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Order of the Court (Fourth Chamber) of 17 July 1998.

Société Anonyme de Traverses en Béton Armé (Sateba) v Commission of the European Communities.

Appeal - Public supply contracts - Decision to take no further action on a complaint concerning the conduct of the contracting authority.

Case C-422/97 P.

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1 Approximation of laws - Public procurement procedures in the water, energy, transport and telecommunications sectors - Directive 93/38 - Complaint by a tenderer alleging that the conduct of the contracting entity infringes the directive and restricts competition - Examination by the Commission under the procedure applicable to a failure by a Member State to fulfil its obligations - Whether permissible - Commission's power to take action upon its own initiative under the competition rules - Not relevant

(EC Treaty, Art. 169; Council Regulation No 17, Art. 3(1); Council Directive 93/38)

2 Appeals - Pleas in law - Plea put forward for the first time in the appeal - Inadmissible

(EC Statute of the Court of Justice, Art. 51)

3 Approximation of laws - Public procurement procedures in the water, energy, transport and telecommunications sectors - Directive 93/38 - Acts of the contracting entities - Acts imputable to the Member States - Applicability of the procedure for a declaration of failure to fulfil obligations

(EC Treaty, Art. 169; Council Directive 93/38)

4 Actions for failure to fulfil obligations - Procedure - Independent of the competition procedure

(EC Treaty, Art. 169; Council Regulation No 17)

5 Actions for failure to fulfil obligations - Commission's right of action - Exercise of its discretion - Procedural position of parties who have submitted a complaint different from that in competition matters

(EC Treaty, Art. 169; Council Regulation No 17)

1 In the case of a complaint submitted to the Commission by a tenderer for a public contract falling within the scope of Directive 93/38, criticising the conduct of the contracting entity, the mere fact that reference is made to a restriction of competition is not sufficient to indicate an infringement of the competition rules in Article 86 of the Treaty when such a restriction is mentioned in the context of infringement of the rules in that directive, but can legitimately be interpreted as intended to supplement that allegation. The fact that the Commission may take action upon its own initiative, pursuant to Article 3(1) of Regulation No 17, in order to examine a possible infringement of the competition rules contained in the Treaty cannot alter that conclusion.

2 A plea in law put forward for the first time in the appeal before the Court of Justice must be rejected as inadmissible. To allow a party to put forward for the first time before the Court of Justice a plea in law which it has not raised before the Court of First Instance would be to allow it to bring before the Court of Justice, whose jurisdiction in appeals is limited, a case of wider ambit than that which came before the Court of First Instance. In an appeal, the jurisdiction of the Court of Justice is thus confined to review of the findings of law on the pleas argued before the Court of First Instance.

3 It follows from the application of the Community rules on public procurement, in this case those covered by Directive 93/38, that acts of contracting entities are imputable to the Member States to which those entities belong and may therefore be condemned in the context of the infringement procedure established by Article 169 of the Treaty.

4 The procedure under Regulation No 17 in the field of competition is independent of the procedure based on Article 169 of the Treaty for a finding that the conduct of a Member State infringes Community law and for termination of that conduct. The two procedures serve different purposes and are governed by different rules, so that the initiation of a procedure under Article 169 of the Treaty cannot automatically entail the adoption of a decision on the basis of Regulation No 17. It follows that a decision by the Commission to take no further action in the context of a procedure for a declaration of failure to fulfil obligations relates exclusively to that procedure and does not constitute an implied rejection of a complaint submitted under Regulation No 17.

5 The procedural position of parties who have submitted a complaint to the Commission is fundamentally different in the case of a procedure under Article 169 of the Treaty from their position in the case of a proceeding under Regulation No 17 in the field of competition. As regards the former, the Commission is not bound to initiate the procedure but has a discretion which excludes the right for individuals to require it to adopt a specific position. Consequently it is not open to persons who have lodged a complaint in the case of a procedure under Article 169 of the Treaty to bring an action before the Community judicature against a decision to take no further action on their complaint; nor do they have any procedural rights, comparable to those they may have in the case of a procedure under Regulation No 17, enabling them to require the Commission to inform them and to grant them a hearing.