Reports of Cases

OPINION OF ADVOCATE GENERAL
KOKOTT
delivered on 18 April 2013 [1]

Case C-115/12 P

French Republic
v

European Commission

(Appeal — Structural fund — European Regional Development Fund (ERDF) — European Union structural assistance in Martinique, France — Reduction of the financial contribution — Article 2 of Directive 93/37/EEC — Public procurement — Coordination of procedures for the award of public works contracts — Direct subsidising of a works contract awarded by a private entity — Sports, recreation and leisure facilities — Renovation and extension work on a hotel complex run by private individuals)

I – Introduction

1. In what circumstances must construction projects of private individuals which are, to a considerable extent, subsidised or financed by public authorities be subject to a tendering procedure under European public procurement law? The Court is asked to state its position on this hitherto largely unclarified question in the present proceedings, which concern the use of money from one of the European structural funds.

2. The background to the dispute is a private construction project initiated in 2003 in Martinique, France, for the renovation and extension of a holiday complex run by a private company. The construction project was more than 50% financed by public money, including finance from the European Regional Development Fund (ERDF).

3. When it became apparent that the construction project had been implemented without previously being made subject to a tendering procedure under European public procurement law, the European Commission decided on 28 July 2010 by Decision C(2010) 5229 to cancel the ERDF funding for the project [2] ('the contested decision'). In so doing, it relied on the principle that European structural fund assistance may be granted only for projects which are in compliance with Community policies, including those relating to public contracts. Since then, France and the Commission have been in dispute as to whether public procurement law actually required a tendering procedure to be conducted in respect of the construction work for the renovation and extension of the private holiday complex.

1 — Original language: German.

2 — European Commission Decision C(2010) 5229 of 28 July 2010 concerning the cancellation of part of the contribution of the European Regional Development Fund (ERDF) under the single programming document in respect of objective 1 for Community structural assistance in the French region of Martinique.

4. Of relevance in this connection is whether the holiday complex concerned may be classified as a 'facility intended for sports, recreation and leisure' under public procurement law, as the provisions of public procurement law must be adhered to specifically in respect of such facilities where their construction is commissioned by private individuals, provided that the relevant project is subsidised directly by more than 50% by public authorities.

5. The question arises too whether tax relief may be regarded as a direct subsidy within the meaning of those provisions.

II – Legal framework

6. The legal framework for this case is defined by Directive 93/37/EEC,[3] Article 2 of which was drafted as follows:[4]

'1. Member States shall take the necessary measures to ensure that the contracting authorities comply or ensure compliance with this Directive where they subsidise directly by more than 50% a works contract awarded by an entity other than themselves.

2. Paragraph 1 shall concern only contracts covered by Class 50, Group 502, of the general industrial classification of economic activities within the European Communities (NACE) nomenclature and contracts relating to building work for hospitals, facilities intended for sports, recreation and leisure, school and university buildings and buildings used for administrative purposes.'

7. Reference should also be made to Article 1(a) of Directive 93/37, which was worded as follows:

'For the purpose of this Directive:

(a) "public works contracts" are contracts for pecuniary interest concluded in writing between a contractor and a contracting authority as defined in (b), which have as their object either the execution, or both the execution and design, of works … or a work defined in (c) below, or the execution … of a work corresponding to the requirements specified by the contracting authority'.

8. The provisions of Directive 93/37 are applicable to this case by virtue of a reference in Article 12 of Regulation (EC) No 1260/1999, which contains general provisions on the structural funds of the European Union ('the EU').[5] Under the heading 'Compatibility', that provision states as follows:

'Operations financed by the Funds or receiving assistance from the EIB or from another financial instrument shall be in conformity with the provisions of the Treaty, with instruments adopted under it and with Community policies and actions, including the rules on competition, on the award of public contracts, on environmental protection and improvement and on the elimination of inequalities and the promotion of equality between men and women.'

3 — 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). That directive has in the meantime been repealed and replaced by Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (OJ 2004 L 134, p. 114), which had to be transposed by 31 January 2006. However, Directive 93/37 is still applicable to this case, as the grant of ERDF financing for the construction project for the renovation and extension of the 'Les Boucaniers' holiday complex falls within its temporal scope.

4 — Article 8 of Directive 2004/18 now contains an essentially identical provision which, in addition to works contracts, is also applicable to service contracts, albeit in both cases only above certain financial thresholds.

5 — Council Regulation (EC) No 1260/1999 of 21 June 1999 laying down general provisions on the Structural Funds (OJ 1999 L 161, p. 1).

III – Background to the dispute

9. Société martiniquaise des villages de vacances (SMVV) runs the Club Méditerranée holiday complex 'Les Boucaniers' in Martinique, France. In 2003, SMVV decided to renovate and extend the complex. The value of the works was estimated at approximately EUR 49.98 million.

10. For this project, subsidies of some EUR 2.5 million and also tax relief of some EUR 16.69 million were approved by the Région de Martinique and the French State respectively.[6] By Decision C(2004) 4142 of 18 October 2004, the European Commission, for its part, fixed the ERDF financial contribution at EUR 12.46 million, which represents 24.93% of the total eligible costs of the project.

11. However, the Commission's grant of ERDF funds was contested by the European Court of Auditors following an audit carried out in 2007 on the ground that, contrary to Article 2 of Directive 93/37, no tendering procedure was conducted in respect of the construction work on the renovation and extension of the 'Les Boucaniers' holiday complex, although the project was financed by aid from public authorities to a total of 63.33%.

12. The Court of Auditors' complaints gave rise to a lengthy correspondence and finally resulted in the Commission deciding in the contested decision of 28 July 2010 to cancel in its entirety the ERDF financial contribution to the project for the renovation and extension of the 'Les Boucaniers' holiday complex. As that construction project had been subsidised as part of an overall programme for EU structural assistance in Martinique,[7] the Commission's decision resulted, technically speaking, in a corresponding reduction in the total extent of EU structural assistance in that region.

13. The action for annulment brought by France on 11 October 2010 against the contested decision was unsuccessful at first instance. In its judgment of 16 December 2011[8] ('the judgment under appeal'), the General Court dismissed France's action as unfounded and ordered it to pay the costs.

IV – Proceedings before the Court of Justice

14. By written pleading of 1 March 2012, the French Republic brought the present appeal against the judgment of the General Court. It claims that the Court should:

— set aside in its entirety the judgment under appeal; and

— itself give final judgment in the matter by annulling Commission Decision C(2010) 5229 of 28 July 2010 or refer the case back to the General Court.

15. The Commission, for its part, contends that the Court should:

— declare the second part of the first plea and the first part of the third plea inadmissible or, in the alternative, unfounded and dismiss the appeal; and

— order the appellant to pay the costs.

16. The appeal was examined before the Court of Justice on the basis of the written documents and, on 11 March 2013, at a hearing.

6 — This tax relief is based on Article 199 undecies B I of the French General Tax Code (Code général des impôts).

7 — By Decision C(2000) 3493 of 21 December 2000, the Commission had approved an ERDF contribution for the years 2000-2006 under the single programming document in respect of objective 1 for Community structural assistance in Martinique, France, of up to EUR 17.15 million.

8 — Case T-488/10 *France* v *Commission*.

V – Assessment of the appeal

17. In its appeal, France relies on a total of three pleas in law to challenge the judgment of the General Court, which, firstly, concern the concept of a direct subsidy and the concept of facilities intended for sports, recreation and leisure within the meaning of Article 2 of Directive 93/37 (first and third pleas in law) and, secondly, allege distortion of facts and an inadmissible retroactive improvement of the reasoning of the contested decision (second plea in law). I shall begin below by examining the second plea and then address the first and third pleas.

A – *Second plea: Alleged distortion of the contested decision and retroactive improvement of its reasoning*

18. By its second plea, France contests the second sentence of paragraph 43 of the judgment under appeal. In that passage of the judgment, the General Court finds that the Commission focused on the overall purpose of the holiday complex when it examined the project for the complete renovation of the 'Les Boucaniers' holiday complex in the contested decision. [9]

19. France complains that the General Court distorted the contested decision at that point and retroactively improved its reasoning. France considers that the Commission did not in fact focus in the contested decision on the purpose and function of the holiday complex, but only on the nature of the works carried out. In this regard, France refers in particular to recitals 31 and 32 of the contested decision.

20. It is settled case-law that, in proceedings for annulment, the EU judicature cannot under any circumstances substitute its own reasoning for that of the author of the contested act. [10] It also cannot distort the content of the contested act. [11]

21. Substantively, the allegation of distortion in relation to the contested decision and the allegation of retroactive improvement of the reasoning of that decision ultimately have the same implication in this case. It is alleged that the General Court 'read something into' the contested decision which was not there. The two allegations can therefore be assessed together.

22. It seems to me that the Commission did not adopt a particularly clear position in the contested decision. It is true that, as France has rightly pointed out, the individual construction works for the renovation and extension of the 'Les Boucaniers' holiday complex figure prominently in recitals 31 and 32 of the decision. At the same time, however, the project is also referred to in the contested decision as a 'single project' or an 'overall project' (recitals 28 and 31 of the contested decision).

9 — In the language of the case, paragraph 43 of the judgment under appeal reads as follows: 'Il convient de rappeler que, afin d'examiner si les marchés de travaux en cause portaient sur des travaux de bâtiment relatifs aux équipements sportifs, récréatifs et de loisirs au sens de l'article 2, paragraphe 2, de la directive 93/37, il y a lieu de se baser sur la vocation d'ensemble du club Les Boucaniers et non sur les travaux entrepris. À cet égard, il convient de relever que, en examinant, dans la décision attaquée, le projet consistant en une rénovation complète du club Les Boucaniers, la Commission a analysé l'applicabilité de l'article 2, paragraphe 2, de la directive 93/37 en ce sens.'

10 — See Case C-164/98 P *DIR International Film and Others* v *Commission* [2000] ECR I-447, paragraphs 38 and 49; Joined Cases C-442/03 P and C-471/03 P *P&O European Ferries (Vizcaya) and Diputación Foral de Vizcaya* v *Commission* [2006] ECR I-4845, paragraphs 60 and 67; Case C-487/06 P *British Aggregates* v *Commission* [2008] ECR I-10515, paragraph 141; and Case C-73/11 P *Frucona Košice* v *Commission* [2013] ECR, paragraph 89.

11 — According to settled case-law, the Court of Justice examines in appeal proceedings whether the General Court has distorted the clear sense of facts or evidence (see, for example, Case C-229/05 P *PKK and KNK* v *Council* [2007] ECR I-439, paragraphs 35 and 37; Case C-326/05 P *Industrias Químicas del Vallés* v *Commission* [2007] ECR I-6557, paragraph 57; and Joined Cases C-71/09 P, C-73/09 P and C-76/09 P *Comitato 'Venezia vuole vivere'* v *Commission* [2011] ECR I-4727, paragraphs 152 and 153.

23. In view of this, it cannot be ruled out that, in reaching its decision, the Commission, in addition to assessing the nature of the work carried out, also assessed the overall purpose and function of the 'Les Boucaniers' holiday complex. At any rate, the contested decision is open to interpretation in this regard, so that the General Court's interpretation of the decision cannot ultimately be regarded as a distortion of that decision [12] or a retroactive improvement of the reasoning of the decision.

24. It follows that the second plea must be rejected.

B – *First plea: The term 'direct subsidy' within the meaning of Article 2(1) of Directive 93/37*

25. By its first plea, France complains that the General Court misinterpreted the term 'direct subsidy' within the meaning of Article 2(1) of Directive 93/37.

26. The background to this complaint is that the assistance granted by the French State for the renovation and extension of the 'Les Boucaniers' holiday complex did not take the form of financial subsidies but of tax relief which, moreover (according to France), was accorded not to Club Méditerranée as the owner of the holiday complex or to SMVV as the developer, but to natural persons who, as partners in a private *société en nom collectif*, [13] had invested in that construction project. [14]

27. France disputes that such tax relief can be regarded as a 'direct subsidy' within the meaning of Article 2(1) of Directive 93/37, firstly, because it does not constitute a subsidy and, secondly, because it does not have the effect of a direct subsidy. It is appropriate to examine the second aspect first.

1. The concept of a 'direct' subsidy (second part of the first plea)

28. The second part of the first plea is concerned with the concept of a 'direct' subsidy within the meaning of Article 2(1) of Directive 93/37 and is specifically directed against paragraphs 36 and 37 of the judgment under appeal. France considers that the General Court erred in law by regarding the tax relief for the works contract as a direct subsidy although that relief was not accorded either to the developer or to the owner of the 'Les Boucaniers' holiday complex but to the partners of a private *société en nom collectif*.

a) Admissibility

29. The Commission considers this part of the first plea to be inadmissible because, in its view, it calls into question the General Court's appraisal of the facts and evidence and presents a new argument which France did not raise at first instance.

30. That objection is not convincing in my view.

12 — See, to this effect (in respect of a document which was open to a number of interpretations), Case C-260/09 P *Activision Blizzard Germany* v *Commission* [2011] ECR I-419, paragraph 54.

13 — The *société en nom collectif* (SNC) under French law is a commercial partnership in which the partners are personally liable in respect of the whole of their assets.

14 — The Commission, on the other hand, emphasises that the tax relief was granted to the *société en nom collectif* as such for the construction project at issue.

31. France's complaint is *not* directed at questioning the General Court's findings of fact regarding the identity of the beneficiary of the tax relief, especially as such findings were not made in any case in the judgment under appeal. Instead, France criticises, firstly, the General Court's interpretation of Article 2(1) of Directive 93/37 and, secondly, the classification of the tax relief actually granted as a 'direct' subsidy. Therefore, the General Court's legal characterisation of the facts will ultimately have to be examined since, according to settled case-law, the Court of Justice has jurisdiction to review such characterisation. [15]

32. Contrary to the view taken by the Commission, it is also irrelevant whether France had already submitted any argument specifically on the issue of 'direct' subsidy in the proceedings at first instance. It is common ground that the General Court dealt with that matter in paragraphs 36 and 37 of the judgment under appeal. These findings of the General Court must be open to review in the appeal proceedings. The case-law recognises that, in appeal proceedings, the Court of Justice is authorised to assess the legal findings on points which were discussed at first instance. [16]

33. It may be that France had not already argued at first instance that a direct subsidy was not granted to *the developer* or *the owner* of the holiday complex because the tax relief had been accorded to private partners of a *société en nom collectif*. However, it is sufficient to note in this regard that the parties are allowed to develop their argument in the course of the dispute provided that they do not alter the subject-matter of the dispute discussed before the General Court. [17] There is no risk of such alteration of the subject-matter occurring in this case, however, as the matter of the direct subsidy as such has already been discussed at first instance.

34. The second part of the first plea is therefore admissible.

b) Substance

35. However, on the merits France's argument is not sound.

36. The very wording of Article 2(1) of Directive 93/37 shows that the existence of a 'direct subsidy' does not depend on *which persons* are granted aid by a public authority. It is sufficient for the application of Article 2(1) of Directive 93/37 that the *works contract* which is awarded by an entity other than a contracting authority is subsidised directly by more than 50% by one or more contracting authorities. In other words, the concept of a 'direct subsidy' is not person-related but object-related.

37. France's particularly narrow interpretation of the concept of a 'direct' subsidy would make it all too easy to circumvent Article 2 of Directive 93/37. A contracting authority would be able to evade its obligations under the directive in that, although it would not be able to grant subsidies to the developer or owner of a property in respect of the relevant works contract, it would be able to grant such subsidies to persons who are economically connected to them.

38. Therefore, the General Court quite rightly focused in paragraphs 36 and 37 of the judgment under appeal on whether *the project* benefited from a direct subsidy within the meaning of Article 2 of Directive 93/37 and not on whether the subsidy was granted specifically to the developer or owner of the 'Les Boucaniers' holiday complex.

15 — See Case C-136/92 P *Commission* v *Brazzelli Lualdi and Others* [1994] ECR I-1981, paragraph 49; Case C-167/04 P *JCB Service* v *Commission* [2006] ECR I-8935, paragraph 106; Case C-440/07 P *Commission* v *Schneider Electric* [2009] ECR I-6413, paragraph 191; and Case C-337/09 P *Council* v *Zhejiang Xinan Chemical Industrial Group* [2012] ECR, paragraph 55.

16 — *Commission* v *Brazzelli Lualdi and Others*, cited in footnote 15, paragraph 59; Case C-295/07 P *Commission* v *Département du Loiret* [2008] ECR I-9363, paragraph 95; and Case C-548/09 P *Bank Melli Iran* v *Council* [2011] ECR I-11381, paragraph 122.

17 — Case C-76/93 P *Scaramuzza* v *Commission* [1994] ECR I-5173, paragraph 18; *PKK and KNK* v *Council*, cited in footnote 11, paragraph 64; Case C-485/08 P *Gualtieri* v *Commission* [2010] ECR I-3009, paragraph 37; and Case C-322/09 P *NDSHT* v *Commission* [2010] ECR I-11911, paragraph 41.

c) Interim conclusion

39. Therefore, the second part of the first plea is admissible but unfounded.

2. The term ‘subsidy’ (first part of the first plea)

40. The first part of the first plea is concerned with the term ‘subsidy’ within the meaning of Article 2(1) of Directive 93/37 and is specifically directed against paragraphs 24 to 35 of the judgment under appeal. France considers that tax relief cannot be regarded as a subsidy under that provision.

41. The term ‘subsidy’ is not further defined in Directive 93/37. Like many other imprecise legal concepts, this term can vary in meaning depending on which area of EU law is concerned. Thus, in the provisions on protection of the European internal market from subsidised imports from third countries, the term ‘subsidy’ expressly includes tax relief. [18] In competition law, on the other hand, tax relief is covered by the broad concept of State aid, [19] but not by the narrower concept of a subsidy; [20] in competition law, the latter term merely denotes direct subsidies.

42. Thus, in order to give effect to Directive 93/37, the meaning of the term ‘subsidy’ employed in it must be determined independently by way of interpretation.

43. Undoubtedly, both the aims and the regulatory context of Article 2 of Directive 93/37 can, in themselves, support a broad interpretation of the term ‘subsidy’, which need not necessarily be limited to direct subsidies by public authorities but may also cover other aid measures such as the tax relief in question here, as the General Court rightly stated in its judgment. [21]

44. However, the interpretation of Article 2 of Directive 93/37 cannot be based only on the aims and regulatory context of that provision but must also take into account its drafting history. In my view, the General Court drew the wrong conclusions specifically from the drafting history in this case.

45. The provision contained in Article 2 of Directive 93/37 first appeared in European law on public works contracts as Article 1a of Directive 71/305/EEC [22] as amended by Directive 89/440/EEC. [23] [24]

18 — Article 3 of Council Regulation (EC) No 597/2009 of 11 June 2009 on protection against subsidised imports from countries not members of the European Community (OJ 2009 L 188, p. 93).

19 — Thus, it was already made clear in Case 173/73 *Italy* v *Commission* [1974] ECR 709, paragraph 13, that a measure is not excluded from the ambit of Article 107 TFEU (formerly Article 92 of the EEC Treaty) merely because of its alleged fiscal nature; see also Case C-169/08 *Presidente del Consiglio dei Ministri* [2009] ECR I-10821, paragraphs 58 and 66.

20 — That the concept of a subsidy is narrower than the concept of aid is clear, inter alia, from Case 30/59 *De Gezamenlijke Steenkolenmijnen in Limburg* v *High Authority* [1961] ECR 1, 19; Case C-276/02 *Spain* v *Commission* [2004] ECR I-8091, paragraph 24; and Case C-279/08 P *Commission* v *Netherlands* [2011] ECR I-7671, paragraph 86.

21 — See, in particular, paragraphs 32 and 33 of the judgment under appeal.

22 — 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).

23 — Council Directive 89/440/EEC of 18 July 1989 amending Directive 71/305/EEC concerning coordination of procedures for the award of public works contracts (OJ 1989 L 210, p. 1).

24 — The judgment under appeal incorrectly refers to Article 1a of Directive 89/440 whereas it should, in fact, refer to Article 1a of Directive 71/305 as amended by Directive 89/440.

46. It should be noted in connection with Article 1a of Directive 71/305 that both the Commission and the European Parliament had originally favoured a very broad wording which did not cover only direct subsidies. Thus, the Commission proposed that Article 1a should cover all forms of direct or indirect financing of works contracts.[25] The position on Article 1a adopted by the Parliament at first reading was also based on this very broad concept of financing. That position even contained a definition of the term 'financing' which, besides public subsidies, expressly included the granting of tax concessions.[26]

47. On the other hand, the version of Article 1a of Directive 71/305 ultimately adopted by the Council no longer refers to the financing of works contracts in general but merely mentions direct subsidising of such contracts by the contracting authorities.

48. Therefore, the Council, as the Community legislature at the time, contrary to the Commission's proposal and to the position adopted at first reading by the Parliament, decided on a narrow formulation in Article 1a of Directive 71/305 which avoids the broad concept of 'financing' and merely specifies the direct subsidising by more than 50% of works contracts by contracting authorities.

49. The same applies to the joint statement by the Council and the Commission which was added to the Council minutes when Article 1a of Directive 71/305 was adopted. Although it is confirmed in that statement that 'the different forms of direct subsidies' were to be covered by Article 1a,[27] there is no indication in that statement that, in addition to direct subsidies, other concessions such as tax relief were to be included in the scope of Article 1a or that such tax relief should be regarded as a direct subsidy as the Commission maintains in the proceedings before the Court of Justice.

50. Against this background, the legal opinion expressed by the General Court[28] and the Commission that the reference to a direct subsidy in Article 1a of Directive 71/305 is 'clearly and solely' intended to exclude indirect subsidies, but not otherwise to limit the scope of that provision, is not very convincing. It does not explain why the Council specifically confined the wording of that provision to subsidies and did not wish to retain the very much more general concept of financing originally employed.

51. In view of this drafting history, the concept of a direct subsidy in Article 2 of Directive 93/37, as the identical successor provision to Article 1a of Directive 71/305, can hardly be interpreted so broadly as even to include tax relief. There is no evidence that the legislature intended that the concept of a subsidy be interpreted so broadly in that provision.

52. The General Court therefore erred in law when, in spite of the drafting history of Article 2 of Directive 93/37 outlined above, it even included tax relief in the scope of that provision.

25 — In the Commission's Proposal for a Council Directive amending Directive 71/305/EEC concerning the coordination of procedures for the award of public works contracts (COM(86) 679 final), the provision was still numbered as Article 2a and stated as follows in paragraph 1: 'Member States shall take the necessary steps to ensure compliance with the provisions of this Directive where investments in respect of works contracts awarded by entities other than those defined in Article 1(b) are financed totally or in part, directly or indirectly, from public funds.'

26 — At first reading, the Parliament approved the following wording, which at that time was still to be inserted as Article 2a of Directive 71/305 (OJ 1988 C 167, p. 65): 'Member States shall take the necessary steps to ensure compliance with the provisions of this Directive where the contracting authorities … provide majority financing for investments in respect of works contracts awarded by entities other than those defined in Article 1(b). "Financing" shall be taken to mean: … the payment of public subsidies, … interest subsidies on loans granted, … the granting of tax concessions, … the granting of property concessions.'

27 — The precise wording of the statement for entry in the Council minutes is as follows: 'The Council and the Commission confirm the need to ensure that in applying Article 1a the different forms of direct subsidies, including Community ones, for the works contracts in question are, as far as possible, taken into account.'

28 — Judgment under appeal, end of paragraph 35.

53. It follows that the first part of the first plea should be upheld. This is itself sufficient to justify setting aside the judgment under appeal. If, in fact, the tax relief granted by the French State for the renovation and extension of the 'Les Boucaniers' holiday complex is not taken into account, then the proportion of direct subsidy by public authorities for that construction project falls below the 50% threshold established in Article 2 of Directive 93/37. [29]

C – *Third plea: Facilities intended for sports, recreation and leisure within the meaning of Article 2(2) of Directive 93/37*

54. The third plea put forward by France is concerned with the term 'facilities intended for sports, recreation and leisure' within the meaning of Article 2(2) of Directive 93/37. France complains that the General Court adopted an excessively broad interpretation of that term and, in so doing, failed to take into consideration that the provision concerns only works contracts which, firstly, serve the collective needs of users of sports, recreation and leisure facilities (see immediately below, section 1) and, secondly, are of direct economic interest to the contracting authorities (see below, section 2).

1. Relevance of the collective needs of users of sports, recreation and leisure facilities (first part of the third plea)

55. The first part of the third plea contests paragraphs 56 to 63 of the judgment under appeal. France complains that the General Court failed to recognise that only those facilities which are to serve the collective needs of their users can be regarded as facilities intended for sports, recreation and leisure within the meaning of Article 2(2) of Directive 93/37.

a) Admissibility

56. The Commission considers this first part of the third plea to be inadmissible because France did not base its argument in the proceedings at first instance on the 'collective needs of the users' of sports, recreation and leisure facilities but relied on the criterion of the 'traditional needs of the contracting authorities'.

57. That objection is unfounded. It is true that France did not use the criterion of the 'collective needs of the users' at first instance (at any rate in the written procedure) but originally argued that Article 2(2) of Directive 93/37 relates to contracts which, by their very nature, fall within the traditional needs of the contracting authorities. However, the present reference to the collective needs of the users is merely a development of France's argument which does not alter the subject-matter of the dispute and is therefore admissible in the appeal proceedings. [30]

58. The first part of the third plea is therefore admissible.

b) Substance

59. As regards the first part of the third plea, the parties are essentially in dispute as to whether the term 'facilities intended for sports, recreation and leisure' in Article 2(2) of Directive 93/37 should be interpreted narrowly or broadly.

29 — See above, points 9 to 11 of this Opinion.

30 — See in this regard the case-law cited in footnote 17 above.

60. In the judgment under appeal, the General Court decided on a broad interpretation, which it also described as a 'functional interpretation'.[31] According to that interpretation, even works contracts relating to private holiday complexes such as Club Méditerranée's 'Les Boucaniers' fall within the scope of public procurement law provided that they are subsidised directly by more than 50% by the contracting authorities.

61. That interpretation of the term 'facilities intended for sports, recreation and leisure' is not convincing.

i) The need for a restrictive interpretation of the term 'facilities intended for sports, recreation and leisure'

62. Although, at first sight, the wording of Article 2(2) of Directive 93/37 may also be applicable to private holiday complexes such as the one at issue here, this is contrary both to the aims of Article 2 of Directive 93/37 and to the context in which that provision brings sports, recreation and leisure facilities within the scope of the directive.

63. Article 2 of Directive 93/37 does not provide for a general extension of public procurement law to all private construction projects where they are more than 50% subsidised from public funds.

64. On the contrary, Article 2 of Directive 93/37 is merely intended to help to prevent the rules applicable to public contracts and the aims pursued by them from being evaded in *certain fields*.[32] Therefore, Article 2 includes private works contracts within the scope of the directive in specifically those fields, in so far as the projects are directly subsidised by more than 50% by contracting authorities. The fact that the provision is not capable of generalisation but is an exhaustive list is indicated not least by the use of the wording 'shall concern only' in Article 2(2) of Directive 93/37.

65. Furthermore, a comparison with the other fields mentioned in Article 2(2) of Directive 93/37 shows that the contracts in question are related only to transport infrastructure[33] or to works which are either to be made available to the public at large (schools, universities, hospitals) or are intended to be used by the contracting authorities themselves (administrative buildings).

66. In view of the above, the term 'facilities intended for sports, recreation and leisure' in Article 2(2) of Directive 93/37 must be interpreted restrictively, in the manner already adopted by the Court of Justice in respect of other provisions of European public procurement law.[34] Contrary to the view of the Commission, that does not in any way amount to 'reading into' Article 2(2) of Directive 93/37 an additional criterion which was not laid down by the EU legislature. Rather, only a restrictive interpretation of the term 'facilities intended for sports, recreation and leisure' reflects the aim of that provision and the regulatory context in which that term is used in Directive 93/37 by the legislature. France has rightly referred to this fact.

31 — Judgment under appeal, in particular the end of paragraph 30 and paragraph 59.

32 — Opinion of Advocate General Léger in Case C-399/98 *Ordine degli Architetti delle Province di Milano e Lodi and Others* [2001] ECR I-5409, point 106; see also paragraph 30 of the judgment under appeal.

33 — These are the contracts within the meaning of Class 50, Group 502, of the 'general industrial classification of economic activities in the European Communities' (NACE) to which Article 2(2) of Directive 93/37 refers.

34 — See, for example, the limitation applied in settled case-law of the term 'public contract' so as to exclude quasi-in-house operations, dating back to the judgment in Case C-107/98 *Teckal* [1999] ECR I-8121, paragraph 50, second sentence.

ii) Criteria for a restrictive interpretation of the term 'facilities intended for sports, recreation and leisure'

67. Although France is correct in its view that the term 'facilities intended for sports, recreation and leisure' in Article 2(2) of Directive 93/37 needs to be interpreted restrictively, I am not convinced that the criteria proposed by that Member State provide an appropriate standard for such an interpretation.

68. The criterion of 'meeting the collective needs of the users' of sports, recreation and leisure facilities on which France relies in these proceedings seems too vague to be able to provide an appropriate standard for the interpretation and application of Article 2(2) of Directive 93/37. Moreover, most of the facilities mentioned in that provision (schools, universities, hospitals, but also sports, recreation and leisure facilities) are (at any rate, also) normally intended to meet the individual needs of their users. [35] Ultimately, it is less important whether 'individual' or 'collective' interests of the users are met, but more important whether the execution of the works in question is in the public interest.

69. The criterion of the 'traditional needs of the contracting authorities' proposed by France at first instance is, in my view, no more suitable. That criterion is too exclusively geared to the traditional duties of public entities and disregards the fact that those duties may change and be extended over time. An appropriate interpretation of Article 2(2) of Directive 93/37 must also take that aspect into account.

70. I therefore propose that Article 2(2) of Directive 93/37 must be understood as covering only private works contracts which are subsidised by contracting authorities in order to fulfil their duty to *provide services of general interest*. Provision of services of general interest is a common concept in EU law, [36] which is also sufficiently open to take account, firstly, of the different needs of the individual Member States and their many local authorities and, secondly, of more recent developments in the duties of public entities. This may also help to ensure consistency between public procurement law and European competition law.

71. Even though neither France nor the Commission has specifically advocated the criterion of provision of services of general interest in this case, this does not prevent the Court of Justice from basing its interpretation and application of Article 2(2) of Directive 93/37 on precisely that criterion, since the Court is not 'the mouthpiece of the parties'. [37] Accordingly, it cannot be obliged to confine itself to the arguments put forward by the parties in support of their claims, or else it might be forced, in some circumstances, to base its decision on erroneous legal considerations. [38]

72. If Article 2(2) of Directive 93/37 is interpreted as covering *not all* sports, recreation and leisure facilities but only those which serve the general interest (such as publicly accessible gardens, sports stadia, libraries and museums), the General Court has erred in law in this case.

73. The first part of the third plea is therefore well founded.

35 — The use of a hospital depends on the state of health of the respective user and is therefore very much an individual matter. Similarly, the use of educational facilities depends entirely or in part on the particular capabilities and preferences of each individual.

36 — See, for example, the Communication from the Commission 'Services of general interest in Europe' (OJ 2001 C 17, p. 4) and the report 'Services of general interest' which the Commission submitted to the Laeken European Council (COM(2001) 598 final).

37 — See the Opinion of Advocate General Léger in Case C-252/96 P *Parliament* v *Gutiérrez de Quijano y Lloréns* [1998] ECR I-7421, point 36.

38 — See, to this effect, the order of 27 September 2004 in Case C-470/02 P *UER* v *M6 and Others*, paragraph 69, and Joined Cases C-514/07 P, C-528/07 P and C-532/07 P *Sweden* v *API and Commission* [2010] ECR I-8533, paragraph 65.

2. Direct economic interest to the contracting authority (second part of the third plea)

74. By the second part of the third plea, France specifically objects to paragraph 64 of the judgment under appeal. France considers that the General Court erred in law in holding that the term 'works contracts' for the purposes of Article 2 of Directive 93/37 should be interpreted independently of the term 'public works contracts' within the meaning of Article 1(a) of that directive. In France's view, both Article 1(a) and Article 2 of Directive 93/37 relate only to works contracts which are of direct economic interest to the contracting authority.

75. The arguments submitted by France are convincing.

76. Works contracts within the meaning of Article 2 of Directive 93/37 differ from those provided for in Article 1(a) of that directive only in so far as they are awarded not by *contracting authorities* but by *entities other than themselves* (particularly private undertakings) and are directly subsidised by more than 50% by contracting authorities.

77. Moreover, on the basis of its wording alone, Article 2 of Directive 93/37 is linked by the use of the term 'works contracts' to the definition of the concept which Article 1(a) establishes for the whole directive and on which the material scope of that directive fundamentally depends.

78. The aim of Article 2 of Directive 93/37 also supports an interpretation of the concept of works contract which is based on the general definition in Article 1(a) of the directive. Article 2 of the directive is intended to prevent the provisions of European public procurement law from being evaded through the involvement of private persons.[39] Consequently, Article 2 can bring no other works contracts within the scope of the directive than those which must also be subject to a tendering procedure where they are awarded by a contracting authority itself instead of by a private person.

79. Thus, if in the normal case of Article 1(a) of Directive 93/37 a works contract exists only where the services provided are of direct economic interest to the contracting authority,[40] this applies all the more in the special case of Article 2 of Directive 93/37. The construction services provided under that article can likewise be included in the scope of Directive 93/37 only where the contracting authorities which subsidise those services directly by more than 50% have a direct economic interest in them.

80. As the Court of Justice has stated, a direct economic interest may exist in particular where it is provided that the public authority is to become the owner of, or is to hold the legal right over the use of, the works to be constructed or where it is to enjoy economic advantages or assume economic risks associated with the future use of the works.[41] This cannot be considered to be so in a case like the present one, where a private construction project merely received financial assistance (in the form of structural aid) from public authorities.

81. The mere fact that a private construction project may have a positive impact on the general economic development of a region, as may be the case with the renovation and extension of a private holiday complex, is not sufficient to establish a direct economic interest on the part of the public entities which have directly subsidised that project. Those public investors have, at most, an *indirect* economic interest in the construction services provided.

39 — See above, point 64 of this Opinion.

40 — See Case C-451/08 *Helmut Müller* [2010] ECR I-2673, paragraphs 49, 54, 57 and 58, and Case C-271/08 *Commission* v *Germany* [2010] ECR I-7091, paragraph 75, which dealt with the successor legislation to Directive 93/37 in Directive 2004/18.

41 — See in this regard *Helmut Müller*, cited in footnote 40, paragraphs 50 to 52. The background to the criterion of direct economic interest was examined recently by Advocate General Wathelet in his Opinion in Case C-576/10 *Commission* v *Netherlands*, pending before the Court, points 108 to 113; see also the Opinion of Advocate General Mengozzi in *Helmut Müller*, cited in footnote 40, points 46 to 62.

82. In this respect, too, therefore, the General Court erred in law in its interpretation and application of Article 2(2) of Directive 93/37. Consequently, the second part of the third plea is also well founded.

3. Concluding remark on the third plea

83. The Commission contends in respect of both parts of the third plea that a broad interpretation of Article 2(2) of Directive 93/37 such as the one adopted by the General Court helps to ensure that public funds are awarded impartially.[42]

84. Admittedly, that is also one of the aims pursued by European public procurement legislation. However, consideration of that aim cannot result in a broad interpretation of Article 2 of Directive 93/37 which is inconsistent with the general scheme of the directive. The legislature decided to achieve that aim in such a manner that not all, but only certain, private construction projects are subject to the provisions of Directive 93/37.

85. It should also be remembered that the prohibition of discrimination is already incorporated in the fundamental freedoms of the European internal market (namely in the freedom of establishment and the freedom to provide services), a prohibition which also implies an obligation of transparency.[43] Those principles prevent contracting authorities even outside the scope of the public procurement directives from subsidising or financing private works contracts with public funds in a non-transparent or discriminatory manner. A broad interpretation of Article 2(2) of Directive 93/37 is not required for this purpose.

D – *Summary*

86. Since the first part of the first plea and both parts of the third plea can be upheld, the judgment under appeal must be set aside.

VI – Decision on the action at first instance

87. Under the first paragraph of Article 61 of its Statute, the Court of Justice may itself give final judgment in the matter, where the state of the proceedings so permits, or refer the case back to the General Court for judgment.

88. In the present case the General Court thoroughly examined in its judgment the pleas in law raised by France in the proceedings at first instance. During the proceedings before the General Court and in the appeal proceedings before the Court of Justice, the parties also had an opportunity to exchange views on all aspects of relevance to the decision in the case. The facts do not need any further clarification. The state of proceedings is therefore such that judgment can be delivered.

89. If Article 2 of Directive 93/37 is interpreted and applied as I propose above in respect of the first and third pleas,[44] the action for annulment brought by France is well founded, since, firstly, the private 'Les Boucaniers' holiday complex was not subsidised directly by more than 50% if one disregards the tax relief granted by the French State and, secondly, that holiday complex cannot be regarded as a

42 — The Commission refers to paragraph 31 of the judgment under appeal.

43 — Case C-324/98 *Telaustria and Telefonadress* [2000] ECR I-10745, paragraphs 60 to 62; Case C-231/03 *Coname* [2005] ECR I-7287, paragraphs 16 and 17; and Case C-91/08 *Wall* [2010] ECR I-2815, paragraph 68.

44 — See above, points 54 to 82 of this Opinion.

sports, recreation or leisure facility within the meaning of that provision. Even if one assumes that the local inhabitants of Martinique also sporadically use the leisure facilities of the holiday complex (as day guests on payment of a fee), this does not alter its character as a hotel complex which serves purely private interests and provides no services of general interest.

90. Consequently, the contested Commission decision must be annulled (first paragraph of Article 264 TFEU).

VII – Costs

91. Under Article 184(2) of the Rules of Procedure of the Court of Justice, where the appeal is well founded and the Court of Justice itself gives final judgment in the case, it is to make a decision as to costs.[45]

92. Under Article 138(1), in conjunction with Article 184(1), of the Rules of Procedure of the Court of Justice, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings.

93. In the action for annulment that it brought at first instance, France applied for costs to be awarded against the Commission. As the Commission has been unsuccessful, it must be ordered to pay the costs of the proceedings at first instance.

94. In the appeal proceedings, on the other hand, France has not applied for costs. It is therefore fair, in my view, that each party should bear its own costs.

VIII – Conclusion

95. In the light of the foregoing considerations, I propose that the Court of Justice should:

(1) Set aside the judgment of the General Court of the European Union of 16 December 2011 in Case T-488/10 *France* v *Commission*;

(2) Annul Decision C(2010) 5229 of the European Commission of 28 July 2010;

(3) Order the European Commission to pay the costs of the proceedings at first instance, and, for the remainder, order the parties to bear their own costs.

45 — Pursuant to the general principle that new procedural rules apply to all proceedings pending at the time when they enter into force (settled case-law, see, for example, Joined Cases 212/80 to 217/80 *Meridionale Industria Salumi and Others* [1981] ECR 2735, paragraph 9), the decision on costs in the present case is based on the Rules of Procedure of the Court of Justice of 25 September 2012, which entered into force on 1 November 2012 (see also, to this effect, Case C-417/11 P *Council* v *Bamba* [2012] ECR, paragraphs 91 and 92). There is, however, no substantive difference from Article 69(2), in conjunction with Article 118 and Article 122(1), of the Rules of Procedure of the Court of Justice of 19 June 1991.