

EC Infringement Proceedings - Public Procurement  
Part 3

Greece - Barriers to the Import of Petroleum Products – Obstacle to Free Movement of Goods

16 April 1998

The Commission decided to bring an action against Greece before the Court of Justice on the basis of certain aspects of its legislation on the stocking, transport and distribution of petroleum products which contravened the provisions of the EU Treaty relating to the free movement of goods (Article 30). In Greece, the obligation to maintain stocks laid down by Directive 68/414/EEC applies to companies marketing petroleum products. However, Greek law provided that if such companies do not have sufficient storage capacity to comply with this obligation, it can be met by refineries established in Greece with which supply contracts have been signed. In practice, this lead marketing companies to sign supply contracts with the refineries. Moreover, Greek law required retailers to transport fuel to points of sale using lorries belonging either to the marketing companies or to public transport companies. For the retailers, this requirement meant additional costs and delivery times which affected prices and the quantities sold. Finally, the effect of the legislation was that retailers could not directly import petroleum products.

In their reply to the reasoned opinion, which the Commission received on 23 September 1997, the Greek authorities maintained their view that these provisions did not constitute an obstacle to the free movement of petroleum products. However, the Commission believed that these provisions together ultimately favoured refineries established in Greece and were likely to restrict imports of petroleum products from other Member States. The Commission has therefore decided to bring the matter before the Court of Justice.

France - Foodstuffs using Enzyme Preparations – Obstacle to Free Movements of Goods

16 April 1998

The Commission decided to send a reasoned opinion to France because its legislation contained provisions which constituted a barrier to the free movement of foodstuffs produced using enzyme preparations. The rules concerned laid down a prior authorisation procedure even for products which had been legally produced and/or marketed in other Member States. In that form, the procedure was disproportionate to the protection of the public interest (public health, consumer protection) and therefore constituted an obstacle to the free movement of goods which is contrary to Articles 30 and 36 of the Treaty of Rome.

France - Disposable Barbecues – Trade Restriction

16 April 1998

The total ban on sales in France of disposable barbecues, despite their being legally produced and/or marketed in other Member States of the European Union, is contrary to Articles 30 and 36 of the EU Treaty because it is disproportionate to the objectives of consumer protection and environmental protection given as justification. The Commission believed that there were less trade-restrictive measures available that would ensure the desired levels of protection. Therefore, following discussions between the Commission and the French authorities, the product was adapted in order to reinforce consumer safety and information. Despite these changes, the product still could not be sold. The Commission therefore decided to send a reasoned opinion to France.

Sweden - Pressure Vessels – Quantitative Restriction

16 April 1998

The Commission decided to send a reasoned opinion to the Swedish Government for refusing to allow pressure vessels legally produced and marketed in Germany to be marketed in Sweden without the applicant having to adapt them. The Commission received a complaint pointing out that the technical requirements applicable in Sweden prevented pressure vessels being accepted unless their design had been modified. The competent authority's refusal to approve the pressure vessels concerned unless the applicant modified them constituted a measure having equivalent effect to a quantitative restriction. The Swedish authorities did not demonstrate to the Commission that their refusal was justified and proportionate to all essential requirements.

France - Architectural Competitions Organised by the General Council of Réunion – Directive Infringement

6 April 1998

After securing the cancellation of several architectural competitions involving serious irregularities in an earlier case in 1995, the Commission received a fresh complaint concerning various architectural competitions organised by the General Council of the French department of Réunion. In general terms, the contracting authority appeared to have departed from the principle of equality of treatment between candidates laid down in Article 3(2) of Directive 92/50/EEC on public service contracts. The two winners of the four contested competitions had links with one of the members of the jury, in breach of Article 13(6) of the Directive, which stipulates that the jury must be independent (one of them was even an ex officio member of the jury). The contracting authority for the most recent competition rejected certain candidates on the ground that they had not been selected in earlier procedures, which contravened the requirement laid down in Article 13(5) of the Directive that selection criteria must be clear and laid down beforehand. One of the projects selected was incompatible with the land-use plan, which was subsequently revised in breach of the principle of equal treatment.

Not satisfied with the explanations given by the French authorities in response to its initial request for information, the Commission sent them a letter of formal notice on 17 September 1997.

After examining their reply dated 5 December 1997, it decided to issue a reasoned opinion for infringement of Directive 92/50/EEC, in which it called on the French authorities to terminate the award procedures in question and to take the necessary steps to ensure that architectural competitions in Réunion are genuinely opened up to competition. The French authorities were advised that if they failed to take this action, the Commission could bring the matter before the Court of Justice.

Italy - IT Services for the General State Accounting Department – Directive Infringement

6 April 1998

The Commission decided to send Italy a reasoned opinion for infringement of Directive 92/50/EEC on public service contracts, in respect of contracts for the maintenance, management and development of the integrated computer system of the Treasury Ministry's General State Accounting Department ('Ragioneria generale dello Stato') and the Court of Auditors.

The infringement resulted from the fact that these contracts, which were originally concluded in 1987 and 1988, had been renewed several times with the same company (owned by the Treasury Ministry), without any call for competition, although the conditions laid down by Article 11 of Directive 92/50/EEC, the only conditions that could justify using the negotiated procedure, were not met.

It is also a consequence of the adoption of legislative decree No 414/97 of 19 November 1997, which allows contracts to be awarded by direct agreement for a period of more than 18 months. The decree also reserves certain IT activities (to be specified in a decree to be adopted by the Treasury Ministry) for the State, which will perform them via a company all of whose capital will be directly or indirectly in State hands. The Italian authorities' reply to the letter of formal notice transmitted on 7 August 1997 was not satisfactory.

UK - Improper Use of Framework Contract Arrangements – Directive Infringement

6 January 1998

The Commission decided to refer the United Kingdom to the Court of Justice concerning the use of "framework arrangements" by the Department of Environment (Northern Ireland) for procuring architectural, engineering and other construction-related services. Under this procedure, a tender notice is published in the EC Official Journal indicating a general category of services to be provided rather than giving details of a specific contract. Once a list of approved suppliers has been established by this procedure, entities may choose suppliers from the list without going through a new competitive procedure for each individual contract. The case raises an important question of principle, namely the use by contracting entities of such framework contract arrangements for the procurement of services, supplies and works. The Directive on procurement of works, supplies, services and in the water, energy, transport and telecommunications sectors (93/38/EEC) explicitly provides for the use of such framework contracts. However, the use of such framework contracts is not authorised by the public procurement rules applicable

in all other sectors to public service, supplies and works contracts (Directives 92/50/EEC, 93/36/EEC and 93/37/EEC respectively).

The UK authorities' reply, received on 29.7.1997, to the reasoned opinion sent by the Commission on 2.5.1997 was unsatisfactory, in the Commission's view.

#### Austria - Qualification Procedure for Potential Bidders – Directive and Treaty Infringements

6 January 1998

The Commission decided to send a reasoned opinion to Austria because of the requirement imposed on EU companies to submit to a qualification procedure to prove their professional capacities before they could bid for a public procurement contract in Austria. Such a qualification procedure violates not only the Directives on public procurement of works, supplies, services (including procurement in the water, energy, transport and telecommunications sectors), but also EC Treaty rules on the freedom to provide services (Article 59). The requirement was laid down specifically in the public procurement legislation of the Land of Vienna and was in practice applied throughout Austria by the Order of Trades (Gewerbeordnung). This Order stipulated that before EU companies could provide a service in Austria, they had to request from the Austrian authorities a declaration that they had the qualifications necessary to be able to provide a service. According to the EU public procurement Directives, contracting authorities cannot, in general, require EU companies to justify their qualifications in the country of the contracting authority and can only request proof delivered in companies' country of origin of the necessary qualifications.

#### Germany - Failure to Recognise Validity of Non-German Technical Specifications - Discrimination

6 January 1998

The Commission decided to send a reasoned opinion to Germany concerning repeated discrimination against imported products when public procurement contracts were awarded by the Länder authorities. Such discrimination contravened EC

Treaty rules on the free movement of goods (Article 30) according to the case law of the Court of Justice (Dundalk ruling, 22 September 1988) and had to be eliminated. The Commission therefore decided to request the German authorities to require that calls for tender feature a mutual recognition clause. Such a clause would ensure that products from other Member States would not be discriminated against on the grounds that they were manufactured according to national technical specifications other than German specifications.

#### Portugal - Incorrect Implementation of Supplies Directive – Directive Infringement

6 January 1998

The Commission decided to refer Portugal to the Court of Justice concerning its failure to implement fully and correctly the Directive on public supply contracts (93/36). Decree-Law 55/95, the instrument of implementation notified by the Portuguese authorities, applies parts of the Directive but does not implement it in full. In particular:

- it provided for the possibility of price negotiation in restricted procedures
- it did not oblige contracting authorities to publish contract notices in the EC's Official Journal or indicate clearly which contracts were subject to that obligation - namely those exceeding the relevant threshold
- it indicated that deadlines for the presentation of applications or tenders count from the date of publication of the notice in the Portuguese Official Journal rather than the EC Official Journal
- the distinction between the selection and the award phase was not clear.

Following the dispatch of a reasoned opinion on 7 July 1997, the Commission's services reached an informal agreement at technical level with representatives from the competent Portuguese services on suggested comprehensive amendments to Decree-law 55/95.

#### Portugal - Incorrect Implementation of the Public Works Directive – Directive Infringement

6 January 1998

The Commission considered that the implementation in Portugal of Directive 93/37 on public works contracts by means of Decree-Laws 405/93, 101/95 and "portaria" 428/95 was in some respects incorrect and/or incomplete. It therefore decided to refer Portugal to the Court of Justice on the following grounds:

- the definitions of public works contract, contracting authority and public works concession were incorrect
- the contracting authority was free to negotiate changes of tenders offered by the winning bidder
- the thresholds triggering advertisement in the EC Official Journal and the entity to whom contracting authorities had to send their draft notices were not specified
- the implementation of the provisions on selection criteria rendered them unworkable or unduly discriminatory against bidders not established in Portugal
- the imposition of a Portuguese licence on all companies wishing to tender for contracts under the thresholds was contrary to EC Treaty rules on freedom to provide services (Article 59).

Following the dispatch of a reasoned opinion on 7 July 1997, the Commission's services reached an informal agreement at technical level with representatives of the competent Portuguese authorities on suggested comprehensive amendments to Decree-law 405/93.

#### Portugal - Incorrect Implementation of the Remedies Directive – Directive Infringement 6 January 1998

The Commission decided to refer Portugal to the Court of Justice because it considered that the implementation of the Directive on remedies for bidders who consider they have been unfairly excluded from a public procurement contract (89/665) by the general system of administrative law in Portugal was incorrect and/or incomplete. The main reasons for the Commission's dissatisfaction were the following:

- only acts which finally close the award procedure may be subject to a court challenge
- the possibility of obtaining interim measures to suspend an award procedure is subject to too stringent conditions and is anyway dependant on the filing of an action for annulment of the act
- there is no provision for remedies against acts taken by private law contracting authorities falling under the definition of "body governed by public law"
- in some situations, contracting authorities themselves are the only valid bodies to which appeals for remedies can be addressed.

Following the dispatch of a reasoned opinion on 7 July 1997, the Commission's services welcomed some of the improvements suggested by representatives of the competent Portuguese services. Nevertheless, the suggested changes failed to address all the Commission's concerns.

#### Portugal - Works on Internal Ring Road ("CRIL") – Directive Infringement 6 January 1998

The Commission decided to send Portugal a reasoned opinion for the excessive amount of additional works that were awarded to the same contractor in connection with road works on the Lisbon internal ring ("CRIL"), which was constructed between 1990 and 1995. Indeed, the amount of additional works awarded to the same contractor for unforeseen circumstances far exceeded the limit of 50% of the initial contract value imposed by the Public Procurement Directives. The Portuguese authorities' replied to a letter of formal notice (first stage of the formal infringement procedure) sent on 15 May 1997 but failed to address the Commission's concerns.

#### Portugal - Incorrect Implementation of Services Directive – Directive Infringement 6 January 1998

The Commission decided to send a reasoned opinion to Portugal concerning its failure to implement fully and correctly the Directive on procurement of services (92/50/EEC). The instrument notified by the Portuguese Authorities, Decree-Law 55/95 failed to implement the Directive in full. In particular:

- it provided for the possibility of price negotiation in restricted procedures

- it did not oblige contracting authorities to publish contract notices in the EC's Official Journal or indicate clearly which contracts were subject to that obligation - namely those exceeding the relevant threshold
- it did not clearly indicate which services were covered by the Directive's obligations
- it indicated that deadlines for the presentation of applications or tenders count from the date of publication of the notice in the Portuguese Official Journal rather than the EC Official Journal
- the distinction between the selection and the award phase was not clear

Following the dispatch of a letter of formal notice on 7 July 1997, the Commission's services reached an informal agreement at technical level with representatives from the competent Portuguese services on suggestions for comprehensive amendments to Decree-law 55/95.

#### France - Planned Automatic Light Rail Transit System – Directive Infringement

18 December 1997

The Commission decided to deliver a reasoned opinion to France concerning the negotiated award to a French group of the main supply contract for the planned automatic light rail transit system in Rennes. It took this decision after asking the French authorities in January for more details about the conditions under which the contract was awarded, after sending them a letter of formal notice on 17 June and after examining their replies of August and November.

Notwithstanding the French authorities' explanations, the Commission considers that no award of the contract at issue took place before the entry into force of the Directive on procurement procedures in the water, energy, transport and telecommunications sectors (93/38/EEC) and that the award of the negotiated contract on 22 November 1996, after the previous procedure conducted between 1989 and 1993 had been abandoned in 1995, was covered by the Directive in question. Furthermore, there were no technical reasons to justify the failure to open up the contract to competition.

Finally, the Commission disputed the contracting entity's use of the possibility, provided for in the French public procurement code, of exempting itself from the normal competition rules on the grounds that it had already carried out major investment. Such justification is not covered by the derogations provided for in Directive 93/38/EEC. The Commission is requesting the French authorities to take appropriate measures to remedy this situation and may decide to refer the matter to the Court of Justice if such measures are not adopted.

#### Italy - Collection of Urban Waste – Directive Infringement

18 December 1997

The Commission decided to deliver a reasoned opinion to Italy in connection with a public contract awarded by the Naples municipal authorities for the collection of urban waste, which was not consistent with the Directive on public service contracts (92/50/EEC) in a number of respects. Firstly, one of the conditions of participation in the contract was registration with the Italian Chamber of Commerce, Industry and Crafts; firms established in other Member States were not permitted to produce equivalent documentary evidence. Secondly, the deadline for submission of tenders was less than the minimum 40 days from the dispatch of the letter of invitation to tender, and that letter did not contain the tender specifications. Thirdly, firms were requested in the letter of invitation to tender to submit documents relating to legal, technical, economic and financial capacity. Those documents included a certificate issued by a "Cancelleria del Tribunale", and firms established in other Member States were not permitted to submit equivalent documents. Finally, quality certification under standard EN 29000 was also required, without firms being able to submit alternative evidence of equivalent quality assurance measures.

#### Italy - Conversion and Maintenance of Heating Installations in Buildings – Directive Infringement

18 December 1997

The Commission decided to deliver a reasoned opinion to Italy for infringing the Directive on public works contracts (71/305/EEC, as amended by 89/440/EEC) and for failing to observe the principle of equality of treatment. The non-compliance alleged by the Commission involved a public contract awarded by the

Rome municipal authorities for the conversion, operation and maintenance of heating installations in a number of their buildings.

The non-compliance stems from the fact that the main terms of the tenders, such as prices and deadlines, were renegotiated after they had been received and opened. The contracting authority thus made de facto use of a negotiated procedure in violation of the provisions of the Directive on public works contracts. Furthermore, in the tender assessment phase, the principle of equality of treatment recognised by the Court of Justice as the basis of the Public Procurement Directives was not observed, because not all the tenderers had the same opportunity to formulate their tenders: only the tenderer which had submitted the tender which, following reformulation, had been selected by the contracting authority was invited to indicate whether it accepted the changes made.

#### Germany - Management of a Waste Disposal Site – Directive Infringement

18 December 1997

The Commission decided to deliver a reasoned opinion to Germany concerning the award of the contract for the management of a waste disposal site at Flörsheim/Wicker. It considered that the award of the contract had infringed the Directive on public service contracts (92/50/EEC), for three reasons. Firstly, the criteria governing the award of the contract were not set out either in the contract notice or in the tender specifications. Secondly, the contracting authority used an accelerated procedure without valid justification for doing so. Thirdly, local firms were placed in a de facto favourable position in that preference was given to firms which already had experience of working for the local authorities in question.

#### Spain - Study for a Road – Directive Infringements

18 December 1997

The Commission decided to deliver a reasoned opinion to Spain in connection with a public service contract put out to tender by the Regional Ministry for Public Works, Housing and Water in the Canary Islands for a study concerning the Agaete - San Nicolás de Tolentino - Mogán road on the island of Gran Canaria. The Commission had a number of objections to the invitation to tender: the use of a mathematical formula which distorted the concept of the "economically most advantageous tender" and penalised tenders considered to be abnormally low; the a posteriori breakdown of the price criterion into subcriteria which had not been previously detailed either in the administrative specifications or in the contract notice; the use of criteria for selecting competitors as award criteria and the fact that these criteria were also contrary to the principles of non-discrimination, equality of treatment and freedom to supply services.