

Case C-425/12 Portgás – Sociedade de Produção e Distribuição de Gás SA v Ministério da Agricultura, do Mar, do Ambiente e do Ordenamento do Território, Judgment of 12 Dec 2013

Facts: The applicant company was an exclusive holder of a public service concession for the supply of gas meters and brought an action for annulment of decision seeking recovery of financial assistance granted to it. It was alleged that Portgas had failed to comply with EU laws on public procurement, and so recovery was sought.

Held: The Member State was allowed to rely on an unimplemented directive against an emanation of a state. As long as EU law provisions were unconditional and sufficiently precise, they could be relied on against the State regardless of capacity in which the State is acting. The provisions of a directive could be relied on against a body, whatever its legal form, which had been given responsibility for providing a public-interest service under the control of the State. That body should have, for that purpose, special powers, beyond those which normally result from rules applicable in private relations. In the absence of control by a public authority and special powers, the mere fact that a private party came within the scope of the directive did not mean that the directive could be relied on against that party.

There was no evidence to determine if public service provided were controlled by State authorities or even if Portgas had special powers – the mere fact that it had special and exclusive rights did not make these powers special. Assuming Portgas was a state body, it should be allowed to rely on the Directive provisions against another state body because it would be contradictory to deny a State body the right to ensure compliance with a Directive provision with which itself should also comply, it would permit a MS to take advantage of its own failure to comply with EU law if compliance could not be ensured by State authorities and it would make compliance with the Directive dependent on the nature of the party bringing the claim.

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