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JUDGMENT OF THE COURT (Fifth Chamber)

1 February 2001 [\(1\)](#)

(Failure by a Member State to fulfil obligations - Directive 93/37/EEC - Public works contracts - Concept of 'contracting authority')

In Case C-237/99,

Commission of the European Communities, represented by M. Nolin, acting as Agent, with an address for service in Luxembourg,

applicant,

v

French Republic, represented by K. Rispal-Bellanger and also by F. Million and S. Pailler, acting as Agents, with an address for service in Luxembourg,

defendant,

supported by

United Kingdom of Great Britain and Northern Ireland, represented by R.V. Magrill, acting as Agent, with an address for service in Luxembourg,

intervener,

APPLICATION for a declaration that, in the context of various procedures for the award of public contracts for the construction of housing organised by public development and construction entities and by low-rent housing corporations, the French Republic has failed to fulfil its obligations under 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), in particular Article 11(2) thereof,

THE COURT (Fifth Chamber),

composed of: A. La Pergola, President of the Chamber, M. Wathelet, D.A.O. Edward, P. Jann (Rapporteur) and L. Sevón, Judges,

Advocate General: J. Mischo,

Registrar: R. Grass,

having regard to the report of the Judge-Rapporteur,

after hearing the Opinion of the Advocate General at the sitting on 19 October 2000,

gives the following

Judgment

1.

By application lodged at the Court Registry on 24 June 1999, the Commission of the European Communities brought an action under Article 226 EC for a declaration that, in the context of various procedures for the award of public works contracts for the construction

of housing organised by *offices publics d'aménagement et de construction* (public development and construction entities, hereinafter 'OPACs) and by *sociétés anonymes d'habitations à loyer modéré* (low-rent housing corporations, hereinafter 'SA HLMs), the French Republic has failed to fulfil its obligations under 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, hereinafter 'the Directive'), in particular Article 11(2) thereof.

Legal framework

Community legislation

2.

The Directive provides in Article 1(b):

'contracting authorities shall be the State, regional or local authorities, bodies governed by public law, associations formed by one or several of such authorities or bodies governed by public law;

A body governed by public law means any body:

- established for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character, and

- having legal personality, and

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

The lists of bodies and categories of bodies governed by public law which fulfil the criteria referred to in the second subparagraph are set out in Annex I. These lists shall be as exhaustive as possible and may be reviewed in accordance with the procedure laid down in Article 35. To this end, Member States shall periodically notify the Commission of any changes of their lists of bodies and categories of bodies.

3.

Article 11(2) of the Directive provides:

'Contracting authorities who wish to award a public works contract by open, restricted or negotiated procedure referred to in Article 7(2), shall make known their intention by means of a notice.

National legislation

4.

The relevant provisions of French law are to be found in Book IV of the Construction and Housing Code (hereinafter 'the Code'). According to Article L. 411-1, those provisions are designed to 'determine the rules applicable to the construction, acquisition, development, improvement, repair and management of collective or individual housing, whether urban or rural, which satisfies the technical characteristics and those relating to cost price determined by administrative decision and are intended for persons and families of modest means.

5.

According to Article L. 411-2 of the Code, 'low-rent housing bodies consist of:

- public development and construction entities;

- public low-rent housing entities;

- low-rent housing corporations;
- low-rent housing cooperatives;
- mortgage corporations;
- low-rent housing foundations.

6.

Article L. 421-1 of the Code defines OPACs as public industrial or commercial establishments.

7.

According to Article L. 422-2 of the Code, SA HLMs are intended to carry out, under the conditions determined by their statutes and primarily with a view to making rented housing available, the operations set out in Article L. 411-1 of the Code.

8.

Article L. 451-1 of the Code provides that low-rent housing bodies are to be subject to supervision by the administration. According to Article R. 451-1 of the Code, that supervision is to be carried out by the Minister responsible for finance and the Minister responsible for construction and housing.

9.

Article L. 451-2 of the Code states that the officials responsible for supervising those bodies may, in the exclusive interest of performing their supervisory duties, consult any accounts, copy letters and documents relating to income and expenditure at the premises of the architects or developers who have dealt with bodies subject to that supervision.

10.

Article L. 422-7 of the Code states:

'In the event of serious irregularities, gross mismanagement or failure to act on the part of the administrative board, or of the managerial board and the supervisory board, of a low-rent housing corporation or mortgage corporation, the Minister responsible for construction and housing may, after hearing the observations of the corporation or after the latter has been duly invited to submit its observations, order that it be wound up and appoint a liquidator.

11.

According to Article L. 422-8 of the Code, the Minister responsible for housing may in such cases merely suspend the managerial organs and appoint a provisional administrator, to whom all the powers of the managerial organs to continue the operations in progress are automatically transferred.

12.

The first paragraph of Article L. 423-1 of the Code provides:

'Any low-rent housing body which manages fewer than 1 500 housing units and has not built at least 500 housing units or granted 300 loans over a 10-year period may be dissolved and a liquidator appointed by decree of the Minister responsible for construction and housing or, in the case of a public low-rent housing entity or a public development and construction entity, by decree adopted jointly by that Minister and the Minister of the Interior.

13.

Article L. 423-2 of the Code provides:

'Any low-rent housing body which manages more than 50 000 housing units may be given formal notice, by decree of the Minister responsible for construction and housing, to transfer all or part of the housing units in excess of that number to one or more bodies designated by name.

14.

By Decree No 93-236 of 22 February 1993 (JORF, 24 February 1993, p. 2941), an interministerial task force for the inspection of social housing was set up. Article 3 of that decree provides:

'The task force shall be responsible for supervising natural or legal persons involved in social housing.

It shall carry out documentary and on-the-spot inspections of operations relating to the construction, acquisition or improvement of housing in respect of which financial assistance has been provided by the State or State-controlled funds have been used, or which form the subject-matter of an agreement with the State or are supported by tax-exempt resources.

...

It may be instructed by the Ministers to whom it is responsible to carry out checks and inquiries and also studies, audits or assessments in the field of social housing.

It shall draw up proposals as to the action to be taken following its inspection reports and shall ensure that the persons concerned by its inspections implement the measures taken by the Ministers to whom it is responsible.

The task force shall provide support to the decentralised departments of the ministries responsible for the economy, finance and budget and materials, when those departments so request.

Pre-litigation procedure

15. On 7 December 1995, the Commission sent the French authorities a formal letter, in which it questioned the compatibility with Community law of the procedures for the award of public works contracts by various low-rent housing management bodies.
16. More specifically, the Commission referred to an open call for tenders published in the *Bulletin Officiel des Annonces des Marchés Publics* of 7 February 1995 by the Val-de-Marne OPAC, to a limited call for tenders which SA HLM Logirel, established in Lyons (France), had published in the *Moniteur des Travaux Publics et du Bâtiment* of 17 February 1995 and to a notice of negotiated contracts which the Paris OPAC had published in the *Bulletin Officiel des Annonces des Marchés Publics* of 16 February 1995.
17. The Commission pointed out that the bodies in question had not published those notices in the *Official Journal of the European Communities*, contrary to the requirements of Article 11(2) of the Directive.
18. In reply, the French authorities maintained that the bodies in question were not contracting authorities within the meaning of the Directive.
19. The Commission was not satisfied with that reply and, in the light of the consistent practice of the bodies in question of not publishing notices of contracts in the *Official Journal of the European Communities*, it sent a reasoned opinion to the French Republic on 10 August 1998, stating that the French Republic had failed to fulfil its obligations under the Directive.
20. Since in its letter in reply to the reasoned opinion the French Republic merely reiterated the arguments already put forward in response to the formal letter, the Commission brought the present action.

Subject-matter of the action

21. The Commission requests the Court to declare that, in the context of various procedures for the award of public supply contracts for the construction of housing organised by OPACs and SA HLMs, the French Republic has failed to fulfil its obligations under the Directive.
22. However, the present action originates in three very specific award procedures, organised by the Paris and Val-de-Marne OPACs and by SA HLM Logirel. It is failure to comply with the Directive in relation to those three awards of public contracts that has formed the substance of the charge against the French Republic throughout the pre-litigation procedure.

23. It is true that the Commission stated in the reasoned opinion that it also criticised the French Republic for not having adopted a general measure in order to ensure compliance with Community law in relation to procedures for the award of public supply contracts organised by OPACs and SA HLMs. However, that complaint was not reproduced in the application to the Court.

24. The subject-matter of the present action should therefore be considered as confined to the three award procedures expressly referred to by the Commission in its application.

Substance

Arguments of the parties

25. As regards the application of the Directive to OPACs, the Commission refers first of all to Articles L. 411-1 and L. 421-1 of the Code in order to demonstrate that those provisions were adopted for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character. Next, it observes that OPACs have legal personality. Last, the Commission maintains, in particular, that it is clear from the composition of the administrative boards of the OPACs that the public authorities play a predominant role therein.

26. The Commission infers that OPACs thus fulfil the three conditions characteristic of a body governed by public law set out in the second subparagraph of Article 1(b) of the Directive.

27. The Commission concludes that, in those circumstances, the OPACs should have complied with the obligation laid down in Article 11(2) of the Directive to publish the contract notices in question in the *Official Journal of the European Communities*.

28. As regards the application of the Directive to SA HLMs, the Commission refers to the conditions laid down in the second subparagraph of Article 1(b) of the Directive and infers from Articles L. 411-1 and L. 422-2 of the Code that those bodies also meet needs in the general interest, not having an industrial or commercial character. Furthermore, they have legal personality.

29. As regards the third condition characteristic of a body governed by public law, the Commission observes that it consists of three alternative criteria. It contends that the criterion in respect of management supervision by the public authorities is satisfied. It refers in that regard to Articles L. 451-2 and R. 451-1 of the Code, which provide that SA HLMs are to be subject to State supervision. That supervision is explained in Articles L. 422-7 and L. 422-8 of the Code.

30. The Commission also refers to Articles L. 423-1 and L. 423-2 of the Code, and also to the standard clauses which must be included in the statutes of SA HLMs pursuant to Article R. 422-1 of the Code, which provides, in particular, that all accounting documents and reports presented at shareholders' meetings and the minutes thereof are to be submitted to the public authorities.

31. The Commission further claims that the interministerial task committee for the inspection of social housing set up by Decree No 93-236 also has extensive supervisory powers.

32. The French Government does not dispute that the OPACs and SA HLMs referred to in the action would have been required to comply with the obligation to publish contract notices laid down in the Directive if they had to be regarded as bodies governed by public law.

33. In the light of the judgments in Case C-44/96 *Mannesmann Anlagenbau Austria and Others v Strohal Rotationsdruck* [1998] ECR I-73 and Case C-360/96 *Arnhem and Rheden v BFI Holding* [1998] ECR I-6821, the French Government now also agrees with the Commission's conclusion that OPACs are bodies governed by public law.

34. However, while it accepts that SA HLMs satisfy the first two parts of the definition of a 'body governed by public law' in the second subparagraph of Article 1(b) of the Directive, the French Government contends that they do not meet any of the three alternative criteria in the third part of that definition.

35. As regards, in particular, management supervision, the French Government claims that the supervision exercised by the public authorities in the present case corresponds to supervision of an administrative nature and not to management or investment supervision. The State has no influence on decisions concerning the proper functioning of SA HLMs. The French Government maintains that Article L. 422-7 of the Code can apply only in exceptional circumstances and that it cannot be inferred from that provision that the management of those corporations is subject to supervision by the public authorities on a regular and consistent basis. It claims that Article L. 422-8 of the Code also concerns exceptional circumstances: first, an administrator can be appointed only in the event of serious irregularities or gross mismanagement and, second, such an appointment is envisaged as being only *pro tempore*.

36. The French Government also claims that the supervision provided for in Articles L. 451-2 and R. 451-1 of the Code consists in checking the accounts of the bodies concerned. In practice, those provisions are more in the nature of a threat constantly hanging over the bodies which are liable to be visited than management supervision in the strict sense, resulting in decisions as to the choice of strategy or investment. Those provisions do not provide a means of exerting significant influence on the management of the bodies in question and the measures referred to therein are of no practical importance.

37. The French Government further maintains in its rejoinder that the supervision exercised pursuant to Decree No 93-236 takes the form of an inspection visit of an administrative nature, which ensures that the rules are observed, that the funds used by SA HLMs are applied in a transparent manner and that the Minister responsible for construction and housing is kept duly informed.

38. The United Kingdom, which was granted leave by order of the President of the Court of Justice of 26 January 2000 to intervene in the present proceedings in support of the form of order sought by the French Republic, also argues that 'management supervision covers neither mere verification of legality or of the appropriate use of funds nor exceptional measures capable of being taken *vis-à-vis* a specific body.

Findings of the Court

39. Since the present proceedings concern the possible classification of various bodies as bodies governed by public law within the meaning of the second subparagraph of Article 1(b) of the Directive, it should be pointed out that, according to that provision, a body governed by public law means a body established for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character, which has legal personality and is closely dependent on the State, regional or local authorities or other bodies governed by public law (see *Mannesmann Anlagenbau Austria*, cited above, paragraph 20).

40. Furthermore, the three conditions set out in that provision are cumulative (*Mannesmann Anlagenbau Austria*, cited above, paragraph 21).

41. As far as the purpose of the Directive is concerned, moreover, the Court has held that 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, most recently, Case C-380/98 *The Queen v H.M. Treasury, ex parte: University of Cambridge* [2000] ECR I-0000, paragraph 16).

42. Consequently, the aim of the Directive is to avoid both the risk of preference being given to national tenderers or applicants whenever a contract is awarded by the contracting authorities and the possibility that a body financed or controlled by the State, regional or local authorities or other bodies governed by public law may choose to be guided by considerations other than economic ones (*University of Cambridge*, paragraph 17).

43. It is in the light of those objectives that 'contracting authority, including a body governed by public law, must be interpreted in functional terms (see, to that effect, most recently, Case C-353/96 *Commission v Ireland* [1998] ECR I-8565, paragraph 36).

44.

- As regards the alternative conditions set out in the third indent of the second subparagraph of Article 1(b) of the Directive, each reflects the close dependency of a body on the State, regional or local authorities or other bodies governed by public law (*University of Cambridge*, paragraph 20).
45. In the light of that case-law, it must be held, as regards OPACs, that it actually follows from the rules relating to them, as described by the Commission, whose arguments, moreover, have not been contradicted on that point by the French Government, that they fulfilled the three conditions that characterise a body governed by public law set out in the second subparagraph of Article 1(b) of the Directive.
46. It follows that the action is well founded in that the charge against the French Republic is that the two OPACs expressly referred to did not comply with the obligation to publish the notices of contract in the *Official Journal of the European Communities* laid down in Article 11(2) of the Directive.
47. As regards SA HLMs, it is common ground, and it is not disputed by the French Government, that they meet needs in the general interest, not having an industrial or commercial character, and that they have legal personality.
48. As regards the third condition that characterises a body governed by public law, it is necessary to consider whether the various controls to which SA HLMs are subject render them dependent on the public authorities in such a way that the latter are able to influence their decisions in relation to public contracts.
49. As the Advocate General has observed at point 48 of his Opinion, since management supervision within the meaning of the third indent of the second subparagraph of Article 1(b) of the Directive constitutes one of the three criteria referred to in that provision, it must give rise to dependence on the public authorities equivalent to that which exists where one of the other alternative criteria is fulfilled, namely where the body in question is financed, for the most part, by the public authorities or where the latter appoint more than half of the members of its managerial organs.
50. In that regard, although, as the Advocate General observes at points 53 to 64 of his Opinion, SA HLMs are commercial companies, their activities are very narrowly circumscribed.
51. Article L. 411-1 of the Code defines their activities in general terms and provides that the technical characteristics and cost prices are to be determined by administrative decision. According to Article R. 422-1 of the Code, their statutes are to contain clauses consistent with the standard clauses set out in an annex to the Code, and those clauses are very detailed, in particular as regards the objects of those entities.
52. As the Advocate General observes at point 67 of his Opinion, since the rules of management are very detailed, the mere supervision of compliance with them may in itself lead to significant influence being conferred on the public authorities.
53. Second, as regards the supervision of SA HLMs' activities, in accordance with Articles L. 451-1 and R. 451-1 of the Code, low-rent housing bodies are subject to supervision by the administration and, more specifically, by the Minister responsible for finance and also by the Minister responsible for construction and housing. Those provisions do not specify the limits within which such supervision is to be exercised or whether it is to be confined to merely checking the accounts, as the French Government claims, although it has not adduced any evidence whatsoever to support the truth of that allegation.
54. Next, the Minister responsible for construction and housing is empowered by Article L. 422-7 of the Code to order that an SA HLM be wound up and to appoint a liquidator, and is also empowered under Article L. 422-8 of the Code to suspend the managerial organs and appoint a provisional administrator.
55. Those powers are provided for in the event of serious irregularities, gross mismanagement or failure to act on the part of the administrative board, or of the managerial board and the supervisory board. As the Advocate General observes at points 72 to 75 of his Opinion, the latter two cases fall within the management policy of the company concerned and not the mere verification of legality.
- 56.

- Furthermore, even accepting that, as the French Government maintains, the exercise of the powers conferred on the competent Minister by those provisions is in fact the exception, it none the less implies permanent supervision, which provides the only means of detecting gross mismanagement or failure to act on the part of the managerial organs.
57. Furthermore, it follows from Articles L. 423-1 and L. 423-2 of the Code that the Minister responsible for construction and housing may impose a specific course of management action on SA HLMs, either by requiring that they display a minimum level of dynamism or by placing limits on what is considered to be excessive activity.
58. Last, the interministerial task force for the inspection of social housing set up by Decree No 93-236 may, in addition to its responsibilities for conducting documentary and on-the-spot inspections of the operations of low-cost housing bodies, be made responsible for carrying out studies, audits or assessments in the field of social housing and may draw up proposals as to the action to be taken following its inspection reports. It also ensures that the persons concerned by its inspections implement the measures adopted by the Ministers to whom it is responsible.
59. It follows from all the provisions referred to in paragraphs 51 to 58 of the present judgment that the management of SA HLMs is subject to supervision by the public authorities which allows the latter to influence the decisions of the SA HLMs in relation to public contracts.
60. Consequently, SA HLMs, which also satisfy at least one of the three alternative criteria referred to in the third indent of the second subparagraph of Article 1(b) of the Directive, thus fulfil the three conditions which characterise a body governed by public law within the meaning of the Directive and are contracting authorities.
61. It follows that the action is also well founded in so far as it concerns the award of a public contract by SA HLM Logirel.
62. Accordingly, it must be held that since the Val-de-Marne and Paris OPACs and SA HLM Logirel did not publish contract notices in the *Official Journal of the European Communities* concerning the public contracts announced by notices in the *Bulletin Officiel des Annonces des Marchés Publics* of 7 and 16 February 1995 and the *Moniteur des Travaux Publics et du Bâtiment* of 17 February 1995, the French Republic has failed to fulfil its obligations under the Directive, in particular Article 11(2) thereof.

Costs

63. 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 Commission has applied for costs and the French Republic has been unsuccessful, the latter must be ordered to pay the costs. The United Kingdom, which has intervened in the proceedings, must bear its own costs, pursuant to Article 69(4) of the Rules of Procedure.

On those grounds,

THE COURT (Fifth Chamber)

hereby:

1. Declares that, since the public management and construction entities of Val-de-Marne and Paris and the low-rent housing corporation Logirel did not publish contract notices in the *Official Journal of the European Communities* concerning the public contracts announced by notices in the *Bulletin Officiel des Annonces des Marchés Publics* of 7 and 16 February 1995 and the *Moniteur des Travaux Publics et du Bâtiment* of 17 February 1995, the French Republic has failed to fulfil its obligations under Council Directive 93/37/EEC of 14 June 1993 concerning the coordination of procedures for the award of public works contracts, in particular Article 11(2) thereof;

2. Orders the French Republic to pay the costs;

3. Orders the United Kingdom of Great Britain and Northern Ireland to bear its own costs.

La Pergola
Wathelet
Edward

Jann

Sevón

Delivered in open court in Luxembourg on 1 February 2001.

R. Grass

A. La Pergola

Registrar

President of the Fifth Chamber
