in two other French *départements* the contracting entities chose to include electrification work and street lighting work in the same contract notice does not alter the different economic and technical function which those networks are intended to fulfil.
- 60 Accordingly, the complaint alleging artificial splitting of the work into electrification works and street lighting works must be rejected.

The complaint that the electrification work was artificially split

- 61 The Commission complains that the French authorities artificially split the work in respect of electrification works. In that connection it points to the geographical contiguity of the networks, the simultaneity of the work programmes, the identical nature of the work descriptions in each contract notice and the overall coordination by Sydev.

- 62 The French Government contends that each joint municipal grouping concluded a separate contract for the network falling within its authority. It explains, on that point, that the joint municipal groupings are responsible for the low voltage electricity supply networks radiating from transformer substations which supply consumers in their territory with electricity.
- 63 The fact that those transformers may themselves be linked to a network of high-voltage lines does not mean that the whole system constitutes a single network and that, therefore, all the action taken on that network must be viewed as part of a single work. If that were the case, any action on the French electricity supply network as a whole would have to be considered to be a lot of a single work; such an interpretation would be too far-reaching and would run counter to the letter and spirit of the Community legislation on public procurement contracts, the sole purpose of which is to allow the tendering procedures for such contracts to be coordinated.
- 64 It must be observed in that regard that, even if, for administrative reasons, the joint municipal groupings in Vendée are responsible for the low-voltage electricity supply networks in the territory of the municipalities which those groupings comprise, that fact cannot, for the reasons stated in paragraphs 43 and 45 of this judgment, be of decisive importance, since those networks are interconnectable and, taken as a whole, they fulfil one economic and technical function, which consists in the supply and sale to consumers in the *département* of Vendée of electricity produced and supplied by *Électricité de France*.
- 65 As regards the contention of the French Government that such reasoning could be applied to the whole of the French electricity supply network, it must be observed that each tender for a contract must be assessed according to its context and its particular characteristics. In the present case, there are important factors which militate in favour of those contracts being aggregated at that level, such as the

fact that the invitations for tenders for the contested contracts were made at the same time, the similarities between the contract notices and the fact that Sydev, the body comprising the joint municipal groupings responsible for electrification within the *département*, initiated and coordinated the contracts within a single geographical area.

66 This complaint of the Commission must, therefore, be upheld and it must be held that the contracts for electrification form part of a single work which has been artificially split. Accordingly, the French Republic has failed to fulfil its obligations under Article 14(10), first subparagraph, and (13) of the Directive.

The complaint that the street lighting work was artificially split

67 The Commission submits that the work was artificially split in respect of street lighting works between several entities within the *département* of Vendée. It puts forward the same arguments in support of its complaint as those raised in support of the complaint concerning electrification.

68 In the written procedure, the French Government stressed the local nature and the autonomy of the street lighting networks.

69 It must be observed in that regard that, unlike electricity supply networks, street lighting networks are, from a technical point of view, not necessarily interdependent, as they can be restricted to built-up areas and no interconnection

between them is necessary. Similarly, it is possible, in economic terms, for each of the local entities concerned to assume the financial burden arising from the operation of such a network. In the light of these factors, it is for the Commission to establish that, from a technical and economic point of view, the street lighting networks concerned in this case formed one unit within the *département*. The Commission has put forward no evidence to that effect.

- 70 It follows that, even if the economic and technical function of each street lighting network is the same as that of all the others within the *département* of Vendée, it is not possible to consider all those networks to form a whole with a single economic and technical function within the *département*.
- 71 Accordingly, that complaint of the Commission must be rejected.
- 72 At the hearing, the French Government expressed doubt as to whether street lighting works fall within the scope of the Directive or 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). On that point, it contended that a street lighting network does not involve the production, supply, transport or distribution of electricity as required by Article 2(2)(a) of the Directive, but, rather, concerns its consumption.
- 73 Leaving aside the question whether such a plea should be considered, given the stage of the procedure at which it was raised, suffice it to note that, in the light of

the findings in paragraphs 56 and 71 of this judgment, there is no need to consider whether street lighting works fall within the scope of the Directive.

The complaint that obligations were not fulfilled as regards the threshold derived from Article 14(1)(c) and (10), second subparagraph, of the Directive

- 74 The Commission complains that, by artificially splitting the contract for the works at issue, the French authorities infringed the provisions of the Directive as regards the threshold.
- 75 It must be observed that Article 14(1)(c) established the threshold for the applicability of the Directive at ECU 5 000 000 and that, as regards the lots of a work, Article 14(10), second subparagraph, whilst requiring the value of all the lots to be aggregated, allows derogation from the Directive in respect of lots the estimated value, net of VAT, for which is less than ECU 1 million, provided that the aggregate value of those lots does not exceed 20% of the overall value of the lots.
- 76 In view of the finding made at paragraph 66 of this judgment, it must be ascertained whether the value of the contracts for electrification exceeds the above thresholds.
- 77 The documents before the Court show that those contracts, of which there are 19, account for a total estimated value, net of VAT, of FRF 483 000 000 over the three-year period envisaged. That sum is well in excess of the threshold of ECU 5 000 000, which, at the material time, was equivalent to FRF 33 966 540.

- 78 It follows that the French authorities should have applied the Directive to all the lots making up the contract for electrification work, apart from those whose estimated individual value, net of VAT, was below the threshold of ECU 1 million which, at the material time, was equivalent to an amount of FRF 6 793 308, provided that their aggregate value did not exceed 20% of the overall value of the lots.
- 79 The evidence put forward by the Commission in reply to a question put by the Court shows that, of the electrification contracts only one, the estimated value, net of VAT, of which was FRF 6 000 000, did not exceed the threshold of ECU 1 million. The value of that contract was also less than 20% of the estimated total value, net of VAT, of all the electrification work.
- 80 The French authorities did not publish an invitation to tender at Community level for the 18 other electrification contracts, but only for six of them. Accordingly, the French Republic has failed to fulfil its obligations under Article 14(1)(c), and (10), second subparagraph, of the Directive.

The complaint that Article 21(1) and (5) of the Directive was disregarded

- 81 It must be observed that, according to Article 21(1) of the Directive, the call for competition for a contract must be made by means of a notice drawn up in accordance with Annex XII of the Directive; that Annex provides in paragraph 5 that the notice must be published in the OJEC.

- 82 The Commission complains, first, that, because they split the work in respect of electrification works, the French authorities failed to publish a call for competition in the OJEC for all the contracts forming part of that work, confining themselves to doing so for only six of them.
- 83 Second, the notices concerning those six contracts, which the French authorities sent for publication in the OJEC, did not, according to the Commission, conform to the model in Annex XII to the Directive, because the information provided in those notices was insufficient to enable several of the headings set out in the model to be filled in. That conduct constituted a further failure to fulfil obligations under Article 21(1) of the Directive.
- 84 As already observed at paragraph 80 of this judgment, the French authorities confined themselves to publishing a call for competition at Community level in respect of only six of the 18 contracts for electrification works for which they were required to publish such a notice. The French Republic has thereby failed to fulfil its obligations under Article 21(1) and (5) of the Directive as regards the other 12 contracts.
- 85 It must be held that, as the French Republic acknowledges, the notices published in the OJEC concerning the six contracts for electrification are incomplete.
- 86 It follows that, as regards those notices, the French Republic has also failed to fulfil its obligations under Article 21(1) of the Directive.

The complaint that Article 24(1) and (2) of the Directive was disregarded

- 87 The Commission complains that the French authorities failed to notify it of the outcome of the tendering procedure for the electrification contracts, including those for which a contract notice was published in the OJEC, which prevented the publication in the OJEC of notices of the award of those contracts, in breach of the obligations deriving from Article 24 of the Directive.
- 88 The French Government admits the failure to fulfil its obligations complained of as regards the six contracts for which a notice was published in the OJEC. As regards the other contracts, it reiterates its argument that, in the absence of technical or geographical splitting, the Directive was not applicable to those contracts.
- 89 It must be observed that Article 24(1) of the Directive requires contracting entities which have awarded a contract to communicate to the Commission the results of the awarding procedure by means of a notice. Article 24(2) sets out the information to be published in the OJEC.
- 90 In the present case it is common ground that the French authorities did not communicate to the Commission the results of the 18 tendering procedures for the electrification contracts to which the Directive was applicable.

91 Accordingly, it must be held that the French Republic failed to fulfil its obligations under Article 24(1) and (2) of the Directive.

The complaint that Article 25 of the Directive was disregarded

92 The Commission submits that the failure of the French Republic to fulfil its obligations under Articles 21 and 24 of the Directive also entails a failure to fulfil its obligations under Article 25 thereof, concerning the dispatch and publication of the notices.

93 It must be observed that, under Article 25(1) of the Directive, the contracting entities must be able to supply proof of the date of dispatch of the notices referred to in Articles 20 to 24. Article 25(5) provides that contracts in respect of which a notice is published in the OJEC are not to be published before that notice has been dispatched to the Office for Official Publications of the European Communities.

94 Given its general wording, the Commission's complaint seems to concern both the cases involving contracts for electrification where no notice of contract or of the award of the contract could have been dispatched to or published in the OJEC and the cases in which a contract notice, albeit incomplete, was published in it.

95 The Court must, therefore, distinguish between the two types of cases in order to assess the complaint raised by the Commission.

96 First, as regards the electrification contracts for which no contract notice or notice of award was sent for publication in the OJEC, although the Directive was applicable to them, there can be no failure to fulfil obligations under Article 25(1) of the Directive precisely because nothing was sent, since that paragraph is only applicable where a notice was actually sent.

97 However, since in all the cases notices were published in the BOAMP, it must be held that there was a failure to fulfil obligations under Article 25(5) of the Directive.

98 Second, as regards the cases of electrification contracts where a contract notice was published in the OJEC, even if the Commission's complaint did concern them, it must be observed, in the light of the documents produced to the Court, that those notices gave the date of their dispatch, which is not disputed by the Commission, and were dispatched for publication in the BOAMP on the same day.

99 In those circumstances, it cannot be held that there was a failure to fulfil obligations under Article 25(1) and (5).

The complaint that Article 4(2) of the Directive was disregarded

100 The Commission complains that the French Republic infringed Article 4(2) of the Directive. That complaint is based on the fact that all the electrification contracts

were published at national level but only some of them were published at Community level, and then only incompletely.

101 The difference between the two series of notices published in the BOAMP and the OJEC is such, the Commission claims, as to mislead and place at a disadvantage tenderers from other Member States compared with their competitors from the Member State in which the contracts are to be awarded. There is less incentive for an undertaking which is not based in the area to respond to six different calls for tender each for an amount of little more than ECU 5 000 000, than to a call for tenders of around ECU 100 million. Moreover, a tenderer unaware of the exact scale of the contract, will, the Commission argues, normally put forward a less competitive price, all other things being equal, than a tenderer with knowledge of all the contracts.

102 The French Government reiterates its principal argument that there was no artificial splitting in the present case. In the alternative it contends that the procedure followed did not entail discrimination between tenderers because all candidates were asked to express their tender in the form of the amount by which it exceeded or undercut the list of prices proposed by the contracting entities.

103 It must be observed that, according to Article 4(2) of the Directive, 'Contracting entities shall ensure that there is no discrimination between different suppliers, contractors or service providers.'

104 Having regard to the nature of the Commission's complaint, it must first be ascertained whether that paragraph requires that there be no discrimination between tenderers including potential tenderers.

- 105 In that connection, regard must be had to Article 1(6) of the Directive, which provides that ‘tenderer’ is to mean a supplier, contractor or service provider who submits a tender.
- 106 It follows that, when it refers to suppliers, contractors or service providers, Article 4(2) of the Directive also concerns tenderers.
- 107 As to whether that paragraph also concerns potential tenderers, it must be held that the principle of non-discrimination applies to all the stages of the tendering procedure and not only from the time when a contractor submits a tender.
- 108 That interpretation is consistent with the purpose of the Directive which is to open up the contracts to which it applies to Community competition. That purpose would be undermined if a contracting entity could organise a tendering procedure in such a way that contractors from Member States other than that in which the contracts are awarded were discouraged from tendering.
- 109 It follows that Article 4(2) of the Directive, in prohibiting any discrimination between tenderers, also protects those who are discouraged from tendering because they have been placed at a disadvantage by the procedure followed by a contracting entity.
- 110 Second, it must be ascertained whether publication at Community level of only some of the electrification contracts constituted discrimination within the meaning of Article 4(2).

- 111 It must be observed in that connection that, in the absence of full publication at Community level of the electrification contracts to which the Directive applied, contractors from other Member States were not in a position to take a decision in the light of all the relevant information which should have been available to them. On the other hand, contractors who were able to consult the BOAMP, the majority of whom were probably nationals of the Member State in which the electrification contracts were awarded, had information concerning the exact scope of the work as regards electrification works.
- 112 Accordingly, it must be held that the French Republic has failed to fulfil its obligations under Article 4(2) of the Directive.
- 113 Having regard to all the foregoing considerations, it must be held that in so far as the French entities responsible for the tendering procedure for electrification contracts initiated in Vendée in December 1994

— split the work,

— did not publish in the OJEC a call for competition for all the contracts comprised in that work above the threshold laid down in Article 14(10), second subparagraph, last sentence, of the Directive but confined themselves to doing so for six of them only,

- did not communicate all the information required by Annex XII to that Directive as regards the six calls for competition published in the OJEC,

- did not communicate to the Commission the information required regarding the award of all the contracts comprised in that work above the threshold laid down in Article 14(10), second subparagraph, last sentence, of the Directive,

the French Republic has failed to fulfil its obligations under Articles 4(2) and 14(1), (10) and (13), together with Articles 21(1) and (5), 24(1) and (2) and 25(5) of the Directive.

Costs

¹¹⁴ 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. However, Article 69(3) provides that the Court may order that the costs be shared or that the parties bear their own costs if each party succeeds on some and fails on other heads.

¹¹⁵ Since the Commission and the French Republic have been partially unsuccessful, they should bear their own costs.

On those grounds,

THE COURT,

hereby:

1. Declares that in so far as the French entities responsible for the tendering procedure for electrification contracts held in Vendée in December 1994

— split the work,

— did not publish in the *Official Journal of the European Communities* a call for competition for all the contracts comprised in that work above the threshold laid down in Article 14(10), second subparagraph, last sentence, of Council Directive 93/38/EEC of 14 June 1993 coordinating the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors but confined themselves to doing so for six of them only,

— did not communicate all the information required by Annex XII to Directive 93/38 as regards the six calls for competition published in the *Official Journal of the European Communities*,

— did not communicate to the Commission the information required regarding the award of all the contracts comprised in that work above the threshold laid down in Article 14(10), second subparagraph, last sentence, of Directive 93/38,

the French Republic has failed to fulfil its obligations under Articles 4(2) and 14(1), (10) and (13) together with Articles 21(1) and (5), 24(1) and (2) and 25(5) of that directive;

2. Dismisses the remainder of the application;
3. Orders the Commission of the European Communities and the French Republic to bear their own costs.

Rodríguez Iglesias	Moitinho de Almeida	
Sevón	Schintgen	Kapteyn
Gulmann	Puissochet	
Wathelet	Skouris	

Delivered in open court in Luxembourg on 5 October 2000.

R. Grass
Registrar

G.C. Rodríguez Iglesias
President