

JUDGMENT OF THE COURT
11 August 1995 ^{*}

In Case C-433/93,

Commission of the European Communities, represented by Hendrik van Lier, Legal Adviser, and Angela Bardenhewer, of the Legal Service, acting as Agents, with an address for service in Luxembourg at the office of Carlos Gómez de la Cruz, also of the Legal Service, Wagner Centre, Kirchberg,

applicant,

v

Federal Republic of Germany, represented by Kay Hailbronner, Professor at the University of Konstanz, and Bernd Klope, Regierungsrat in the Federal Ministry of Economic Affairs, acting as Agent,

defendant,

APPLICATION for a declaration that, by failing to adopt or notify within the prescribed period all the measures necessary to comply with the requirements arising under Council Directive 88/295/EEC of 22 March 1988 amending Directive 77/62/EEC relating to the coordination of procedures on the award of public supply contracts and repealing certain provisions of Directive 80/767/EEC (OJ 1988 L 127, p. 1) and under Council Directive 89/440/EEC of 18 July 1989 amending Directive 71/305/EEC concerning coordination of procedures for the award of public works contracts (OJ 1989 L 210, p. 1), the Federal Republic of Germany has failed to fulfil its obligations under the EEC Treaty, now the EC Treaty,

^{*} Language of the case: German.

THE COURT,

composed of: G. C. Rodríguez Iglesias, President, F. A. Schockweiler, P. J. G. Kapteyn (Rapporteur) and P. Jann (Presidents of Chambers), G. F. Mancini, C. N. Kakouris, J. C. Moitinho de Almeida, J. L. Murray, G. Hirsch, H. Ragnemalm and L. Sevón, Judges,

Advocate General: M. B. Elmer,
Registrar: L. Hewlett, Administrator,

having regard to the Report for the Hearing,

after hearing oral argument from the parties at the hearing on 7 March 1995,

after hearing the Opinion of the Advocate General at the sitting on 11 May 1995,

gives the following

Judgment

- ¹ By application lodged at the Registry of the Court of Justice on 3 November 1993, the Commission of the European Communities brought an action under Article 169 of the EC Treaty for a declaration that, by failing to adopt or notify within the prescribed period all the measures necessary to comply with the requirements arising under Council Directive 88/295/EEC of 22 March 1988 amending Directive 77/62/EEC relating to the coordination of procedures on the award of public supply contracts and repealing certain provisions of Directive 80/767/EEC (OJ 1988 L 127, p. 1) (hereafter 'Directive 88/295') and under Council Directive 89/440/EEC of 18 July 1989 amending Directive 71/305/EEC concerning coordi-

nation of procedures for the award of public works contracts (OJ 1989 L 210, p. 1) (hereafter 'Directive 89/440'), the Federal Republic of Germany has failed to fulfil its obligations under the EEC Treaty, now the EC Treaty.

2 Under Article 20 of Directive 88/295 Member States were required to adopt the measures necessary to comply with the directive by 1 January 1989 and forthwith to inform the Commission thereof. Likewise, Article 3 of Directive 89/440 required Member States to transpose that directive into national law no later than one year after its notification, that was to say, by 19 July 1990, and forthwith to inform the Commission thereof.

3 For the purpose of transposing Directive 88/295 in the Federal Republic of Germany, 'a' paragraphs were added to the Verdingungsordnung für Leistungen — ausgenommen Bauleistungen — Teil A (Contracting Rules for the Award of Supply Contracts, with the Exception of Building Contracts, Part A) (hereafter 'VOL/A'). The altered text was published under the title 'Neufassung der VOL/A, Ausgabe 1990' in the *Bundesanzeiger* (Federal Gazette) No 45A of 6 March 1990.

4 The provisions of Directive 89/440 were incorporated in the form of 'a' paragraphs in the Verdingungsordnung für Bauleistungen, Teil A (Contracting Rules for the Award of Building Contracts, Part A) (hereafter 'VOB/A'). The text of the VOB/A was published in the *Bundesanzeiger* No 132 of 19 July 1990.

5 In its two letters of formal notice of 27 February 1992, the Commission contended that Directives 88/295 and 89/440 had not been transposed in accordance with the relevant requirements of Community law. Where a directive was intended to con-

fer subjective rights on individuals, its transposition required the adoption of binding legal provisions enabling the intended beneficiaries to be aware of the full scope of their rights and, if necessary, to rely on those rights before national courts. Transposing a directive by mere administrative practice, which could be altered at any moment, was therefore inadequate.

- 6 According to the Commission, the Verdingungsordnungen were negotiated by German committees on placing of contracts by tender. These committees, consisting of representatives of local authorities, as well as trade representatives and trade-union representatives, were purely private bodies that did not form part of the public administration. The Verdingungsordnungen were therefore no more than purely private procedural rules which were not binding on contract-awarding authorities. Even assuming that those rules took the form of administrative provisions which heads of administration declared to be applicable to those working under them, they would not amount to legal rules and would not give rise to any subjective rights for individuals outside administrative departments, whereas the directives in question were designed to protect tenderers against arbitrary conduct on the part of the contract-awarding authorities.
- 7 By letter of 2 July 1992, the German Government forwarded to the Commission the draft legislation intended to amend the Haushaltsgrundsätzegesetz (Law on the Principles of Budgetary Law) (hereafter 'the Budgetary Law') in order to provide a legal basis for the adoption of a regulation relating to provisions governing the award of contracts applicable to public contracts, in which the Verdingungsordnungen were to be incorporated (hereafter referred to as 'the budgetary solution').
- 8 On 3 December 1992, the Commission sent to the Federal Republic of Germany two reasoned opinions setting out once again the arguments contained in the letters of formal notice. The Commission also stated that even if, as the German Government envisaged in the budgetary solution, the Verdingungsordnungen were

to become regulatory, the draft legislation would not create subjective rights for tenderers, since the German Government took the view that neither Directive 88/295, Directive 89/440, nor the abovementioned draft legislation was intended to confer any such rights on individuals.

- 9 By letter of 11 March 1993, the German Government forwarded to the Commission a slightly modified version of the draft legislation amending the Budgetary Law.
- 10 Since it took the view that transposition of Directives 88/295 and 89/440 by the *Verdingungsordnungen* did not, even under the budgetary solution, meet the requirements of Community case-law, the Commission instituted the present proceedings.
- 11 The *Zweites Gesetz zur Änderung des Haushaltsgrundsätzegesetzes* (Second Law amending the Law on the Principles of Budgetary Law), *Bundesgesetzblatt* 1993, Part I, p. 1928, was adopted on 26 November 1993 and entered into force on 1 January 1994. On this basis the German Government, on 26 January 1994, adopted the *Verordnung über die Vergabebestimmungen für öffentliche Aufträge — Vergabeverordnung* (Regulation on Provisions for the Award of Public Contracts), *Bundesgesetzblatt* 1994, Part I, p. 321 (hereafter 'the VGV') and the *Nachprüfungsverordnung* (Regulation on Control Procedures), *Bundesgesetzblatt* 1994, Part I, p. 324. The German Government takes the view that, by this latter regulation, it has transposed Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts (OJ 1989 L 395, p. 33) (hereafter 'Directive 89/665'). The Commission was notified of the adoption of those regulations on 7 February 1994.
- 12 Under Articles 1 and 2 of the VGV, the contract-awarding authorities referred to in Paragraph 57a(1)(1) to (3) of the Budgetary Law are required, when

awarding public supply and public works contracts, to apply the rules on the award of public contracts, that is to say the VOL/A, as amended on 3 August 1993 (*Bundesanzeiger* No 175a of 17 September 1993), and the VOB/A, as amended on 12 November 1992 (*Bundesanzeiger* No 223a of 27 November 1992).

The subject-matter of the proceedings

- 13 In their pleadings, the parties dealt essentially with the question whether the measures envisaged and subsequently adopted by the German Government for the purpose of giving effect to the 'budgetary solution' properly transposed Directives 88/295 and 89/440 into national law.
- 14 At the hearing, however, the Commission pointed out that, in the forms of order set out in its application, it was only seeking a declaration that the Federal Republic of Germany had failed to fulfil its obligations under the Treaty in so far as on 3 February 1993, the date on which the period set in the reasoned opinions expired, it had still not correctly transposed Directives 88/295 and 89/440.
- 15 According to settled case-law (see the judgment in Case C-80/92 *Commission v Belgium* [1994] ECR I-1019, paragraph 19), amendments made to national legislation are irrelevant for the purpose of giving judgment on the subject-matter of an action for failure to fulfil obligations if they have not been implemented before the expiry of the period set by the reasoned opinion.
- 16 Consequently, it will be sufficient in these proceedings to examine whether on 3 February 1993 the transposition of Directives 88/295 and 89/440 into the 'a' paragraphs of, respectively, the VOL/A, published under the title 'Neufassung der VOL/A, Ausgabe 1990' in *Bundesanzeiger* No 45A of 6 March 1990, and

the VOB/A, published in *Bundesanzeiger* No 132 of 19 July 1990, satisfies the requirements of Community law, and it will be unnecessary to consider the 'budgetary solution'.

The question whether the action is well founded

- 17 According to the German Government, the domestic law in force prior to 3 February 1993 already allowed Directives 88/295 and 89/440 to be correctly applied. At federal level and at *Land* and commune level, contract-awarding authorities were bound to act in compliance with the *Verdingungsordnungen* as administrative directions.
- 18 It should first be pointed out that the Court has consistently held (see, in particular, the judgment in Case C-361/88 *Commission v Germany* [1991] ECR I-2567, paragraph 15) that the transposition of a directive into domestic law does not necessarily require that its provisions be incorporated formally and *verbatim* in express, specific legislation, and that a general legal context may, depending on the content of the directive, be adequate for the purpose, provided that it does indeed guarantee the full application of the directive in a sufficiently clear and precise manner so that, where the directive is intended to create rights for individuals, the persons concerned can ascertain the full extent of their rights and, where appropriate, rely on them before the national courts.
- 19 Next, it should be noted that the rules regarding participation and advertising in directives coordinating procedures for the award of public contracts are intended to protect tenderers against arbitrariness on the part of the contract-awarding authority (see the judgment in Case 31/87 *Beentjes v Netherlands* [1988] ECR 4635, paragraph 42). Such protection cannot be effective if a tenderer is not able to rely on those rules as against the contract awarder and, if necessary, to plead a breach of those rules before national courts.

- 20 The German Government does not deny that, at the expiry of the period set in the reasoned opinions, the *Verdingungsordnungen*, which were applied only as administrative rules, did not confer any right on individuals which could be relied on before national courts.
- 21 The German Government submits here that it was only with the adoption of Directive 89/665 that rules were established to govern the procedure to be followed in actions brought against breaches of Directives 88/295 and 89/440. In any event, according to the German Government, it follows from the case-law on the direct effect of directives that it is open to individuals to rely on them before national courts as against public authorities where the latter have infringed the rules on tendering contained in those directives.
- 22 The argument based on Directive 89/665 is irrelevant. The German Government has itself acknowledged that the directive was completely transposed into national law only by the abovementioned *Nachprüfungsverordnung* adopted on 26 January 1994 pursuant to the Budgetary Law.
- 23 In any event, the adoption of Directive 89/665 has no bearing on the transposition of Directives 88/295 and 89/440. As is clear from the first and second recitals in the preamble to Directive 89/665, this directive is confined to reinforcing existing arrangements at both national and Community levels for ensuring effective application of Community directives on the award of public contracts, in particular at the stage where infringements can still be rectified.
- 24 Nor can the argument based on the direct effect of Directives 88/295 and 89/440 be accepted. The effect of the third paragraph of Article 189 is that Community directives must be implemented by appropriate implementing

measures taken by the Member States. Only in specific circumstances, in particular where a Member State has failed to take the implementing measures required or has adopted measures which do not conform to a directive, has the Court recognized the right of persons affected thereby to rely in law on a directive as against a defaulting Member State. This minimum guarantee, arising from the binding nature of the obligation imposed on the Member States by the effect of the directives under the third paragraph of Article 189, cannot justify a Member State's absolving itself from taking in due time implementing measures sufficient to meet the purpose of each directive (see, in particular, the judgment in Case 102/79 *Commission v Belgium* [1980] ECR 1473, paragraph 12).

- 25 Since the German Government did not properly transpose Directives 88/295 and 89/440 within the period prescribed, the Commission's claim for a declaration that there has been a failure to fulfil obligations in this regard must be upheld.

- 26 It must accordingly be held that, by failing to adopt within the prescribed period the laws, regulations and administrative provisions necessary to comply with the requirements arising under Directives 88/295 and 89/440, the Federal Republic of Germany has failed to fulfil its obligations under the EC Treaty.

Costs

- 27 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 the Federal Republic of Germany has been unsuccessful, it must be ordered to pay the costs.

On those grounds,

THE COURT

hereby:

1. Declares that, by failing to adopt within the prescribed period the laws, regulations and administrative provisions necessary to comply with the requirements arising under Council Directive 88/295/EEC of 22 March 1988 amending Directive 77/62/EEC relating to the coordination of procedures on the award of public supply contracts and repealing certain provisions of Directive 80/767/EEC and under Council Directive 89/440/EEC of 18 July 1989 amending Directive 71/305/EEC concerning coordination of procedures for the award of public works contracts, the Federal Republic of Germany has failed to fulfil its obligations under the EC Treaty;
2. Orders the Federal Republic of Germany to pay the costs.

Rodríguez Iglesias

Schockweiler

Kapteyn

Jann

Mancini

Kakouris

Moitinho de Almeida

Murray

Hirsch

Ragnemalm

Sevón

Delivered in open court in Luxembourg on 11 August 1995.

R. Grass

G. C. Rodríguez Iglesias

Registrar

President