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JUDGMENT OF THE COURT (Sixth Chamber)

16 October 2003 [\(1\)](#)

(Failure of a Member State to fulfil its obligations - Public procurement - Directive 93/37/EEC - Procedure for the award of public works contracts - State commercial company governed by private law - Company's object consisting of the implementation of a plan for repaying the costs of and establishing prisons - Concept of contracting authority)

In Case C-283/00,

**Commission of the European Communities**, represented by G. Valero Jordana, acting as Agent, with an address for service in Luxembourg,

applicant,

v

**Kingdom of Spain**, represented by M. López-Monís Gallego, acting as Agent, with an address for service in Luxembourg,

defendant,

APPLICATION for a declaration that, in connection with the call for tenders for the execution of works for the Centro Educativo Penitenciario Experimental de Segovia (Experimental Educational Prison, Segovia) issued by the Sociedad Estatal de Infraestructuras y Equipamientos Penitenciarios S.A., a company falling within the definition of a contracting authority for the purposes of Article 1(b) of 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), the amount of which far exceeds the threshold provided for by that directive, by failing to comply with all the provisions of that directive and, more specifically, the advertising rules laid down in Article 11(2), (6), (7) and (11), and the provisions of Articles 12(1), 29(3), 18, 27 and 30(4), the Kingdom of Spain has failed to fulfil its obligations under Community law,

THE COURT (Sixth Chamber),

composed of: J.-P. Puissochet, President of the Chamber, R. Schintgen, V. Skouris (Rapporteur), N. Colneric and J.N. Cunha Rodrigues, Judges,

Advocate General: S. Alber,

Registrar: R. Grass,

having regard to the report of the Judge-Rapporteur,

after hearing the Opinion of the Advocate General at the sitting on 7 November 2002,

gives the following

## Judgment

1.

By application lodged at the Court Registry on 18 July 2000, the Commission of the European Communities brought an action under Article 226 EC for a declaration that, in

connection with the call for tenders for the execution of works for the Centro Educativo Penitenciario Experimental de Segovia (Experimental Educational Prison, Segovia) issued by the Sociedad Estatal de Infraestructuras y Equipamientos Penitenciarios S.A. (SIEPSA), a company falling within the definition of a contracting authority for the purposes of Article 1(b) of 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, the Directive), the amount of which far exceeds the threshold provided for by that directive, by failing to comply with all the provisions of that directive and, more specifically, the advertising rules laid down in Article 11(2), (6), (7) and (11), and the provisions of Articles 12(1), 29(3), 18, 27 and 30(4), the Kingdom of Spain has failed to fulfil its obligations under that directive.

## **Legal background**

*The relevant provisions of Community law*

2.

The second recital in the preamble to the Directive states that the simultaneous attainment of freedom of establishment and freedom to provide services in respect of public works contracts awarded in Member States on behalf of the State, or regional or local authorities or other bodies governed by public law entails not only the abolition of restrictions but also the coordination of national procedures for the award of public works contracts.

3.

According to Article 1(b) of the Directive:

[C]ontracting 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. ...

4.

Article 11(2), (6), (7) and (11) of the Directive provides as follows:

(2) 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.

...

(6) The notices referred to in paragraphs 1 to 5 shall be drawn up in accordance with the models given in Annexes IV, V and VI, and shall specify the information requested in those Annexes.

The contracting authorities may not require any conditions but those specified in Articles 26 and 27 when requesting information concerning the economic and technical standards which they require of contracts for their selection ...

(7) The contracting authorities shall send the notices referred to in paragraphs 1 to 5 as rapidly as possible and by the most appropriate channels to the Office for Official Publications of the European Communities ...

...

(11) The notice shall not be published in the official journals or in the press of the country of the contracting authority before the date of dispatch to the *Official Journal of the European Communities* and it shall mention this date. ...

5.

Article 12(1) of the Directive provides as follows:

In open procedures the time-limit for the receipt of tenders, fixed by the contracting authorities shall be not less than 52 days from the date of dispatch of the notice.

6.

Under Article 18 of the Directive:

Contracts shall be awarded on the basis of the criteria laid down in Chapter 3 of this Title, taking into account Article 19, after the suitability of the contractors not excluded under Article 24 has been checked by contracting authorities in accordance with the criteria of economic and financial standing and of technical knowledge or ability referred to in Articles 26 to 29.

7.

Article 24 of the Directive provides inter alia:

Any contractor may be excluded from participation in the contract who:

(a) is bankrupt or is being wound up, whose affairs are being administered by the court, who has entered into an arrangement with creditors, who has suspended business activities or who is in any analogous situation arising from a similar procedure under national laws and regulations;

(b) is the subject of proceedings for a declaration of bankruptcy, for an order for compulsory winding up or administration by the court or for an arrangement with creditors or of any other similar proceedings under national laws or regulations;

(c) has been convicted of an offence concerning his professional conduct by a judgment which has the force of *res judicata*;

(d) has been guilty of grave professional misconduct proved by any means which the contracting authorities can justify;

...

(g) is guilty of serious misrepresentation in supplying the information required under this Chapter.

...

8.

Under Article 27(1) of the Directive:

Evidence of the contractor's technical capability may be furnished by:

...

(c) a statement of the tools, plant and technical equipment available to the contractor for carrying out the work;

...

(e) a statement of the technicians or technical bodies which the contractor can call upon for carrying out the work, whether or not they belong to the firm.

9.

It is apparent from Article 29(3) of the Directive that certified registration in the official lists by the competent bodies is, for the contracting authorities of other Member States, to constitute a presumption of suitability for works corresponding to the contractor's classification, in particular, as regards Article 27(b) and (d).

10.

Article 30(1) and (4) of the Directive provides:

(1) The criteria on which the contracting authorities shall base the award of contracts shall be:

(a) either the lowest price only;

(b) or, when the award is made to the most economically advantageous tender, various criteria according to the contract: e.g. price, period for completion, running costs, profitability, technical merit.

...

(4) If, for a given contract, tenders appear to be abnormally low in relation to the works, the contracting authority shall, before it may reject those tenders, request, in writing, details of the constituent elements of the tender which it considers relevant and shall verify those constituent elements taking account of the explanations received.

The contracting authority may take into consideration explanations which are justified on objective grounds including the economy of the construction method, or the technical solution chosen, or the exceptionally favourable conditions available to the tenderer for the execution of the work, or the originality of the work proposed by the tenderer.

If the documents relating to the contract provide for its award at the lowest price tendered, the contracting authority must communicate to the Commission the rejection of tenders which it considers to be too low.

...

11.

Part V of Annex I to the Directive contains a list of the categories of the bodies governed by public law referred to in Article 1(b) in respect of Spain. Those categories are the following:

- Entidades Gestoras y Servicios Comunes de la Seguridad Social (administrative entities and common services of the health and social services),

- Organismos Autónomos de la Administración del Estado (independent bodies of the national administration),

- Organismos Autónomos de las Comunidades Autónomas (independent bodies of the autonomous communities),

- Organismos Autónomos de las Entidades Locales (independent bodies of local authorities),

- Otras entidades sometidas a la legislación de contratos del Estado español (other entities subject to Spanish State legislation on procurement).

12.

Article 1(1) and (2) 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), is worded as follows:

For the purpose of this Directive:

(1) [P]ublic 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;

(2) [P]ublic undertaking shall mean any undertaking over which the public authorities may exercise directly or indirectly a dominant influence by virtue of their ownership of it, their financial participation therein, or the rules which govern it. A dominant influence on the part of the public authorities shall be presumed when these authorities, directly or indirectly, in relation to an undertaking:

- hold the majority of the undertaking's subscribed capital, or

- control the majority of the votes attaching to shares issued by the undertaking, or

- can appoint more than half of the members of the undertaking's administrative, managerial or supervisory body.

*The relevant provisions of national law*

The general rules applicable to SIEPSA

13.

The Directive was implemented in domestic Spanish law by the Ley 13/1995 de Contratos de las Administraciones Públicas (Law on public procurement) of 18 May 1995 (BOE No 119 of 19 May 1995, p. 14601).

14.

Article 1(2) and (3) of Law No 13/1995 provides:

(2) For the purposes of this law, public authorities shall mean:

(a) the central administrative authority of the State;

(b) the authorities of the autonomous communities;

(c) the bodies of which local authorities consist.

(3) This Law shall also apply to the award of contracts by independent bodies in all cases and by other bodies governed by public law and possessing legal personality, connected to or controlled by a public authority, if they meet the following criteria:

(a) that they were established for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character,

(b) that they carry on activity which is financed, for the most part, by public authorities or other bodies governed by public law, or that their management is subject to supervision by those [public] bodies, or that more than half of the members of their administrative, managerial or supervisory board are appointed by the public authorities or by other bodies governed by public law.

15.

The sixth provision supplementing Law No 13/1995, entitled Rules applicable to the award of contracts in the public sector, is worded as follows:

When awarding public procurement contracts, commercial companies in the capital of which public authorities or their independent bodies, or bodies governed by public law, have a majority holding, whether direct or indirect, shall comply with the rules on advertising and competition, unless the nature of the transaction to be effected is incompatible with those rules.

16.

Since these proceedings were initiated, the Kingdom of Spain has, by means of Real Decreto Legislativo 2/2000 por el que se aprueba el texto refundido de la Ley de Contratos de las Administraciones Públicas (Royal Legislative Decree approving the consolidated text of the Law on public procurement) of 16 June 2000 (BOE No 148 of 21 June 2000, p. 21775), adopted a new consolidated version of that law confined, however, to grouping together and rearranging the earlier provisions, without amending their content.

17.

Article 2(2) of the Ley 30/1992 de Régimen Jurídico de las Administraciones Públicas y del Procedimiento Administrativo Común (Law on the legal rules governing public authorities and common administrative procedure) of 26 November 1992, as amended by Ley 4/1999 of 13 January 1999 (BOE No 12 of 14 January 1999, p. 1739, Law No 30/1992), provides:

Bodies governed by public law and possessing separate legal personality, connected to or controlled by any public authority whatsoever shall also be regarded as public authorities. The activities of such bodies shall be regulated by this Law where those bodies exercise administrative powers, their other activities being governed by the rules applicable to their formation.

18.

It is clear from the 12th provision supplementing Ley 6/1997 de Organización y Funcionamiento de la Administración General del Estado (Law on the organisation and working of the central administration of the State) of 14 April 1997 (BOE No 90 of 15 April 1997, p. 11755, Law No 6/1997), that State commercial companies are governed wholly by private law, whatever their legal form, except in the spheres regulated by statute with regard to budget, accounts, financial audit and public procurement, and that they may in no circumstances have powers which might suggest the exercise of public authority.

19.

Furthermore, SIEPSA is regulated in particular by the Texto Refundido de la Ley General Presupuestaria (consolidated version of the General Budget Law), approved by Royal Legislative Decree No 1091/1988 of 23 September 1988 (BOE No 234 of 29 September 1988, p. 28406), by the Texto Refundido de la Ley de Sociedades Anónimas (consolidated version of the Law on public limited companies), approved by Royal Legislative Decree No 1564/1989 of 22 December 1989 (BOE No 310 of 27 December 1989, p. 40012), by the general laws on public limited companies and by its statutes.

SIEPSA's statutes

20.

SIEPSA is a State company created by decision of the Council of Ministers of 21 February 1992 in the form of a commercial public limited company. Originally created for a period of eight years, the company has since become a company of unlimited duration, following amendment of its statutes in October 1999. At the beginning of 2000 its capital came to ESP 85 622 000 000, fully subscribed and paid up by the Spanish State as the sole shareholder.

21.

In accordance with the provisions of its statutes, the company is directed and represented by a board of directors. The eight members of that board are appointed by the general

meeting of shareholders, on a proposal made by the Ministries of Justice, the Economy and Finance. Its chairman is nominated by the board of directors and chosen from among the members of the board proposed by the Ministry of Justice.

22.

Following the amendment to the statutes of 17 July 1998 the company has the following object:

1. The development and execution of programmes and actions contained or which may in future be contained in the plan for repaying the costs of and establishing prisons, approved by decision of the Council of Ministers ... so far as concerns the construction of prisons or annexes by the company itself or through others, and the repaying of the costs of or transfer of real property and centres which, once they have ceased to be used for prison services or for prison purposes, are to be assigned to the company pursuant to the plan, so that it may carry out in particular the following operations in accordance with the directives issued by the prison administration's central management:

(a) carrying on all town-planning management and consultancy activities necessary in order to implement the abovementioned plan and collaboration with public or private bodies for those purposes;

(b) locating and purchasing appropriate buildings or, if necessary, adapting those which prove suitable for being fitted out as new prisons or annexes, and making payment for the acquisitions made by the prison authorities by any means and for the purpose stated;

(c) drawing up works projects, making the plans and preparing the conditions for the award of the works involved in a procurement contract;

(d) organising and awarding the contracts for the performance of the works in accordance with statutory procedures, and taking such action as may be necessary for directing the works, quality control, measurements, certification and monitoring and everything relating to fittings and subsidiary material, in collaboration with technicians appointed by the prison authorities;

(e) organising and carrying out the necessary planning, construction, building and financing works and providing the necessary equipment for the commissioning of the new prisons and annexes.

2. The transfer of real property and prisons which, on no longer being used in the prison service or for such purposes, are assigned to it by the State ... and which, where that would be expedient in order to increase the profits to be derived and the value of the transfer, may be in part transferred to the local authorities concerned or exchanged for other property belonging to those authorities, with which collaboration agreements may be concluded which allow of such improvement and which permit needs falling within their ambit to be met. The funds thus acquired shall be used to pay for the activities provided for in the plan.

...

### **The pre-litigation procedure**

23.

A complaint was laid before the Commission concerning a procedure for the award of a public works contract for the Experimental Educational Prison, Segovia, initiated by SIEPSA in connection with a plan approved by the Ministry of Justice and of the Interior, the maximum budget being ESP 4 392 399 500, exclusive of VAT. The call for tenders in the procedure in question had been published in the daily newspaper *El País* on 3 April 1997.

24.

By letter of 24 September 1997 the Commission drew to the attention of the Spanish authorities the fact that many provisions of the Directive had been disregarded in that call for tenders.

25.

In their reply of 17 December 1997 the Spanish authorities maintained that SIEPSA, as a State commercial company governed by private law, was not a contracting authority for the

- purposes of the Directive and that the provisions of the Directive were therefore not applicable to the circumstances of the case.
26. In response to that reply, on 6 November 1998 the Commission sent the Spanish authorities a letter of formal notice in which it argued that SIEPSA had to be regarded as a contracting authority and that, by the same token, it was required to comply with all the provisions of the Directive, notwithstanding the wording of Law No 13/1995.
27. By letter of 26 January 1999 the Spanish authorities communicated their observations, stressing in the first place the argument that State companies such as SIEPSA do not fall within the ambit of the Directive or of Law No 13/1995, since they are governed by rules of private law. In the second place, they maintained that SIEPSA did not meet the first condition laid down in Article 1(b) of the Directive, since it met general-interest needs of a commercial character. Furthermore, SIEPSA had in their view complied sufficiently with the rules on advertising and competition by publishing tender notices in the national and local daily papers.
28. Considering that reply to be inadequate, on 25 August 1999 the Commission issued a reasoned opinion under Article 226 EC in which it repeated and added to its arguments set out in the letter of formal notice, concluding that in connection with the call for tenders for the works to be carried out on the Experimental Educational Prison, Segovia, issued by SIEPSA, the Kingdom of Spain had failed to fulfil its obligations under certain of the provisions of Directive 93/37.
29. The Spanish Government answered that reasoned opinion by letter of 22 November 1999 rejecting the Commission's analysis.
30. Taking the view that the observations submitted by the Spanish Government showed that the failures to fulfil obligations referred to in the reasoned opinion had not been remedied, the Commission decided to bring the present action.

## **Substance**

### *Arguments of the parties*

31. The Commission states that certain of the provisions of the Directive were not complied with during the procedure followed for the award of the works in question. Having stressed the preliminary point that the maximum budget exceeded the threshold provided by Directive 93/37, then standing at ECU 5 million, it notes that the tender notice appeared in the national press only, and was not published in the *Official Journal of the European Communities*, in contravention of Article 11(2), (7) and (11) of the Directive. Moreover, the time-limit for the receipt of tenders was 35 days only, whereas Article 12(1) of the Directive specifies a minimum time-limit of 52 days in open procedures.
32. The Commission also claims that, among the conditions laid down in order to be able to tender, the first requirement is to belong to one of 25 various sub-groups of State contractors, the second is to have paid-up share capital of at least ESP one milliard and the third is to have won at least four works contracts in the past five years (at least two of them for construction work) for a minimum final amount of ESP 2 milliard per contract, confirmed by the relevant certificates. In the Commission's submission, the third condition is redundant since under Article 29(3) of Directive 93/37 certified registration in the official lists constitutes a presumption of suitability for the contracting authorities of the other Member States in respect of the list of works completed in the past five years.
33. The Commission then notes that the eight criteria for award of the contract include technical team permanently assigned to the works and quality of the execution of the contracts awarded by SIEPSA. On that subject, it points out that while those two criteria appear in Article 27 of Directive 93/37 among the factors which may constitute evidence of the contractor's technical capability and contribute to its being selected, they cannot however be used in determining the best tender, since the criteria for the award of contracts referred to in Article 30 of the Directive can relate only to the specific works in question. The Commission concludes therefore that it is contrary to Articles 18, 27 and 30(1) of Directive 93/37 to include those two criteria among the criteria for the award of the contract.

34. As regards the criterion of price, the Commission states that it is clear from the contract documents that while they will not be excluded, tenders for an amount judged to be abnormally low will have points deducted, that is to say, where the amount differs by more than 10 units from the arithmetic average of the selected proposals. According to the Commission, the effect of automatically penalising tenders for an amount considered to be abnormally low is equivalent to a practice of automatic exclusion of those offers, without allowing any opportunity of explaining the price, which is contrary to Article 30(4) of the Directive.
35. The Commission concludes that when it organised the call for tender at issue SIEPSA ought to have complied with the relevant provisions of the Directive for, according to the Court's case-law, the obligation placed on Member States by a directive to attain the result provided for by that act, and their duty under Article 10 EC, to take all appropriate measures, whether general or particular, to ensure fulfilment of that obligation, are incumbent on all authorities of the Member States. Here the Commission refers in particular to Case C-353/96 *Commission v Ireland* [1998] ECR I-8565, paragraph 23, where it is held that the directives on the award of public contracts would be deprived of their effectiveness if the actions of a contracting authority were not imputable to the Member State concerned.
36. The Spanish Government does not deny that the call for tenders in respect of the procedure for the award of the public works contract for the Experimental Educational Prison, Segovia, issued by SIEPSA, did not conform to the requirements of the Directive, but contends that that company is not to be considered to be a contracting authority for the purposes of that directive.
37. The Spanish Government argues generally that Directive 93/37, just like Council Directive 93/36/EEC of 14 June 1993 coordinating procedures for the award of public supply contracts (OJ 1993 L 199, p. 1) and Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts (OJ 1992 L 209, p. 1), does not include commercial companies under public control, such as SIEPSA, within the notion of bodies governed by public law. That finding is borne out by the fact that Directive 93/38 draws a distinction between the concept of a body governed by public law, identical in all four directives, and the concept of a public undertaking, the definition of which corresponds to that of a public commercial company.
38. On that subject the Spanish Government notes that the Community legislature was aware that many undertakings in the private sector, although possessing the form of a public undertaking, specifically pursue a wholly commercial object, despite their dependency on the State, and operate on the market in accordance with the rules of free competition and in conditions of equality with other private undertakings strictly for the purpose of making profits. That is why the legislature confined the Directive's ambit to bodies cumulatively satisfying the three conditions set out in Article 1(b) thereof.
39. While that Government acknowledges that SIEPSA fulfils the two last conditions under Article 1(b) of the Directive, it argues that SIEPSA possesses the attributes of a commercial company, given that its objects and tasks are typically commercial, and that it therefore meets general-interest needs of a commercial character, which is not in keeping with the first criterion of that provision.
40. In addition, referring to the list in Part V of Annex I to the Directive, which contains the categories of Spanish bodies governed by public law that meet the criteria laid down in the second paragraph of Article 1(b) of that directive, the Spanish Government asserts that SIEPSA does not belong to any of those categories, since it is not an independent body and since it is not subject to the Spanish laws on public procurement.
41. The Spanish Government explains that SIEPSA does not fall within the scope *ratione personæ* of Law No 13/1995 which, as Article 1 thereof makes clear, neither includes nor refers to State commercial companies. The only express reference to those State companies occurs in the sixth provision supplementing that Law, imposing on them the strict application of the advertising and competition rules in respect of procedures for the award of public procurement conducted by them, rules which it claims SIEPSA did observe in the circumstances of the case.
- 42.

- According to the Spanish Government, that exclusion from the scope *ratione personæ* of the Spanish rules on procedures for the award of public procurement contracts and, consequently, of the Community rules on public procurement is accounted for by the circumstance that, in the Spanish legal order, it is generally the task of public bodies governed by private law, a category consisting of commercial companies under public control, such as SIEPSA, to meet general-interest needs, which explains why they are under public control, but those needs are commercial or industrial in nature for, if that were not so, they could not be the object of a commercial company.
43. As more particularly regards SIEPSA, the Spanish Government states that its principal task entrusted to it, namely, the building of new prisons suited to the needs of society, consists of a general-interest requirement of a commercial character, which serves the ultimate purpose of contributing to prison policy, which is also in the general interest.
44. SIEPSA was created in order to carry out all actions which prove necessary to the proper management of the programmes and transactions provided for in the plan for paying off the costs of and establishing prisons, either itself or through others. Its attributes are those of a typical commercial company, it even being governed by commercial law, without prejudice to the exceptions provided for in the areas of budget, accounts and financial audit.
45. In order to attain those objectives, SIEPSA performs transactions which must, in the Spanish Government's submission, be objectively classified as commercial, such as locating and acquiring buildings to be fitted out as new prisons and the development and execution of preparatory and construction works.
46. That Government observes that, in carrying on those activities, SIEPSA makes a profit and that the performance of those operations with a view to generating profits is a typically commercial activity which can be successfully carried out only by a company subject to the free play of the commercial rules of the private sector with which it must necessarily engage. It goes on to say that that company's activity cannot be treated as administrative, since its objective is to acquire financial means or resources like any contractor, and that is so even though in the final analysis those resources are applied for other general-interest purposes.
47. Referring to Case C-360/96 *BFI Holding* [1998] ECR I-6821, paragraph 47, where the Court stated that the absence of competition is not a condition necessarily to be taken into account in defining a body governed by public law, the Spanish Government argues that, whether or not SIEPSA is subject to market competition, it carries on activity which is commercial in nature, which quite simply means that it cannot fall within the notion of a contracting authority used by the Directive.
48. According to that Government, the fact that State commercial companies such as SIEPSA are regulated by private law is not so much the cause as the consequence of their actual nature. It states in this regard that that company is not commercial in character because it is governed by private law, but that it is precisely the commercial character of its activity that confers on it the attributes it possesses and results in its being governed by private law.
49. The Spanish Government submits that its is the only view that respects the autonomous definition of the criterion of the non-industrial or commercial character of needs in the general interest, as it emerges from paragraphs 32 and 36 of *BFI Holding*. It contends that, since the State serves the general interest and since it has a majority shareholding in State commercial companies, it is logical to suppose that those companies will always serve the general interest to a greater or lesser extent. If, in order for the body to be classified as a contracting authority, it were sufficient that it should perform tasks in the general interest, such as contributing to the imposition of criminal penalties, then the condition that those tasks should not be industrial or commercial in character would be meaningless.
50. The Government concludes therefore that SIEPSA ought to receive the same treatment as undertakings supplying gas, electricity or water, sectors which satisfy essential social requirements and which are at present in the hands of entirely private undertakings. In that connection it notes that those undertakings also pursue broader objectives in the general interest since they guarantee, inter alia, the proper working of spheres essential to the productive life of the nation.
- 51.

By contrast, the Commission is of the view that SIEPSA fulfils all the conditions laid down in Article 1(b) of the Directive and that it is therefore a contracting authority for the purposes of that directive.

52.

As a preliminary point, it observes that the scope *ratione personæ* of Directive 93/37 is determined by the Directive itself and not by provisions of national law and that SIEPSA's classification under Spanish law is in consequence immaterial. The Commission notes that, when implementing Community directives in domestic law, the Member States are required to respect the meaning of the words and concepts used in those measures, in order to guarantee uniform interpretation and application of Community legislation in the various Member States. As a result, the Spanish authorities are bound to give the expression body governed by public law, used in the Directive, the meaning it has under Community law. Thus, according to the Commission, if SIEPSA is excluded from the ambit of the Community rules on the award of public procurement contracts by Law No 13/1995, that is because Directive 93/37 has not been properly transposed into Spanish law.

53.

In addition, the Commission claims that the functional interpretation of the notion of contracting authority and, therefore, of body governed by public law adopted in the established case-law of the Court implies that the latter notion includes commercial companies under public control, provided that they fulfil the conditions laid down in the second paragraph of Article 1(b) of the Directive.

54.

As regards the distinction allegedly drawn by Directive 93/38 between the definitions of a body governed by public law and a public undertaking, the Commission states that that directive does not clarify the concept of a body governed by public law, which is identical in the four directives in question, but extends the scope *ratione personæ* of the provisions of Community law relating to public procurement to certain sectors (water, energy, transport and telecommunications) excluded from Directives 93/36, 93/37 and 92/50, in order to cover certain bodies carrying on significant activity in those sectors, namely, public undertakings and those which enjoy special or exclusive rights granted by the authorities. In addition, it ought to be borne in mind that the concept of a public undertaking has always been different from that of a body governed by public law, in that bodies governed by public law are created specifically to meet needs in the general interest having no industrial or commercial character, whereas public undertakings act to satisfy needs of an industrial or commercial character.

55.

The Commission also disproves the Spanish Government's interpretation which makes the concept of body governed by public law dependent on the lists contained in Annex I to the Directive in respect of every Member State, with the result that a Community concept comes to have different meanings, depending on the way in which the various lists in Annex I were drawn up.

56.

According to the Commission, the interpretation favoured by the Spanish Government runs counter to the primary object of the Directive, as set out in the second recital in the preamble thereto, and is also contrary to the third paragraph of Article 1(b) thereof, according to which the lists are to be as exhaustive as possible. The Commission stresses the point that that expression cannot be understood to mean anything other than that the lists are not exhaustive and that that interpretation has been confirmed by the Court in *BFI Holding*, paragraph 50. From that it deduces that the circumstance that State companies do not appear, directly or indirectly, in the list of bodies governed by public law in Part V of Annex I to the Directive does not mean that they fall outside the concept defined in the second paragraph of Article 1(b) thereof.

57.

So far as the conditions laid down in the second paragraph of Article 1(b) of the Directive are more particularly concerned, the Commission observes that that provision makes no mention of the set of rules, whether public or private, under which bodies governed by public law have been formed, or of the legal form chosen, but rather refers to other standards, including the purpose for which the bodies in question were created.

58.

The Commission submits that SIEPSA was established for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character, *videlicet* to contribute to the implementation of State prison policy through the management of programmes and actions contained in the plan for paying off the costs of and establishing prisons approved by the Council of Ministers.

59.

Referring to Case C-44/96 *Mannesmann Anlagenbau Austria and Others* [1998] ECR I-73, paragraph 24, the Commission claims that that general interest, closely linked as it is to public order and the institutional operation of the State and even to the very essence of the State, inasmuch as the State holds the monopoly of power in the penal sphere consisting of the imposition of penalties depriving persons of their liberty, does not possess an industrial or commercial character.

60.

The Commission next disproves the Spanish Government's argument that companies which, like SIEPSA, operate on the market subject to the principles of free competition in the same way as private undertakings and for the same purpose of making profits have a purely commercial object and by that token fall outside the ambit of the Community directives on public procurement. In particular, it refers by way of example to the award of works contracts for the construction of public prisons or the sale of the State's prison properties, which are two of SIEPSA's company objects and which cannot be regarded as activities subject to market competition.

61.

Furthermore, the Commission submits that paragraph 47 of *BFI Holding* makes it clear that, even if it should be conceded that SIEPSA carries on activity subject to free competition, that fact does not mean that it cannot be regarded as a contracting authority.

62.

In addition, the Commission claims that the Spanish Government's argument to the effect that all SIEPSA's activities are commercial is groundless.

63.

In the first place, it states that, contrary to the claims made by the Spanish Government, SIEPSA's activity cannot be compared with private-sector activity. It explains that that company does not offer prisons on the penal establishments market (there is no such market) but rather acts as the representative of the State administration in order to assist the latter in a task of a typically State nature: the construction, management and selling of prison properties. On this subject the Commission notes that, as is clear from the company's statutes, in carrying out its tasks SIEPSA follows directives issued by the general management of the prison administration, and real property is sold and the sums so realised are used in accordance with the directives issued by the general management of State assets.

64.

In the second place, the Commission observes that the Spanish Government separates the need to build prisons (from which it infers that it is of general interest and possessed of a commercial character) from the ultimate purpose, which is to contribute to penal policy (which it classifies as being in the general interest). It states that that separation, as well as being artificial in that the two needs are closely linked, is inconsistent with the reasoning followed by the Court in other cases, in which it has declared that the collection and treatment of waste (*BFI Holding*) or the printing of official administrative documents (*Mannesmann Anlagenbau Austria and Others*) are needs in the general interest, not having an industrial or commercial character, without separating those activities from their ultimate purpose: public health and environmental protection, on the one hand, and public order and the institutional operation of the State, on the other.

65.

In the third place, the Commission claims that even if SIEPSA's objective were profit, that aim would not prevent the company from meeting needs in the general interest not having an industrial or commercial character. In its opinion, while the pursuit of profit may be a distinguishing feature of the company's activities, it is nowhere stated in the text of the Directive that that goal makes it impossible to consider that the general-interest needs to meet which SIEPSA was created have no industrial or commercial character.

66.

It adds that it is debatable whether the pursuit of profit is an object for a State company such as SIEPSA, which is wholly funded out of public resources, and which was created for the purpose of drawing up and implementing a plan for paying off the costs of and establishing prisons. It is obvious to the Commission that in such a sphere making a profit is not a factor which a Member State would consider of prime importance. In support of its claim, it submits that the Economic and Financial Reports of the State public sector drawn up for the financial years 1997 and 1998 by the Intervención General del Estado make it clear that SIEPSA recorded large losses for those years.

67.

In any case, the Commission claims that, even on the assumption that SIEPSA did carry on activities of a commercial nature, those activities would amount to no more than a means of satisfying a need in the general interest not having an industrial or commercial

character, viz. the implementation of the State's prisons policy, which the company was specifically established to meet.

*Findings of the Court*

68.

As stated in paragraph 36 above, the Spanish Government does not deny that the call for tenders for the public works contract for the Experimental Educational Prison, Segovia, issued by SIEPSA, was not in keeping with the requirements of the Directive, but contends that the Directive is not applicable to procedures for the award of public procurement contracts conducted by that company, because the latter is not to be regarded as a body governed by public law or, in consequence, as a contracting authority for the purposes of the Directive.

69.

A preliminary point to be noted is that, according to settled case-law, in order to be defined as a body governed by public law within the meaning of the second paragraph of Article 1(b) of the Directive an entity must satisfy the three cumulative conditions set out therein, requiring it to be a body established for the specific purpose of meeting needs in the general interest not having an industrial or commercial character, to possess legal personality and to be closely dependent on the State, regional or local authorities or other bodies governed by public law (*Mannesmann Anlagenbau Austria and Others*, paragraphs 20 and 21, and Case C-214/00 *Commission v Spain* [2003] ECR I-4667, paragraph 52).

70.

In the circumstances of this case, although the parties agree that SIEPSA satisfies the conditions of the second and third indents of the second paragraph of Article 1(b) of the Directive, they differ as to whether or not the needs in the general interest to meet which SIEPSA was specifically created are commercial in character.

71.

In *Commission v Spain* the Court rejected the Spanish Government's arguments based on the fact that, under the Spanish legislation applicable to the case, viz. Article 1(3) of Law No 13/1995 read in conjunction with the sixth provision supplementing that Law, commercial companies under public control such as SIEPSA are excluded from the ambit *ratione personæ* of both the Spanish rules or the Community rules on public procurement.

72.

More specifically, in order to determine whether that exclusion constitutes correct transposition of the concept of contracting authority employed in Article 1(1) of Directive 89/665, the Court, considering that the ambit *ratione personæ* of that directive coincided with that of the Directive, referred to the scope of the concept of body governed by public law employed in the second paragraph of Article 1(b) of the Directive (*Commission v Spain*, paragraphs 48, 50 and 51).

73.

In that context the Court noted that, in accordance with established case-law, in light of the dual purpose of opening up competition and of transparency pursued by the Directive, that concept must be given an interpretation as functional as it is broad (*Commission v Spain*, paragraph 53).

74.

It is from that point of view that the Court has held that, following settled case-law, for the purposes of settling the issue of the classification of an entity governed by public law within the meaning of the second paragraph of Article 1(b) of the Directive, it is necessary to establish only whether or not the body concerned fulfils the three conditions set out in that provision, for that body's status as a body governed by private law does not constitute a criterion capable of excluding it from being classified as a contracting authority for the purposes of the Directive (*Commission v Spain*, paragraphs 54 and 55).

75.

In addition, the Court has stated that that interpretation, the only one capable of maintaining the full effectiveness of the Directive, does not disregard the industrial or commercial character of the general-interest needs which the body concerned is intended to meet, for that aspect is necessarily taken into consideration for the purpose of determining whether or not that body satisfies the condition laid down in the first indent of the second paragraph of Article 1(b) of the Directive (*Commission v Spain*, paragraphs 56 and 58).

76.

Nor is that conclusion invalidated by the want of an express reference in the Directive to the specific category of public undertakings which is, however, used in Directive 93/38. As the Commission has correctly observed, that last directive was adopted for the purpose of extending the application of the Community rules regulating public procurement to the

water, energy, transport and telecommunications sectors which were not covered by other directives. From that point of view, by employing the concepts of public authorities, on the one hand, and public undertakings, on the other, the Community legislature adopted a functional approach similar to that adopted in Directives 92/50, 93/36 and 93/37. It was thus able to ensure that all the contracting entities operating in the sectors regulated by Directive 93/38 were included in its ambit *ratione personarum*, on condition that they satisfied certain criteria, their legal form and the rules under which they were formed being in this respect immaterial.

77.

With regard on the other hand to the relevance of the Spanish Government's argument that SIEPSA does not fall within any of the categories of Spanish bodies governed by public law listed in Annex I to the Directive, the Court has held in Case C-373/00 *Adolf Truley* [2003] ECR I-1931, paragraph 39, that that list is in no way exhaustive, as its accuracy varies considerably from one Member State to another. The Court concluded therefrom that, if a specific body does not appear in that list, its legal and factual situation must be determined in each individual case in order to assess whether or not it meets a need in the general interest (*Adolf Truley*, paragraph 44).

78.

Next, with more particular regard to the concept of needs in the general interest, not having an industrial or commercial character appearing in the first indent of the second paragraph of Article 1(b) of the Directive, the Court has already had occasion to clarify its purport in the context of various Community directives on the coordination of procedures for the award of public procurement contracts.

79.

The Court has thus held that concept is one of Community law and must accordingly be given an autonomous and uniform interpretation throughout the Community, the search for which must take account of the background to the provision in which it appears and of the purpose of the rules in question (see, to that effect, *Adolf Truley*, paragraphs 36, 40 and 45).

80.

According to settled case-law, needs in the general interest, not having an industrial or commercial character, within the meaning of Article 1(b) of the Community directives coordinating the award of public contracts are generally needs which are satisfied otherwise than by the supply of goods and services in the marketplace and which, for reasons associated with the general interest, the State chooses to provide itself or over which it wishes to retain a decisive influence (see, inter alia, *Adolf Truley*, paragraph 50, and Case C-18/01 *Korhonen* [2003] ECR I-5321, paragraph 47).

81.

The case-law makes it equally clear that in determining whether or not there exists a need in the general interest not having an industrial or commercial character account must be taken of relevant legal and factual circumstances, such as those prevailing when the body concerned was formed and the conditions in which it carries on its activity, including, inter alia, lack of competition on the market, the fact that its primary aim is not the making of profits, the fact that it does not bear the risks associated with the activity, and any public financing of the activity in question (*Adolf Truley*, paragraph 66, and *Korhonen*, paragraphs 48 and 59).

82.

As a matter of fact, as the Court found in *Korhonen*, paragraph 51, if the body operates in normal market conditions, aims at making a profit and bears the losses associated with the exercise of its activity, it is unlikely that the needs it aims at meeting are not of an industrial or commercial nature.

83.

It is therefore in light of the conditions defined in the case-law that the question whether or not the needs in the general interest that SIEPSA is designed to meet are other than industrial or commercial in character must be considered.

84.

It is common ground that SIEPSA was established for the specific purpose of putting into effect, alone, the programmes and actions provided for in the plan for paying off the costs of and establishing prisons for the purpose of implementing the Spanish State's prison policy. To that end, as its statutes show, it carries on all activities which prove necessary in order to construct, manage or sell that State's prison assets.

85.

The needs in the general interest which SIEPSA is responsible for meeting being, therefore, a necessary condition of the exercise of the State's penal powers they are intrinsically linked to public order.

86.

- That intrinsic link is to be seen in particular in the decisive influence wielded by the State over the carrying through of the tasks entrusted to SIEPSA. It is not in fact disputed that the latter puts into effect a plan for paying off the costs of and establishing prisons approved by the Council of Ministers and that it carries out its activities in accordance with directives issued by the public authorities.
87. What is more, imposition of criminal penalties being one of the rights and powers of the State, there is no market for the goods and services offered by SIEPSA in the planning and establishment of prisons. As the Commission has rightly argued, activities such as paying off the costs of and establishment of prisons, which are among SIEPSA's primary objectives, are not subject to market competition. That company cannot, therefore, be regarded as a body which offers goods or services on a free market in competition with other economic agents.
88. As to the argument which the Spanish Government bases on the fact that SIEPSA carries on its activities for profit, it is enough to state that, even if SIEPSA's activities do generate profits, it would appear inconceivable that the pursuit of such profit should be in itself the company's chief aim.
89. It is clear from that company's statutes that activities such as the acquisition of buildings to be fitted out as new prisons, the development and performance of planning and building works or the sale of disused facilities are simply the means it employs in order to attain its main objective, which is to contribute to the implementation of State prison policy.
90. That conclusion is confirmed by the fact that, as the Commission has noted without being contradicted by the Spanish Government, SIEPSA recorded large financial losses for the years 1997 and 1998.
91. It must be added that, regardless of the question whether or not there is any official mechanism for offsetting any losses made by SIEPSA, it seems unlikely that it itself should have to bear the financial risks bound up with its activity. In fact, having regard to the fact that the performance of that company's duties is a fundamental constituent of the Spanish State's prison policy, it seems likely that that State, being the sole shareholder, would take all necessary measures to prevent the compulsory liquidation of SIEPSA.
92. In those circumstances, it is possible that in a procedure for the award of public contracts SIEPSA should allow itself to be guided by other than purely economic considerations. It is precisely in order to guard against such a possibility that it is essential to apply the Community directives on public contracts (see, to this effect, *inter alia*, *Adolf Truley*, paragraph 42, and *Korhonen*, paragraphs 51 and 52).
93. Having regard to all the legal and factual matters governing SIEPSA's activity, as set down in paragraphs 84 to 92 above, it must be concluded that the needs in the general interest to meet which the company was specifically established possess a character which is other than industrial or commercial.
94. It follows that a body such as SIEPSA must be treated as a body governed by public law for the purposes of the second paragraph of Article 1(b) of the Directive and, therefore, as a contracting authority for the purposes of the first paragraph thereof.
95. Consequently, the Directive is applicable to the procedures for the award of public works contracts conducted by that company.
96. Having regard to all the foregoing considerations, it must be declared that, by failing to comply with all the provisions of the Directive in connection with the call for tenders for the execution of works for the Centro Educativo Penitenciario Experimental de Segovia issued by the Sociedad Estatal de Infraestructuras y Equipamientos Penitenciarios S.A., a company falling within the definition of a contracting authority for the purposes of Article 1(b) of the Directive, the Kingdom of Spain has failed to fulfil its obligations under that directive.

### **Costs**

97. 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 asked for costs and the Kingdom of Spain has been unsuccessful, the latter must be ordered to pay the costs.

On those grounds,

THE COURT (Sixth Chamber)

hereby:

**1. Declares that, by failing to comply with all the provisions of Council Directive 93/37/EEC of 14 June 1993 concerning the coordination of procedures for the award of public works contracts in connection with the call for tenders for the execution of works for the Centro Educativo Penitenciario Experimental de Segovia issued by the Sociedad Estatal de Infraestructuras y Equipamientos Penitenciarios S.A. (SIEPSA), a company falling within the definition of a contracting authority for the purposes of Article 1(b) of the Directive, the Kingdom of Spain has failed to fulfil its obligations under that directive;**

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

Puissochet

Schintgen  
Skouris

Colneric

Cunha Rodrigues

Delivered in open court in Luxembourg on 16 October 2003.

R. Grass

V. Skouris

Registrar

President