

## JUDGMENT OF THE COURT (Third Chamber)

28 January 2010 (\*)

(Failure of a Member State to fulfil obligations – Directive 93/37/EEC – Public works contracts – Notification to candidates and tenderers of decisions awarding contracts – Directive 89/665/EEC – Procedures for review of the award of public contracts – Period within which actions for review must be brought – Date from which the period for bringing an action starts to run)

In Case C-456/08,

ACTION under Article 226 EC for failure to fulfil obligations, brought on 20 October 2008,

**European Commission**, represented by G. Zavvos, M. Konstantinidis and E. White, acting as Agents, with an address for service in Luxembourg,

applicant,

v

**Ireland**, represented by D. O'Hagan, acting as Agent, and by A. Collins SC, with an address for service in Luxembourg,

defendant,

THE COURT (Third Chamber),

composed of J.N. Cunha Rodrigues (Rapporteur), President of the Second Chamber, acting for the President of the Third Chamber, P. Lindh, A. Rosas, U. Löhmus and A. Ó Caoimh, Judges,

Advocate General: J. Kokott,

Registrar: R. Şereş, Administrator,

having regard to the written procedure and further to the hearing on 24 September 2009,

after hearing the Opinion of the Advocate General at the sitting on 29 October 2009,

gives the following

### Judgment

- 1 By its application, the Commission of the European Communities asks the Court to declare that, by reason of the rules on time-limits in the national legislation regulating the exercise of the right of tenderers to judicial review in public procurement procedures and by failing to notify the award decision to the complainant in the procurement procedure in question, Ireland has failed to fulfil its obligations, concerning the applicable time-limits, under Article 1(1) of Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts (OJ 1989 L 395, p. 33), as amended by Council Directive 92/50/EEC of 18 June 1992 (OJ 1992 L 209, p. 1) ('Directive 89/665'), as interpreted by the Court, and, concerning the lack of notification, under Article 1(1) of Directive 89/665, as interpreted by the Court, and Article 8(2) 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), as amended by European Parliament and Council Directive 97/52/EC of 13

October 1997 (OJ 1997 L 328, p. 1) ('Directive 93/37').

## Legal context

### *Community legislation*

2 Article 1(1) of Directive 89/665 provides:

'The Member States shall take the measures necessary to ensure that, as regards contract award procedures falling within the scope of [Council Directive 71/305/EEC of 26 July 1971 concerning the coordination of procedures for the award of public works contracts (OJ, English Special Edition 1971 (II), p. 682)], [Council Directive 77/62/EEC of 21 December 1976 coordinating procedures for the award of public supply contracts (OJ 1977 L 13, p. 1)], and [Directive] 92/50/EEC, decisions taken by the contracting authorities may be reviewed effectively and, in particular, as rapidly as possible in accordance with the conditions set out in the following Articles and, in particular, Article 2(7), on the grounds that such decisions have infringed Community law in the field of public procurement or national rules implementing that law.'

3 Under Article 2(1) of Directive 89/665:

'The Member States shall ensure that the measures taken concerning the review procedures specified in Article 1 include provision for the powers to:

- (a) take, at the earliest opportunity and by way of interlocutory procedures, interim measures with the aim of correcting the alleged infringement or preventing further damage to the interests concerned, including measures to suspend or to ensure the suspension of the procedure for the award of a public contract or the implementation of any decision taken by the contracting authority;
- (b) either set aside or ensure the setting aside of decisions taken unlawfully, including the removal of discriminatory technical, economic or financial specifications in the invitation to tender, the contract documents or in any other document relating to the contract award procedure;
- (c) award damages to persons harmed by an infringement.'

4 Article 8(2) of Directive 93/37 provides:

'Contracting authorities shall promptly inform candidates and tenderers of the decisions taken on contract awards, including the reasons why they have decided not to award a contract for which there has been an invitation to tender or to start the procedure again, and shall do so in writing if requested. They shall also inform the *Office for Official Publications of the European Communities* of such decisions.'

### *National legislation*

5 Order 84A(4) of the Rules of the Superior Courts, in the version resulting from Statutory Instrument N° 374 of 1998 ('the RSC'), provides that:

'An application for the review of a decision to award or the award of a public contract shall be made at the earliest opportunity and in any event within three months from the date when grounds for the application first arose unless the Court considers that there is good reason for extending such period.'

## Background to the dispute and pre-litigation procedure

- 6 The National Roads Authority ('the NRA') is a public authority responsible for the construction and maintenance of roads in Ireland.
- 7 SIAC Construction Limited ('SIAC') is a limited liability company established in Ireland, which carries on business in the construction sector.
- 8 The NRA published a call for interest in the *Official Journal of the European Communities* on 10 July 2001 to design, build, finance and operate the Dundalk Western Bypass. The contractor was required to establish a public-private partnership with the NRA and to operate that section of motorway for approximately 30 years.
- 9 In December 2001, four candidates were invited to proceed to negotiations.
- 10 Of those four candidates, two were selected in April 2003 to proceed to more intensive negotiations: these were a consortium called EuroLink, of which SIAC formed part, and a consortium called Celtic Roads Group ('CRG').
- 11 On 8 August 2003, the NRA invited EuroLink and CRG to submit a best and final offer.
- 12 By letter of 14 October 2003, EuroLink was informed that the NRA had decided to designate CRG as the preferred tenderer. That letter from the NRA pointed out that this was not a rejection of the offer submitted by EuroLink. The letter explained that the NRA would proceed with discussions with CRG, potentially leading to the award of the contract for the project in question. However, if such discussions were to terminate without a contract being awarded, the NRA reserved the right to invite EuroLink to enter into discussions with it in place of CRG.
- 13 On 9 December 2003, the NRA decided to award the contract in question to CRG.
- 14 On 5 February 2004, the NRA signed the contract with CRG. A notice to that effect was displayed on the NRA website on 9 February 2004. The contract award notice was published in the *Official Journal of the European Union* on 3 April 2004.
- 15 On 8 April 2004, SIAC brought an action for damages before the High Court of Ireland. It complained, inter alia, first, of the selection of the negotiated procedure and, secondly, of certain irregularities which, in its view, had occurred at the stage of introducing and evaluating the best and final offers. With regard to limitation periods, SIAC claimed that the date on which the period for bringing an action began to run was the date on which the contract with CRG was signed, that is to say, 5 February 2004.
- 16 The High Court took the view that the relevant grounds for bringing the action arose on the date on which the consortium to which SIAC belonged was informed of the identity of the preferred tenderer, namely 14 October 2003. SIAC, it ruled, ought to have brought its action no later than three months after that date, in accordance with Order 84A of the RSC. The High Court, by its judgment of 16 July 2004, accordingly dismissed SIAC's action as being out of time.
- 17 SIAC submitted a complaint to the Commission. The latter sent a letter of formal notice to Ireland on 10 April 2006, to which that Member State replied on 30 May 2006.
- 18 On 15 December 2006, the Commission sent an additional letter of formal notice to Ireland, which replied on 21 February 2007.
- 19 As it was not satisfied by the explanations which it had received, the Commission sent Ireland a reasoned opinion on 1 February 2008, inviting that Member State to take the measures necessary for compliance within a period of two months. Ireland replied to that reasoned opinion on 25 June 2008.
- 20 As it considered that reply to be unsatisfactory, the Commission brought the present action.

## The action

### *The first head of claim*

- 21 By its first head of claim, the Commission alleges that the NRA did not inform the unsuccessful tenderer of its decision awarding the contract for the design, construction, financing and operation of the Dundalk Western Bypass.

### Arguments of the parties

- 22 The Commission submits that notification of the public contract award decision to the unsuccessful candidates and tenderers is required under Article 8(2) of Directive 93/37. It also submits that, in the context of Directive 89/665, complete legal protection presupposes an obligation to inform candidates and tenderers of the award decision.
- 23 The communication to EuroLink, by letter from the NRA of 14 October 2003, of the fact that CRG had been designated as the preferred tenderer was not, the Commission contends, tantamount to a rejection of the offer submitted by EuroLink. That letter cannot therefore be regarded as constituting the notification of the award decision provided for in Directive 89/665 and in Article 8(2) of Directive 93/37.
- 24 Since it is common ground that SIAC did not receive notification of the final award of the contract at issue, the requirements of those provisions were not complied with.
- 25 Ireland accepts the obligation on Member States to ensure prompt notification to candidates and tenderers of decisions taken on contract awards. It argues that it has faithfully transposed Article 8(2) of Directive 93/37, which lays down that obligation, into its domestic legal order. The Commission, moreover, is not claiming that the relevant Irish legislation does not comply with the requirements of Community law.
- 26 With regard to the contract relating to the Dundalk motorway bypass, Ireland accepts that communication of the preferred tenderer to EuroLink on 14 October 2003 does not constitute notification of the decision to award the contract.
- 27 Ireland claims, however, that, as is apparent from the judgment of the High Court of Ireland of 16 July 2004, it was, as of 14 October 2003, clear to SIAC that a decision had been taken to award the contract. SIAC must have been aware that the NRA was engaged in the process necessary to conclude a contract with CRG. In Ireland's view it follows that, in the circumstances of the present case, no injustice was caused by the lack of notification of the final decision to award the contract.
- 28 Ireland submits that, as its national law faithfully transposes the Community rules on notification of decisions concerning the award of public contracts, Ireland cannot be considered to have failed in its obligations under Community law on the basis of a single incident of non-notification.

### Findings of the Court

- 29 Article 8(2) of Directive 93/37 requires contracting authorities to inform candidates and tenderers promptly of the decisions taken on contract awards. Notification to unsuccessful candidates and tenderers of the public contract award decision is mandatory under that provision.
- 30 That same obligation also arises under Article 1(1) of Directive 89/665, inasmuch as the possibility of bringing an effective action against award decisions can be ensured only if all candidates or tenderers are informed in good time of those decisions (see, to that effect,

judgment of 24 June 2004 in Case C-212/02 *Commission v Austria*, paragraph 21, and Case C-444/06 *Commission v Spain* [2008] ECR I-2045, paragraph 38).

31 It is not disputed that in the present case the NRA never officially informed EuroLink of its decision to award the contract in question to CRG.

32 The announcement of the award on the NRA's website on 9 February 2004 and the publication thereof on 3 April 2004 in the *Official Journal of the European Union* cannot adequately rectify that failure.

33 That information was released into the public domain after the signature of the contract on 5 February 2004. In order to make effective legal protection possible for the candidates or tenderers, however, they ought to have been informed of the NRA's award decision in good time before the contract was concluded (see, to that effect, *Commission v Austria*, paragraph 21, and *Commission v Spain*, paragraph 38).

34 The NRA thus failed in its obligations under Article 8(2) of Directive 93/37 and Article 1(1) of Directive 89/665 to provide information in regard to the contract in question.

35 Referring in this connection to the NRA's letter of 14 October 2003, Ireland submits that in the present case SIAC nevertheless did not suffer any injustice. In its view, after that date, SIAC must have been aware that the NRA was in the process of signing a contract with CRG.

36 That argument cannot be accepted.

37 First of all, the NRA did not, by its letter of 14 October 2003, notify the definitive decision to award the contract in question. It merely indicated that it had selected CRG as the preferred tenderer. The NRA even stated that, in the event that the discussions between it and CRG did not lead to the award of a contract, it reserved the right to enter into discussions with EuroLink in place of CRG. At that stage, EuroLink had not been definitively ruled out as a potential candidate for the contract and could legitimately take the view that the procedure for the award of that contract had not been completed.

38 Secondly, and in any event, the finding that a Member State has failed to fulfil its obligations is not bound up with a finding as to the damage flowing from that failure (Case C-263/96 *Commission v Belgium* [1997] ECR I-7453, paragraph 30, and Joined Cases C-20/01 and C-28/01 *Commission v Germany* [2003] ECR I-3609, paragraph 42).

39 Lastly, Ireland argues that the national legislation at issue satisfies the information obligations which are imposed by the Community legislation. In those circumstances, a single incident of failure to notify a decision concerning the award of a public contract cannot justify a finding that the Member State in question has failed to fulfil its obligations under Community law.

40 That argument also cannot be accepted.

41 Without its being necessary to rule on the assertion that the national legislation at issue transposes adequately the relevant requirements of Community law, suffice it to recall that, according to settled case-law, an action for failure to fulfil obligations makes possible not only an examination of the compatibility of a Member State's laws, regulations and administrative provisions with Community law but also a determination that there has been an infringement of Community law by the national bodies in a specific individual case (see, concerning the award of public contracts, Joined Cases C-20/01 and C-28/01 *Commission v Germany*, paragraph 30, and judgment of 15 October 2009 in Case C-275/08 *Commission v Germany*, paragraph 27).

42 It follows that the first head of claim is well founded.

*The second head of claim*

- 43 The Commission's second head of claim consists of two parts. First, the Commission argues that the national legislation in question gives rise to uncertainty as to which decision must be challenged through legal proceedings. It maintains, secondly, that that legislation is unclear on how periods within which proceedings must be brought are to be determined.

The first part of the second head of claim

– Arguments of the parties

- 44 The Commission states that it is difficult for tenderers to know which decision by the contracting authority they have to challenge and on which date the period for challenging that decision begins to run. The Commission argues that that uncertainty is attributable to the wording of Order 84A(4) of the RSC and its uncertain interpretation.
- 45 The Commission asserts that the expression 'a decision to award or the award of a public contract' used in Order 84A(4) of the RSC refers to decisions which may be challenged and that that provision makes no reference to earlier interim decisions taken by the contracting authority. In its judgment of 16 July 2004, the High Court took the view that that provision applies not only to the decision to award a contract or to the award of such a contract, but also to decisions taken by contracting authorities in respect of public procurement procedures.
- 46 In the Commission's view, the national legislation in question appears not to be in line with the fundamental principle of legal certainty and the requirement of effectiveness envisaged by Directive 89/665, which is an application of that principle, since tenderers are left in uncertainty as to their situation when they intend to bring an action against an award decision taken by a contracting authority in a two-stage procedure in which the final award decision is taken after a tenderer has been selected.
- 47 The Commission argues that it must be made clear to tenderers whether Order 84A(4) of the RSC applies not only to decisions to award contracts, but also to interim decisions taken by a contracting authority during the tendering procedure, including those concerning the selection of the preferred tenderer.
- 48 Ireland points out that Article 1 of Directive 89/665 requires Member States to ensure that there are effective legal remedies against all decisions taken by contracting authorities in public procurement procedures and not only against decisions to award contracts in those procedures. In Ireland's view, the Irish courts interpret and apply Order 84A(4) of the RSC in accordance with those requirements. The High Court's judgment of 16 July 2004 in particular states clearly that that provision allows proceedings to be brought against any decision taken by contracting authorities in a public procurement procedure, which is entirely consistent with Article 1 of Directive 89/665.
- 49 With regard to the date from which the period for challenging an interim decision by a contracting authority begins to run, Ireland observes that Directive 89/665 requires that it be possible for decisions taken by contracting authorities to be reviewed rapidly. An application can be examined expeditiously only if both parties to the dispute are obliged to act quickly in the relevant proceedings. That objective could not be attained if the parties were allowed to await formal notification of the award decision before bringing proceedings, even though they have all the elements of fact and law necessary for bringing such an action.
- 50 Ireland submits that, if a tenderer could simply await notification of a formal decision not to award it the contract in question, despite knowing that it was not going to be awarded the contract, as found by the High Court in the case which gave rise to its judgment of 16 July 2004, significant delay would ensue for the review of all decisions by contracting authorities.

– Findings of the Court

- 51 The Court has already held that Directive 89/665 does not preclude national legislation which provides that any application for review of a contracting authority's decision must be commenced within a period laid down to that effect and that any irregularity in the award procedure relied upon in support of such application must be raised within the same period, if it is not to be out of time, with the result that, when that period has passed, it is no longer possible to challenge such a decision or to raise such an irregularity, provided that the period in question is reasonable (Case C-241/06 *Lämmerzahl* [2007] ECR I-8415, paragraph 50 and case-law cited).
- 52 That case-law is based on the consideration that the full implementation of the objective sought by Directive 89/665 would be undermined if candidates and tenderers were allowed to invoke, at any stage of the award procedure, infringements of the rules of public procurement, thereby obliging the contracting authority to restart the entire procedure in order to correct such infringements (*Lämmerzahl*, paragraph 51).
- 53 On the other hand, national limitation periods, including the detailed rules for their application, should not in themselves be such as to render virtually impossible or excessively difficult the exercise of any rights which the person concerned derives from Community law (*Lämmerzahl*, paragraph 52).
- 54 Order 84A(4) of the RSC provides that 'an application for the review of a decision to award or the award of a public contract' must be made within a specified period.
- 55 However, as occurred in the dispute which gave rise to the High Court's judgment of 16 July 2004, the Irish courts may interpret that provision as applying not only to the final decision to award a public contract but also to interim decisions taken by a contracting authority during the course of that public procurement procedure. If the final decision to award a contract is taken after expiry of the period laid down for challenging the relevant interim decision, the possibility cannot be excluded that an interested candidate or tenderer might find itself out of time and thus prevented from bringing an action challenging the award of the contract in question.
- 56 According to the Court's settled case-law, the application of a national limitation period must not lead to the exercise of the right to review of decisions to award public contracts being deprived of its practical effectiveness (see, to that effect, Case C-470/99 *Universale-Bau and Others* [2002] ECR I-11617, paragraph 72; Case C-327/00 *Santex* [2003] ECR I-1877, paragraphs 51 and 57; and *Lämmerzahl*, paragraph 52).
- 57 As observed by the Advocate General in point 51 of her Opinion, only if it is clear beyond doubt from the national legislation that even preparatory acts or interim decisions of contracting authorities at issue in public procurement cases start the limitation period running can tenderers and candidates take the necessary precautions to have possible breaches of procurement law reviewed effectively within the meaning of Article 1(1) of Directive 89/665 and to avoid their challenges being statute-barred.
- 58 Accordingly, it is not compatible with the requirements of Article 1(1) of that directive if the scope of the period laid down in Order 84A(4) of the RSC is extended to cover the review of interim decisions taken by contracting authorities in public procurement procedures without that being clearly expressed in the wording thereof.
- 59 Ireland disagrees with this finding, contending that the application of such a period for challenging interim decisions corresponds to the objectives of Directive 89/665, in particular the requirement of rapid action.
- 60 It is true that Article 1(1) of Directive 89/665 requires Member States to ensure that decisions taken by contracting authorities may be reviewed effectively and as rapidly as possible. In order to attain the objective of rapidity pursued by that directive, Member States may impose limitation periods for actions in order to require traders to challenge promptly preliminary

measures or interim decisions taken in public procurement procedures (see, to that effect, *Universale-Bau and Others*, paragraphs 75 to 79; Case C-230/02 *Grossmann Air Service* [2004] ECR I-1829, paragraphs 30 and 36 to 39; and *Lämmerzahl*, paragraphs 50 and 51).

- 61 However, the objective of rapidity pursued by Directive 89/665 must be achieved in national law in compliance with the requirements of legal certainty. To that end, Member States have an obligation to create a legal situation that is sufficiently precise, clear and foreseeable to enable individuals to ascertain their rights and obligations (see, to that effect, Case C-361/88 *Commission v Germany* [1991] ECR I-2567, paragraph 24, and Case C-221/94 *Commission v Luxembourg* [1996] ECR I-5669, paragraph 22).
- 62 The abovementioned objective of rapidity does not permit Member States to disregard the principle of effectiveness, under which the detailed methods for the application of national limitation periods must not render impossible or excessively difficult the exercise of any rights which the person concerned derives from Community law, a principle which underlies the objective of ensuring effective review proceedings laid down in Article 1(1) of Directive 89/665.
- 63 The extension of the limitation period under Order 84A(4) of the RSC to interim decisions taken by contracting authorities in public procurement procedures in a manner which deprives the parties concerned of their right of review satisfies neither the requirements of legal certainty nor the objective of effective review. Interested parties must be informed of the application of limitation periods to interim decisions with sufficient clarity to enable them effectively to bring proceedings within the periods laid down. The failure to provide such information cannot be justified on grounds of procedural rapidity.
- 64 Ireland submits that the Irish courts interpret and apply Order 84A(4) of the RSC in conformity with the requirements of Directive 89/665. This argument refers to the significant role played by case-law in common-law countries such as Ireland.
- 65 It should be noted in this regard that, according to the Court's settled case-law, although the transposition of a directive into domestic law does not necessarily require the provisions of the directive to be reproduced in precisely the same words in a specific, express provision of national law and a general legal context may be sufficient, it is nevertheless necessary that that legal context be sufficiently clear and precise as to enable the parties concerned to be fully informed of their rights and, if necessary, avail themselves of those rights before the national courts (judgment of 29 October 2009 in Case C-474/08 *Commission v Belgium*, paragraph 19 and case-law cited).
- 66 Order 84A(4) of the RSC, however, does not satisfy those requirements inasmuch as it allows national courts to apply, by analogy, the limitation period which it provides for challenges to public contract award decisions to challenges to interim decisions taken by contracting authorities in the course of those procurement procedures, in respect of which no express provision was made by the legislature for that limitation period to apply. The resulting legal situation is not sufficiently clear and precise to exclude the risk that concerned candidates and tenderers may be deprived of their right to challenge decisions in public procurement matters handed down by a national court on the basis of its own interpretation of that provision.
- 67 It follows that the first part of the second head of claim is well founded.

The second part of the second head of claim

– Arguments of the parties

- 68 The Commission points out that Order 84A(4) of the RSC requires actions to be brought 'at the earliest opportunity and in any event within three months'. The Commission takes the view that that formulation leaves tenderers in uncertainty when they consider exercising their right

under Community law to bring proceedings against a decision of a contracting authority. Indeed, tenderers would discover what interpretation will be given to the formulation 'at the earliest opportunity' only after their action has been brought and the competent court has exercised its discretion in interpreting that provision. Such a situation runs counter to the principle of legal certainty.

69 That provision, it continues, also creates a further uncertainty as to the question of the cases in which the three-month limitation period will be applied, and as to that of the other cases in which that period will be shorter because it was possible to bring an action at an earlier opportunity.

70 The Commission accordingly submits that Order 84A(4) of the RSC lacks clarity and gives rise to legal uncertainty. The Commission considers that, in view of the obligation to respect the principle of legal certainty, the applicable period has to be a fixed one which can be interpreted in a clear and foreseeable manner by all tenderers.

71 Ireland replies that, to date, no Irish court has dismissed, as being out of time, any action challenging a decision of a contracting authority made in the course of a public contract award procedure which was brought within the three-month limitation period but not at the earliest opportunity. Ireland takes the view that any such interpretation could not be upheld, since the expression 'in any event' indicates that any action brought within three months will be within time. Moreover the High Court of Ireland has expressly held that, where appropriate, the three-month limitation period will be extended.

72 Ireland observes that Order 84A(4) of the RSC gives the Irish courts the discretion to extend the period within which proceedings must be brought. The grant of discretion to a court by a legislative provision is a legitimate option available to the Member States when regulating periods for bringing proceedings. The Member States are not obliged to establish immutable limitation periods.

– Findings of the Court

73 Since Directive 89/665 pursues an objective of rapid action, it is legitimate for a Member State, in implementing that directive, to require interested parties to be diligent in bringing actions for review.

74 However, the wording of Order 84A(4) of the RSC, which provides that all relevant applications 'shall be made at the earliest opportunity and in any event within three months' gives rise to uncertainty. The possibility cannot be ruled out that such a provision empowers national courts to dismiss an action as being out of time even before the expiry of the three-month period if those courts take the view that the application was not made 'at the earliest opportunity' within the terms of that provision.

75 It is not possible for parties concerned to predict what the limitation period will be if this is left to the discretion of the competent court. It follows that a national provision providing for such a period does not ensure effective transposition of Directive 89/665.

76 Ireland asserts, by way of reply to such an inference, that no Irish court has dismissed an action relating to public procurement as being out of time on the ground that it was not brought 'at the earliest opportunity'.

77 Suffice it to point out in this regard that, in order to determine whether a directive has been adequately transposed, it is not always necessary to establish the actual effects of the legislation transposing it into national law; the situation is different if the legislation itself harbours the insufficiencies of transposition (see, to that effect, Case C-392/96 *Commission v Ireland* [1999] ECR I-5901, paragraph 60).

78 Ireland explains that Order 84A(4) of the RSC confers discretion on the Irish courts to extend

the periods for bringing proceedings.

79 That provision provides for the application of the period laid down therein 'unless the Court considers that there is good reason for extending such period'.

80 Admittedly, such a provision in itself, independently of its context, must be recognised as a valid implementation of Directive 89/665. In a field such as public procurement, in which procedures can be complex and the facts may vary widely, the opportunity granted by the national legislature to national courts to extend, on grounds of fairness, the periods within which actions must be brought may be in the interests of the proper administration of justice.

81 However, the possibility for national courts to extend periods for bringing actions, as provided for in Order 84A(4) of the RSC, is not such as to compensate for the shortcomings in that provision, having regard to the clarity and precision which Directive 89/665 requires in respect of the system of limitation periods. Even if the candidate or tenderer concerned takes into account the possibility that periods may be extended, it will still not be able to predict with certainty which period will be accorded to it for the purpose of bringing proceedings, in view of the reference to the obligation to bring an action at the earliest opportunity.

82 Consequently, the second part of the second head of claim is well founded.

83 In the light of the foregoing, it must be held that,

- by reason of the fact that the NRA did not inform the unsuccessful tenderer of its decision to award the contract for the design, construction, financing and operation of the Dundalk Western Bypass, and
- by maintaining in force Order 84A(4) of the RSC, in so far as it gives rise to uncertainty as to which decision must be challenged through legal proceedings and as to how periods for bringing an action are to be determined,

Ireland has failed – as regards the first head of claim – to fulfil its obligations under Article 1(1) of Directive 89/665 and Article 8(2) of Directive 93/37 and – as regards the second head of claim – to fulfil its obligations under Article 1(1) of Directive 89/665.

### **Costs**

84 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 to be awarded against Ireland and the latter has been unsuccessful, Ireland must be ordered to pay the costs.

On those grounds, the Court (Third Chamber) hereby:

#### **1. Declares that:**

- **by reason of the fact that the National Roads Authority did not inform the unsuccessful tenderer of its decision to award the contract for the design, construction, financing and operation of the Dundalk Western Bypass, and**
- **by maintaining in force Order 84A(4) of the Rules of the Superior Courts, in the version resulting from Statutory Instrument N° 374 of 1998, in so far as it gives rise to uncertainty as to which decision must be challenged through legal proceedings and as to how periods for bringing an action are to be determined,**

**Ireland has failed – as regards the first head of claim – to fulfil its obligations under Article 1(1) of Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts, as amended by Council Directive 92/50/EEC of 18 June 1992, and Article 8(2) of Council Directive 93/37/EEC of 14 June 1993 concerning the coordination of procedures for the award of public works contracts, as amended by European Parliament and Council Directive 97/52/EC of 13 October 1997 and – as regards the second head of claim – to fulfil its obligations under Article 1(1) of Directive 89/665, as amended by Directive 92/50;**

**2. Orders Ireland to pay the costs.**

[Signatures]

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\* Language of the case: English.

