Master's Program 2007/2008

Public Procurement

Compendium

Peter Gjørtler

Public Procurement

Introduction

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- Procurement principles of the Internal Market
- Presentation of the Procurement directives
- Presentation of the Remedies directives

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- Open, restricted and negotiated procedures
- Competitive dialogue and dynamic purchasing
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Reading: Trepte chapter 6

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Practical aspects of procurement

Session no. 8

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Practical aspects of procurement

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- Criteria for preselection

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- Case C-234/03, Contse, European Court reports 2005, page i-9315 …….. p. 089
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Session no. 15

9-11, Friday 18 January 2008: Lecture

- Presentation of problem
- Deadline for submission
- Final questions and answers

Deadline

12.00, Friday 1 February 2008

Submission of written pleadings

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Judgment of the Court (First Chamber)
of 10 November 2005
Commission of the European Communities v Republic of Austria. Failure of a Member State to fulfil obligations - Articles 8, 11(1) and 15(2) of Directive 92/50/EEC - Procedure for the award of public service contracts - Contract relating to waste disposal - Absence of call for tenders. Case C-29/04.

In Case C-29/04,

ACTION under Article 226 EC for failure to fulfil obligations, brought on 28 January 2004,

Commission of the European Communities, represented by K. Wiedner, acting as Agent, with an address for service in Luxembourg,

applicant,

v

Republic of Austria, represented by M. Fruhmann, acting as Agent,

defendant,

THE COURT (First Chamber),

composed of P. Jann, President of the Chamber, K. Schiemann (Rapporteur), J.N. Cunha Rodrigues, K. Lenaerts and M. Ilei, Judges,

Advocate General: L.A. Geelhoed,

Registrar: R. Grass,

having regard to the written procedure,

after hearing the Opinion of the Advocate General at the sitting on 21 April 2005,

gives the following

Judgment

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

1. Declares that, in that the contract for the disposal of the town of Mödling's waste was entered into without complying with the procedural and advertising rules laid down by Article 8, in conjunction with Articles 11(1) and 15(2) of Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts, the Republic of Austria has failed to fulfil its obligations under that directive;

2. Orders the Republic of Austria to pay the costs.

1. By its application, the Commission of the European Communities requests the Court to declare that, in that the contract for the disposal of the town of Mödling's waste was entered into without complying with the procedural and advertising rules laid down by Article 8, in conjuction with Articles 11(1) and 15(2) of Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts (OJ 1992 L 209, p. 1), the Republic of Austria has failed to fulfil its obligations under that directive.

Legal background

2. Article 1 of Directive 92/50 states:

(a) public service contracts shall mean contracts for pecuniary interest concluded in writing

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between a service provider and a contracting authority,...

...

(b) contracting authorities shall mean the State, regional or local authorities, bodies governed by public law, associations formed by one or more of such authorities or bodies governed by public law.

...

(c) service provider shall mean any natural or legal person, including a public body, which offers services....

(d) open procedures shall mean those national procedures whereby all interested service providers may submit a tender;

(e) restricted procedures shall mean those national procedures whereby only those service providers invited by the authority may submit a tender;

(f) negotiated procedures shall mean those national procedures whereby authorities consult service providers of their choice and negotiate the terms of the contract with one or more of them;

...'

3. Article 8 of that directive provides:

Contracts which have as their object services listed in Annex I A shall be awarded in accordance with the provisions of Titles III to VI.'

4. Article 11(1) of the directive provides:

In awarding public service contracts, contracting authorities shall apply the procedures defined in Article 1(d), (e) and (f), adapted for the purposes of this directive.'

5. According to Article 15(2) of Directive 92/50:

Contracting authorities who wish to award a public service contract by open, restricted or, under the conditions laid down in Article 11, negotiated procedure, shall make known their intention by means of a notice.'

Facts and pre-litigation procedure

6. On 21 May 1999 at a meeting of its municipal council, the town of Mödling decided to create a legally independent body to carry out its obligations under the Law of the Land of Lower Austria on Waste Management (Niederösterreichisches Abfallwirtschaftsgesetz) of 1992 (LGB1. 8240) with a view, in particular, to supplying services in the ecological waste management sector and to engaging in related commercial transactions, primarily in the waste disposal sector.

7. Consequently, on 16 June 1999, an instrument of incorporation was drawn up relating to the creation of the company Stadtgemeinde Mödling AbfallwirtschaftsgmbH (hereinafter AbfallgmbH'), the share capital of which was held in its entirety by the town of Mödling. On 25 June 1999, the Mödling municipal council decided to make AbfallgmbH exclusively responsible for waste management in the municipality.

8. On 15 September 1999, by means of a contract which was concluded for an unlimited period and came into force with retrospective effect from 1 July 1999, the town of Mödling transferred exclusive responsibility for the collection and treatment of its waste to AbfallgmbH. That contract stipulated the amount of the remuneration, namely a fixed sum per dustbin or container, which the town of Mödling was to pay to AbfallgmbH.

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9. At its meeting on 1 October 1999, the Mödling municipal council decided to transfer 49% of the shares in AbfallgmbH to the company Saubermacher Dienstleistungs-Aktiengesellschaft (hereinafter Saubermacher AG'). According to the minutes of that meeting, following the decision taken on 25 June 1999, numerous meetings had taken place with representatives of companies interested in setting up a partnership in AbfallgmbH's field of business, in particular with Saubermacher AG.

10. On 6 October 1999, AbfallgmbH's instrument of incorporation was amended in order to allow the general assembly to adopt the majority of decisions by a simple majority and in order to set the quorum at 51% of the share capital. It was also decided that that company would be represented, in respect of its internal and external dealings, by two managing directors, each appointed by a partner, who would have joint authority to sign.

11. The abovementioned share transfer in fact took place on 13 October 1999. AbfallgmbH, however, began its operational activities only on 1 December 1999, that is to say at a time at which Saubermacher AG already held some of the shares in that company.

12. From 1 December 1999 to 31 March 2000, AbfallgmbH carried out its activities exclusively on behalf of the town of Mödling. Subsequently, after a waste transfer centre was put into operation, it also provided services to third parties, mainly to other municipalities in the district.

13. After giving the Republic of Austria formal notice to submit its observations, the Commission delivered a reasoned opinion on 2 April 2003 in which it set out the infringement of the provisions of Directive 92/50, stemming from the fact that the town of Mödling had not arranged a call for tenders for the purpose of awarding the waste disposal contract in question although that contract was to be regarded as a public service contract within the meaning of that directive.

14. In reply to that reasoned opinion, the Republic of Austria maintained that the conclusion of that contract with AbfallgmbH did not come within the scope of the directives on public contracts on the ground that it involved an in-house' transaction between the municipality of Mödling and AbfallgmbH.

15. As it was not satisfied with that reply, the Commission decided to bring this action.

The action

Arguments of the parties

16. The Commission submits that, as the conditions for application of Directive 92/50 have been satisfied, the procedural rules set out in Article 11(1) of that directive and the advertising rules in Article 15(2) thereof are applicable in full.

17. According to the Commission, contrary to the claim of the Austrian Government in the pre-litigation procedure, there is no evidence to establish the existence of an internal relationship between the municipality of Mödling and AbfallgmbH. In that regard, the Commission refers to Case C-107/98 Teckal [1999] ECR I-8121, paragraph 50, in which the Court held that a call for tenders is not mandatory in a case where the public authority, which is a contracting authority, exercises over the distinct body concerned a control which is similar to that which it exercises over its own departments and that body carries out the essential part of its activities with the controlling public authority or authorities.

18. The Commission submits that even though that judgment was given in relation to Article 1(a) of Council Directive 93/36/EEC of 14 June 1993 coordinating procedures for the award of public supply contracts (OJ 1993 L 199, p. 1), the Court's finding can be applied to all the Community directives on public contracts. The Commission relies on Teckal in order to substantiate its argument that it is only where the contracting authority exercises unlimited control over the contractor that the directives on public contracts do not apply. If a private undertaking holds shares in

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the contracting company it must, according to the Commission, be assumed that the contracting authority is not able to exercise over that company a control which is similar to that which it exercises over its own departments' within the meaning of that judgment. A minority holding by a private undertaking is thus sufficient to preclude the existence of an in-house' transaction.

19. Furthermore, the Commission observes that, in this case, Saubermacher AG's minority holding implies the existence, to that company's advantage, of rights of veto and of the power to appoint one of the two managing directors having identical rights, which precludes the town of Mödling from exercising over AbfallgmbH a control which is similar to that which it exercises over its own departments.

20. In its defence the Austrian Government disputes, first, the admissibility of the Commission's action.

21. It maintains that the establishment of AbfallgmbH, the conclusion of the waste disposal contract and the share transfer constitute three separate transactions which should not have been examined in the light of the provisions of Directive 92/50 but directly in the light of the provisions of the EC Treaty. An infringement of that directive is thus conceivable only if those transactions were decided on in order to circumvent the application of Directive 92/50 or if the share transfer at issue may give rise to a transaction falling within the scope of the provisions on the award of public contracts.

22. In the course of the infringement proceedings, the Commission made no observation on those possibilities. It did not, in either the pre-litigation procedure or the application, define the subject-matter of the proceedings and nor did it establish that the contract at issue was entered into in breach of Directive 92/50 or state the reasons why it considers that the existence of an in-house' transaction is essential in this case.

23. Secondly, as to the substance, the Austrian Government alleges that the Commission overlooked the fact that, at the time the waste disposal contract was entered into with AbfallgmbH, the shares in that company were held 100% by the town of Mödling. Thus, faced with an in-house' transaction, a call for tenders was not required.

24. Furthermore, that government considers that the concept of control similar to that exercised over its own departments' within the meaning of Teckal means comparable control and not identical control. The town of Mödling retained such control even after the transfer of 49% of the shares in AbfallgmbH.

Findings of the Court

- Admissibility

25. It is settled case-law that the purpose of the pre-litigation procedure is to give the Member State concerned an opportunity, on the one hand, to comply with its obligations under Community law and, on the other, to avail itself of its right to defend itself against the objections formulated by the Commission (see, inter alia, Case C-152/98 Commission v Netherlands [2001] ECR I-3463, paragraph 23, and Case C-439/99 Commission v Italy [2002] ECR I-305, paragraph 10).

26. It follows that, first, the subject-matter of proceedings under Article 226 EC is delimited by the pre-litigation procedure governed by that provision and that consequently the reasoned opinion and the application must be founded on identical charges. If a charge was not included in the reasoned opinion, it is inadmissible at the stage of proceedings before the Court (see, inter alia, Commission v Italy , cited above, paragraph 11).

27. Second, the reasoned opinion must contain a cogent and detailed exposition of the reasons

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which led the Commission to the conclusion that the Member State concerned had failed to fulfil one of its obligations under the Treaty (see, inter alia, Case C-207/96 Commission v Italy [1997] ECR I-6869, paragraph 18, and Case C-439/99 Commission v Italy , cited above, paragraph 12).

28. In the present case, in point 16 of its reasoned opinion and point 13 of its letter of formal notice, the Commission claimed that the sequence of events, from the Mödling municipal council's decision to make AbfallgmbH exclusively responsible for management of that municipality's waste up to the transfer of 49% of the shares in that company to Saubermacher AG, showed that the period during which the town of Mödling held 100% of the shares in AbfallgmbH constituted in reality only a transitional stage leading to the acquisition by a private undertaking of a holding in that company. The Commission thus clearly stated in the course of the pre-litigation procedure that it disputed the town of Mödling's argument based on the existence of three separate transactions.

29. The Commission thus gave a cogent and detailed exposition of the reasons why, taking the view that the provisions of Directive 92/50 were applicable, the conclusion of the contract transferring exclusive responsibility to AbfallgmbH for the collection and treatment of the town of Mödling's waste could not be regarded as an in-house' transaction and should have been the subject of a public tendering procedure.

30. In those circumstances, the inevitable conclusion is that the subject-matter of the action was clearly defined and that the plea of inadmissibility raised by the Austrian Government must be rejected.

- Substance

31. In this case, the Commission is essentially alleging that the Austrian authorities permitted the award by a municipality of a public service contract to a company which is legally distinct from that municipality and 49% owned by a private undertaking without the public tendering procedure provided for in Directive 92/50 being implemented.

32. It must be stated at the outset that the conditions for application of that directive were fulfilled in the present case. The town of Mödling is regarded, qua local authority, as a contracting authority', within the meaning of Article 1(b) of Directive 92/50, which entered into a contract for pecuniary interest with AbfallgmbH, which is a service provider' within the meaning of Article 1(c) of that directive. Services for the collection and treatment of waste constitute services within the meaning of Article 8 of that directive and Annex I A thereto. Furthermore, according to the findings of the Commission, which have not been disputed by the Austrian Government, the threshold laid down in Article 7(1) of Directive 92/50, as amended by European Parliament and Council Directive 97/52/EC of 13 October 1997 (OJ 1997 L 328, p. 1) was exceeded in the present case.

33. Consequently, the award of a contract in respect of those services could, under Article 8 of Directive 92/50, occur only in compliance with the rules laid down in Titles III to VI of that directive, in particular in Articles 11 and 15(2) thereof. Under the latter provision it was for the contracting authority concerned to publish a contract notice.

34. However, according to the Court's case-law, a call for tenders is not mandatory, even though the other contracting party is an entity legally distinct from the contracting authority, where the public authority which is a contracting authority exercises over the separate entity concerned a control which is similar to that which it exercises over its own departments and that entity carries out the essential part of its activities with the controlling public authority or authorities (Teckal , paragraph 50, and Case C-26/03 Stadt Halle and RPL Lochau [2005] ECR I-1, paragraph 49).

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35. The Austrian Government maintains that that was the case in this instance so that there was no need to apply the procedures for the award of public service contracts provided for in Directive 92/50.

36. First, that government contends that the conclusion of the waste disposal contract with AbfallgmbH, which occurred while the shares in that company were still entirely held by the town of Mödling, was not intended to establish a relationship between independent legal persons given that that local authority was able to exercise over AbfallgmbH a control similar to that which it exercises over its own departments. Consequently, that contract does not come within the scope of Directive 92/50 and there is no obligation on the town of Mödling to arrange a public call for tenders.

37. That argument cannot be upheld.

38. In the present case, the relevant date in order to determine whether the provisions of Directive 92/50 should have been applied is not the actual date on which the public contract at issue was awarded, and it is not necessary to resolve the issue of whether the municipality of Mödling's holding of the whole of the capital in AbfallgmbH on the date on which the public service contract was awarded was sufficient to establish that that local authority exercised over AbfallgmbH a control similar to that which it exercises over its own departments. Even though it is true that for reasons of legal certainty it is, in general, appropriate to consider the contracting authority's possible obligation to arrange a public call for tenders in the light of the circumstances prevailing on the date on which the public contract at issue is awarded, the particular circumstances of this case require the events which took place subsequently to be taken into account.

39. It must be borne in mind that the transfer of 49% of the shares in AbfallgmbH took place shortly after that company was made responsible, exclusively and for an unlimited period, for the collection and treatment of the town of Mödling's waste. Furthermore, AbfallgmbH became operational only after Saubermacher AG took over some of its shares.

40. Thus, it is not disputed that, by means of an artificial construction comprising several distinct stages, namely the establishment of AbfallgmbH, the conclusion of the waste disposal contract with that company and the transfer of 49% of its shares to Saubermacher AG, a public service contract was awarded to a semi-public company 49% of the shares in which were held by a private undertaking.

41. Accordingly, the award of that contract must be examined taking into account all those stages as well as their purpose and not on the basis of their strictly chronological order as suggested by the Austrian Government.

42. To examine, as the Austrian Government suggests, the award of the public contract at issue only from the standpoint of the date on which it took place, without taking account of the effects of the transfer within a very short period of 49% of the shares in AbfallgmbH to Saubermacher AG, would prejudice the effectiveness of Directive 92/50. The achievement of the objective of that directive, namely the free movement of services and the opening-up to undistorted competition in all the Member States, would be jeopardised if it were permissible for contracting authorities to resort to devices designed to conceal the award of public service contracts to semi-public companies.

43. Secondly, the Austrian Government submits that, even after having transferred 49% of the shares in AbfallgmbH to Saubermacher AG, the town of Mödling retained a control identical to that exercised over its own departments. In view of the judgment in Teckal , that factor exempted it from arranging a public call for tenders on the ground that the conclusion of the waste disposal contract constituted an in-house' transaction.

44. In this respect, it must be noted that, in the present case, the contract at issue, relating to services within the material scope of Directive 92/50, was concluded for pecuniary interest

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between a contracting authority and a company governed by private law, which is legally distinct from the authority and in the capital of which that contracting authority has a majority holding.

45. In Stadt Halle and RPL Lochau , the Court has already considered the question of whether, in such circumstances, the contracting authority is obliged to apply the public tendering procedures laid down by Directive 92/50 merely because a private company has a holding, albeit a minority one, in the capital of the company with which it concludes the contract.

46. It held that the participation, even as a minority, of a private undertaking in the capital of a company in which the contracting authority concerned is also a participant excludes in any event the possibility of that contracting authority exercising over that company a control similar to that which it exercises over its own departments (Stadt Halle and RPL Lochau , paragraph 49).

47. The relationship between a public authority which is a contracting authority and its own departments is governed by considerations and requirements proper to the pursuit of objectives in the public interest. Any private capital investment in an undertaking, on the other hand, follows considerations proper to private interests and pursues objectives of a different kind (Stadt Halle and RPL Lochau , paragraph 50).

48. The award of a public contract to a semi-public company without calling for tenders would interfere with the objective of free and undistorted competition and the principle of equal treatment of the persons concerned, referred to in Directive 92/50, in that such a procedure would offer a private undertaking with a capital presence in that undertaking an advantage over its competitors (Stadt Halle and RPL Lochau , paragraph 51).

49. The Court held that, where a contracting authority intends to conclude a contract for pecuniary interest relating to services within the material scope of Directive 92/50 with a company legally distinct from it, in whose capital it has a holding together with one or more private undertakings, the public award procedures laid down by that directive must always be applied (Stadt Halle and RPL Lochau , paragraph 52).

50. Thus, having regard to the foregoing, it must be found that, in that the contract for the disposal of the town of Mödling's waste was entered into without complying with the procedural and advertising rules laid down by Article 8, in conjunction with Articles 11(1) and 15(2) of Directive 92/50, the Republic of Austria has failed to fulfil its obligations under that directive.

Costs

51. 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 and the Republic of Austria has been unsuccessful, the Republic of Austria must be ordered to pay the costs.

DOCNUM	62004J0029
AUTHOR	Court of Justice of the European Communities
FORM	Judgment
TREATY	European Economic Community

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PUBREF	European Court reports 2005 Page I-09705
DOC	2005/11/10
LODGED	2004/01/28
JURCIT	11997E226 : N 26 31992L0050 : N 31 38 42 44 49 31992L0050-A01 : N 2 31992L0050-A01LB : N 32 31992L0050-A01LC : N 32 31992L0050-A07P1 : N 32 31992L0050-A08 : N 1 3 32 33 50 31992L0050-A11P1 : N 1 4 33 50 31992L0050-A15P2 : N 1 5 33 50 31992L0050-N1LA : N 32 61996J0207 : N 27 61998J0107 : N 34 61998J0152 : N 25 61999J0439 : N 25 - 27 62003J0026 : N 34 45 - 49
CONCERNS	Failure concerning 31992L0050 -A08 Failure concerning 31992L0050 -A11P1 Failure concerning 31992L0050 -A15P2
SUB	Freedom of establishment and services ; Right of establishment ; Free movement of services
AUTLANG	German
APPLICA	Commission ; Institutions
DEFENDA	Austria ; Member States
NATIONA	Austria
NOTES	Ardelean, Veronica: O nou noiune de drept comunitar: parteneriatul public-privat instituionalizat (PPPI)., Revista româna de drept comunitar 2005 Vol.4 p.105-112 ; Broussy, Emmanuelle ; Donnat, Francis ; Lambert, Christian: Qualification de marché public, L'actualité juridique ; droit administratif 2006 p.253-255 ; Hoffer, Raoul ; Innerhofer, Isabelle: Umgehung des Vergaberechts bei PPPs?, Ecolex 2006 p.80-82 ; Dreifuss, Muriel: Le ciel s'obscurcit pour les contrats intégrés dérogeant aux règles communautaires de mise en concurrence, Recueil Le Dalloz 2006 Jur. 423-425
PROCEDU	Action for failure to fulfil obligations - successful
ADVGEN	Geelhoed
JUDGRAP	Schiemann
DATES	of document: 10/11/2005 of application: 28/01/2004

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Judgment of the Court (Fifth Chamber)
of 22 May 2003
Arkkitehtuuritoimisto Riitta Korhonen Oy, Arkkitehtitoimisto Pentti Toivanen Oy and Rakennuttajatoimisto Vilho Tervomaa v Varkauden Taitotalo Oy. Reference for a preliminary ruling: Kilpailuneuvosto - Finland. Directive 92/50/EEC - Public service contracts - Definition of contracting authority - Body governed by public law - Company set up by a regional or local authority to promote the development of industrial or commercial activities on the territory of that authority. Case C-18/01.

1. Preliminary rulings - Jurisdiction of the Court - Limits - Manifestly irrelevant questions and hypothetical questions in a context which precludes any useful answer - Questions not related to the purpose of the main proceedings - (Art. 234 EC)

2. Approximation of laws - Procedures for the award of public service contracts - Directive 92/50 - Contracting authorities - Body governed by public law - Definition - Company set up by a regional or local authority to promote the development of industrial or commercial activities on the territory of that authority - Included - Needs in the general interest, not having an industrial or commercial character - Assessment by the national courts - Criteria - (Council Directive 92/50, Art. 1(b), second para.)

1. In the context of the cooperation between the Court of Justice and the national courts provided for by Article 234 EC, it is solely for the national courts before which actions are brought, and which must bear the responsibility for the subsequent judicial decision, to determine in the light of the special features of each case both the need for a preliminary ruling in order to enable them to deliver judgment and the relevance of the questions which they submit to the Court. Consequently, since the questions referred involve the interpretation of Community law, the Court is, in principle, obliged to give a ruling.

Moreover, the Court can refuse to rule on a question referred for a preliminary ruling by a national court only where it is quite obvious that the interpretation of Community law that is sought bears no relation to the actual facts of the main action or its purpose, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it.

see paras 19-20

2. A limited company established, owned and managed by a regional or local authority meets a need in the general interest, within the meaning of the second subparagraph of Article 1(b) of Directive 92/50 relating to the coordination of procedures for the award of public service contracts, where it acquires planning and construction services with a view to promoting the development of industrial or commercial activities on the territory of that regional or local authority by constructing premises to be leased to undertakings. Such activities are likely to give a stimulus to trade and the economic and social development of the local authority concerned, since the location of undertakings on the territory of a municipality often has favourable repercussions for that municipality in terms of creation of jobs, increase of tax revenue and improvement of the supply and demand of goods and services. To determine whether that need has no industrial or commercial character, the national court must assess the circumstances which prevailed when that company was set up and the conditions in which it carries on its activity, taking account in particular of the fact that it does not aim primarily at making a profit, the fact that it does not bear the risks associated with the activity, and any public financing of the activity in question.

The fact that the premises to be constructed are leased only to a single undertaking is not capable of calling into question the lessor's status of a body governed by public law, where it is shown that the lessor meets a need in the general interest not having an industrial or commercial character.

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see paras 45, 59, 64, operative part

In Case C-18/01,

REFERENCE to the Court under Article 234 EC by the Kilpailuneuvosto (Finland) for a preliminary ruling in the proceedings pending before that court between

Arkkitehtuuritoimisto Riitta Korhonen Oy,

Arkkitehtitoimisto Pentti Toivanen Oy,

Rakennuttajatoimisto Vilho Tervomaa

and

Varkauden Taitotalo Oy,

on the interpretation of Article 1(b) of Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts (OJ 1992 L 209, p. 1),

THE COURT (Fifth Chamber),

composed of:

C.W.A. Timmermans (Rapporteur), President of the Fourth Chamber, acting for the President of the Fifth Chamber,

D.A.O. Edward,

P. Jann,

S. von Bahr and

A. Rosas, Judges,

Advocate General: S. Alber,

Registrar: M.-F. Contet, Principal Administrator,

after considering the written observations submitted on behalf of:

Varkauden Taitotalo Oy, by H. Tuure, asianajaja,

the Finnish Government, by T. Pynnä, acting as Agent,

the French Government, by G. de Bergues and S. Pailler, acting as Agents,

the Austrian Government, by M. Fruhmann, acting as Agent,

the Commission of the European Communities, by M. Nolin and M. Huttunen, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations of the Finnish Government and the Commission at the hearing on 16 May 2002,

after hearing the Opinion of the Advocate General at the sitting on 11 July 2002,

gives the following

Judgment

Costs

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65. The costs incurred by the Finnish, French and Austrian Governments and by the Commission, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the proceedings pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT (Fifth Chamber),

in answer to the questions referred to it by the Kilpailuneuvosto by order of 14 December 2000, hereby rules:

1. A limited company established, owned and managed by a regional or local authority meets a need in the general interest, within the meaning of the second subparagraph of Article 1(b) of Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts, where it acquires services with a view to promoting the development of industrial or commercial activities on the territory of that regional or local authority. To determine whether that need has no industrial or commercial character, the national court must assess the circumstances which prevailed when that company was set up and the conditions in which it carries on its activity, taking account in particular of the fact that it does not aim primarily at making a profit, the fact that it does not bear the risks associated with the activity, and any public financing of the activity in question.

2. The fact that the premises to be constructed are leased only to a single undertaking is not capable of calling into question the lessor's status of a body governed by public law, where it is shown that the lessor meets a need in the general interest not having an industrial or commercial character.

1. By order of 14 December 2000, received at the Court on 16 January 2001, the Kilpailuneuvosto (Competition Council) referred to the Court for a preliminary ruling under Article 234 EC three questions on the interpretation of Article 1(b) of Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts (OJ 1992 L 209, p. 1).

2. Those questions were raised in proceedings between Arkkitehtuuritoimisto Riitta Korhonen Oy and Arkkitehtitoimisto Pentti Toivanen Oy and Rakennuttajatoimisto Vilho Tervomaa (hereinafter referred to together as "Korhonen and Others") and Varkauden Taitotalo Oy ("Taitotalo") concerning the latter's decision not to accept the tender they had submitted in connection with a contract for the supply of design and construction services for a building project.

Legal context

Community legislation

3. Article 1(b) of Directive 92/50 provides as follows:

"For the purposes of this Directive:

...

(b) contracting authorities shall mean the State, regional or local authorities, bodies governed by public law, associations formed by one or more of such authorities or bodies governed by public law.

Body governed by public law means any body:

established for the specific purpose of meeting needs in the general interest, not having an industrial

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or commercial character, and

having legal personality and

financed, for the most part, by the State, or regional or local authorities, or other bodies governed by public law; or subject to management supervision by those bodies; or having an administrative, managerial or supervisory board, more than half of whose members are appointed by the State, regional or local authorities or by other bodies governed by public law.

The lists of bodies or of categories of such bodies governed by public law which fulfil the criteria referred to in the second subparagraph of this point are set out in Annex I to Directive 71/305/EEC. These lists shall be as exhaustive as possible and may be reviewed in accordance with the procedure laid down in Article 30b of that Directive.

"

National legislation

4. Directive 92/50 was transposed into Finnish law by the Julkisista hankinnoista annettu laki (Law on public procurement) 1505/1992 of 23 December 1992 ("Law 1505/1992").

5. That law contains, in Paragraph 2, a definition of a contracting entity (contracting authority) which is very similar to that in Article 1(b) of Directive 92/50. Under Paragraph 2(1)(2) of Law 1505/1992, legal persons "regarded as belonging to the public administration" are "contracting entities" within the meaning of that law. Paragraph 2(2) says that that is considered to be the case where a legal person is established to look after tasks in the general interest with no industrial or commercial character and either is financed primarily by a public authority, or is under its supervision, or has an administrative, managerial or supervisory board over half of whose members are appointed by a public authority.

The main proceedings and the questions referred for a preliminary ruling

6. Taitotalo is a limited company whose capital is wholly owned by the town of Varkaus (Finland), and whose objects are to buy, sell and lease real property and shares in property companies, and to organise and supply property maintenance services and other related services needed for the management of those properties and shares. The company's board has three members, who are officials of the town of Varkaus, appointed by the general meeting of the company's shareholders, at which the town has 100% of the voting rights. According to the information provided by the national court, the company's foundation document was signed on 21 January 2000 and it was entered in the register of commerce on 6 April 2000.

7. Following the town of Varkaus's decision to create on its territory a technological development centre under the name Tyyskän osaamiskeskus ("Tyyskä Skills Centre"), Taitotalo is arranging for several office blocks and a multi-storey car park to be built. Taitotalo's stated intention is to buy the land from the town of Varkaus once the site has been parcelled out, and then to lease the newly constructed buildings to firms in the technology sector.

8. To carry out the project, recourse was had to construction, marketing and coordination services from Keski-Savon Teollisuuskylä Oy ("Teollisuuskylä"). According to its statutes, the objects of Teollisuuskylä which is owned by a regional development company most of whose shares are held by the town of Varkaus and other municipalities in the central Savo region are to build, acquire and manage premises for industrial and commercial use and properties primarily for the use of undertakings to which they are transferred at cost price.

9. By a first call for tenders of 6 July 1999, Teollisuuskylä asked for bids for the supply of design and construction services for the first stage of the building project described above, relating

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to construction of the Tyyskä 1 building, intended for the use of Honeywell-Measurex Oy, and the Tyyskä 2 building for the use of several smaller undertakings. After the period for bidding had ended, at the end of August 1999, however, Teollisuuskylä informed the bidders that because of changes to the ownership basis of the property company to be set up Taitotalo the design and construction of the project had to be the subject of an open competition published in the Official Journal of the European Communities .

10. After amending the contract documents, Teollisuuskylä therefore, by a second call for tenders of 4 September 1999, started a new procedure for awarding the contract for design and construction services for the first stage of the project. The main contractors were stated to be the town of Varkaus and Teollisuuskylä. An invitation to tender was also published in Virallinen lehti (Official Journal of the Republic of Finland) No 35 of 2 September 1999 under the heading "suunnittelukilpailu" (design contest). The notice gave the contracting authority as the town of Varkaus, on behalf of the property company to be set up.

11. Korhonen and Others submitted tenders in this new procedure, but were informed by letter from Taitotalo of 6 April 2000 that JP-Terasto Oy and the group led by Arkkitehtitoimisto Pekka Paavola Oy had been chosen to design and construct the Tyyskä 1 and Tyyskä 2 buildings respectively.

12. Since they considered that the Finnish public procurement legislation had not been complied with, Korhonen and Others brought applications before the Kilpailuneuvosto on 17 and 26 April 2000, seeking either for the award to be set aside with damages being awarded in the alternative, or merely for damages.

13. Before the Kilpailuneuvosto, Taitotalo submitted that the applications of Korhonen and Others should be dismissed as inadmissible, on the ground that it was not a contracting entity within the meaning of Paragraph 2 of Law 1505/1992. Relying in particular on a decision of the Korkein hallinto-oikeus (Supreme Administrative Court) in a similar case, Taitotalo submitted that it had not been established to look after tasks in the general interest with no industrial or commercial character, and that in any event the amount of public support granted to the building project in question was less than half the total value of the operation.

14. Since it considered that the outcome of the dispute before it depended on the interpretation of Community law, in particular in view of the common practice in Finland of public authorities setting up, owning and managing limited companies which do not themselves aim to make a profit but intend to create favourable conditions for the pursuit of commercial or industrial activities on the territory of those authorities, the Kilpailuneuvosto which from 1 March 2002 became the Markkinaoikeus (Market Court) decided to stay the proceedings and refer the following questions to the Court for a preliminary ruling:

"1. Is a share company which a town owns and in which the town exercises control to be regarded as a contracting authority within the meaning of Article 1(b) of Council Directive 92/50/EEC relating to the coordination of procedures for the award of public service contracts, where the company acquires design and construction services for a building lot comprising offices to be leased to undertakings?

2. Does it affect the decision on the point that the town's building project endeavours to create the conditions for business activity to be carried on in the town?

3. Does it affect the decision on the point that the offices to be built are leased to one undertaking only?
"

Admissibility of the questions

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15. On the basis of the Court's case-law according to which, in order to enable the Court to provide an interpretation of Community law which will be of use to the national court, that court must define the factual and legal context of the questions it is asking or, at the very least, explain the factual circumstances on which they are based (see, inter alia , Joined Cases C-115/97 to C-117/97 Brentjens' [1999] ECR I-6025, paragraph 38), the Commission voices doubts as to the admissibility of the questions referred for a preliminary ruling, on the ground that the order for reference does not make it possible to identify the provisions on the basis of which the two award procedures were initiated and those which were not applied in the main proceedings, and that the order also fails to disclose the identity of the entity which, at least formally, carried out the public procurement procedure.

16. The French Government observes for its part that, with respect to the second call for tenders, the order for reference mentions the town of Varkaus both as contracting authority and as main contractor. In those circumstances, the Government doubts the need for a reference, in that, first, at the time of publication of that call for tenders Taitotalo did not yet have the legal personality required by Directive 92/59 and, second, the town of Varkaus as a local authority is subject to the provisions of the directive in any event.

17. The French Government further submits that, contrary to what Teollisuuskylä told the bidders in August 1999, there was no publication in the Official Journal of the European Communities of the second invitation to tender.

18. Without there being any need to consider here whether or not the invitation to tender for the contract at issue in the main proceedings had to be the subject of publication in the Official Journal of the European Communities , the French Government's argument that there was no publication of the second invitation to tender must be rejected at the outset, since, as the Finnish Government stated at the hearing, that invitation to tender was published in supplement No 171 to the Official Journal of the European Communities of 3 September 1999.

19. As regards the French Government's doubts as to the need for the questions referred and the Commission's objections concerning the lack of detail as to the factual and legal context of the main proceedings, it should be recalled that, according to settled case-law, it is solely for the national courts before which actions are brought, and which must bear the responsibility for the subsequent judicial decision, to determine in the light of the special features of each case both the need for a preliminary ruling in order to enable them to deliver judgment and the relevance of the questions which they submit to the Court. Consequently, since the questions referred involve the interpretation of Community law, the Court is, in principle, obliged to give a ruling (see, inter alia , Case C-379/98 PreussenElektra [2001] ECR I-2099, paragraph 38; Case C-390/99 Canal Satélite Digital [2002] ECR I-607, paragraph 18; and Case C-373/00 Adolf Truley [2003] ECR I-1931, paragraph 21).

20. Moreover, it also follows from that case-law that the Court can refuse to rule on a question referred for a preliminary ruling by a national court only where it is quite obvious that the interpretation of Community law that is sought bears no relation to the actual facts of the main action or its purpose, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it (see PreussenElektra , paragraph 39, Canal Satélite Digital , paragraph 19, and Adolf Truley , paragraph 22).

21. In the present case, it is not obvious that the questions referred by the national court fall within one of those hypotheses.

22. First, it cannot be maintained that the interpretation of Community law which is sought bears no relation to the actual facts or purpose of the main proceedings or is hypothetical, since the

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admissibility of the main proceedings depends in particular on the proper extent of the term "body governed by public law" in Article 1(b) of Directive 92/50.

23. Second, the national court has furnished the Court, albeit in summary fashion, with the material necessary to enable it to give a useful answer to the questions referred, in particular by stating in its account of the factual context of the main proceedings that the notice published in Virallinen lehti of 2 September 1999 mentioned as contracting authority the town of Varkaus acting "on behalf of the property company to be set up" .

24. In those circumstances, it cannot be excluded that Taitotalo, although lacking legal personality at the time of publication of the second call for tenders, played a decisive part in the award procedure at issue in the main proceedings.

25. It should also be noted that, in reply to a question put by the Court at the hearing, the Finnish Government explained that, under Finnish law, the founders of a company can act on behalf of the company before it is entered in the register of commerce, and on the date when the company is so registered it takes over all the previous commitments entered into on its behalf.

26. Such appears to have been the case in the main proceedings, since the national court observes that Taitotalo was entered in the register of commerce on 6 April 2000 and it was on that date that Korhonen and Others were informed by that company that their tenders had not been selected.

27. In those circumstances, it cannot be excluded that Taitotalo took over, on 6 April 2000, all the previous commitments entered into on its behalf by the town of Varkaus, and may on that basis be regarded as responsible for the award procedure at issue in the main proceedings.

28. In the light of the foregoing, the questions referred by the Kilpailuneuvosto must be declared admissible.

The questions referred for a preliminary ruling

29. By its questions to the Court, the national court seeks clarification of the term "body governed by public law" within the meaning of Article 1(b) of Directive 92/50, so as to be able to decide, in the main proceedings, whether Taitotalo should be regarded as a contracting authority.

30. According to the first subparagraph of Article 1(b) of Directive 92/50, the State, regional or local authorities, bodies governed by public law, and associations formed by one or more of such authorities or bodies governed by public law are "contracting authorities" .

31. The second subparagraph of Article 1(b) of Directive 92/50 defines a "body governed by public law" as any body established for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character, with legal personality and closely dependent, by its method of financing, management or supervision, on the State, regional or local authorities, or other bodies governed by public law.

32. As the Court has consistently held (see, inter alia , Case C-360/96 BFI Holding [1998] ECR I-6821, paragraph 29; Joined Cases C-223/99 and C-260/99 Agorà and Excelsior [2001] ECR I-3605, paragraph 26; and Adolf Truley , paragraph 34), the conditions set out in that provision are cumulative, so that in the absence of any one of them an entity may not be classified as a body governed by public law, and hence as a contracting authority within the meaning of Directive 92/50.

33. Since it is not in dispute that Taitotalo is owned and managed by a local authority and at least from its date of entry in the register of commerce, 6 April 2000 has legal personality, the national court's questions must be understood as relating solely to whether that company was established for the specific purpose of meeting needs in the general interest, not having an industrial

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or commercial character.

The first and second questions

34. By its first two questions, which should be examined together, the national court essentially asks whether a limited company established, owned and managed by a regional or local authority may be regarded as meeting a specific need in the general interest, not having an industrial or commercial character, where that company's activity consists in acquiring services with a view to the construction of premises intended for the exclusive use of private undertakings, and whether the assessment of whether that condition is satisfied would be different if the building project in question were intended to create favourable conditions on that local authority's territory for the exercise of business activities.

Observations submitted to the Court

35. Taitotalo and the French Government consider that those two questions should be answered in the negative, as Taitotalo's activity is not intended to meet needs in the general interest and/or in any event has an industrial or commercial character.

36. Taitotalo submits that its sole object is to promote the conditions for the exercise of the activities of specific undertakings, not for the exercise generally of economic activity in the town of Varkaus, while the fact that it is owned and financed by a contracting authority is of no relevance, since, in the case in the main proceedings, it meets industrial or commercial needs. Taitotalo states, in particular, that it acquired at market price the land needed for the building works at issue in the main proceedings and that the financing of the project will be taken in hand essentially by the private sector, by means of bank loans secured by mortgages.

37. In reliance on the Court's judgment in Case C-44/96 Mannesmann Anlagenbau Austria and Others [1998] ECR I-73, in which, it says, the Court was concerned to ascertain whether the activity of the entity at issue in that case the Austrian State printing works came under an essential prerogative of the State, the French Government considers for its part that the leasing of premises for industrial or commercial use cannot in any case be regarded as within the prerogatives which by their very nature are part of the exercise of public powers. Moreover, because of its commercial character, this activity cannot be compared with those at issue in BFI Holding and Case C-237/99 Commission v France [2001] ECR I-939, namely the collection and treatment of household waste and the construction of social housing.

38. In the Finnish Government's view, on the other hand, Taitotalo's activity typically appears among those which respond to a need in the general interest with no industrial or commercial character. First, Taitotalo's primary aim is not to generate profits by its activity but to create favourable conditions for the development of economic activities on the territory of the town of Varkaus, which fits in perfectly with the functions which regional and local authorities may assume by virtue of the autonomy guaranteed to them by the Finnish constitution. Second, the objective of Directive 92/50 would be compromised if such a company were not regarded as a contracting authority within the meaning of the directive, as municipalities might in that case by tempted to establish, in their traditional sphere of activity, other undertakings whose contracts would be outside the scope of the directive.

39. Finally, while not excluding the possibility that Taitotalo's activity may meet a need in the general interest because of the stimulus it gives to trade and the development of business activities on the territory of the town of Varkaus, the Austrian Government and the Commission state for their part that, in view of the incomplete information available, they are unable to assess the extent to which that need has an industrial or commercial character. They therefore invite the national court to perform that assessment itself, examining in particular the competition position

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of Taitotalo and whether it bears the risks associated with its activity.

Findings of the Court

40. The Court has already held that the second subparagraph of Article 1(b) of Directive 92/50 draws a distinction between needs in the general interest not having an industrial or commercial character and needs in the general interest having an industrial or commercial character (see, *inter alia*, *BFI Holding*, paragraph 36, and *Agorà and Excelsior*, paragraph 32). To give a useful answer to the questions put, it must first be ascertained whether activities such as those at issue in the main proceedings in fact meet needs in the general interest and then, if necessary, it must be determined whether such needs have an industrial or commercial character.

41. As regards the question whether the activity at issue in the main proceedings meets a need in the general interest, it appears from the order for reference that Taitotalo's principal activity consists in buying, selling and leasing properties and organising and supplying property maintenance services and other related services needed for the management of those properties. The operation carried out by Taitotalo in the main proceedings consists, more precisely, in acquiring design and construction services in connection with a building project relating to the construction of several office blocks and a multi-storey car park.

42. In that that operation follows from the town of Varkaus's decision to create a technological development centre on its territory, and Taitotalo's stated intention is to buy the land from the town once the site has been parcelled out, and to make the newly constructed buildings available to firms in the technology sector, its activity is indeed capable of meeting a need in the general interest.

43. In this respect, it may be recalled that, on being asked whether a body whose objects were to carry on and facilitate any activity concerned with the organisation of trade fairs, exhibitions and conferences could be regarded as a body governed by public law within the meaning of Article 1(b) of Directive 92/50, the Court held that activities relating to the organisation of such events meet needs in the general interest, in that an organiser of those events, in bringing together manufacturers and traders in one geographical location, is not acting solely in the individual interest of those manufacturers and traders, who are thereby afforded an opportunity to promote their goods and merchandise, but is also providing consumers who attend the events with information that enables them to make choices in optimum conditions. The resulting stimulus to trade may be considered to fall within the general interest (see *Agorà and Excelsior*, paragraphs 33 and 34).

44. Similar considerations may be put forward *mutatis mutandis* with respect to the activity at issue in the main proceedings, in that it is undeniable that, in acquiring design and construction services in connection with a building project relating to the construction of office blocks, Taitotalo is not acting solely in the individual interest of the undertakings directly concerned by that project but also in that of the town of Varkaus.

45. Activities such as those carried on by Taitotalo in the case in the main proceedings may be regarded as meeting needs in the general interest, in that they are likely to give a stimulus to trade and the economic and social development of the local authority concerned, since the location of undertakings on the territory of a municipality often has favourable repercussions for that municipality in terms of creation of jobs, increase of tax revenue and improvement of the supply and demand of goods and services.

46. A more difficult question, on the other hand, is whether such needs in the general interest have a character which is not industrial or commercial. While the Finnish Government submits that those needs have no industrial or commercial character, in that Taitotalo aims not so much to make a profit as to create favourable conditions for the location of undertakings on the territory of

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the town of Varkaus, Taitotalo puts forward the contrary argument, on the ground that it provides services precisely for commercial undertakings and that the financing of the building project in question is borne essentially by the private sector.

47. According to settled case-law, needs in the general interest, not having an industrial or commercial character, within the meaning of Article 1(b) of the Community directives relating to the coordination of procedures for the award of public contracts are generally needs which are satisfied otherwise than by the availability of goods and services in the market place and which, for reasons associated with the general interest, the State chooses to provide itself or over which it wishes to retain a decisive influence (see, inter alia , BFI Holding , paragraphs 50 and 51, Agorà and Excelsior , paragraph 37, and Adolf Truley , paragraph 50).

48. In the present case, it cannot be excluded that the acquisition of services intended to promote the location of private undertakings on the territory of a particular local authority may, for the reasons referred to in paragraph 45 above, be regarded as meeting a need in the general interest whose character is not industrial or commercial. In assessing whether or not such a need in the general interest is present, account must be taken of all the relevant legal and factual elements, such as the circumstances prevailing at the time when the body concerned was established and the conditions under which it exercises its activity (see, to that effect, Adolf Truley , paragraph 66).

49. In particular, it must be ascertained whether the body in question carries on its activities in a situation of competition, since the existence of such competition may, as the Court has previously held, be an indication that a need in the general interest has an industrial or commercial character (see, to that effect, BFI Holding , paragraphs 48 and 49).

50. However, it also follows from the wording of that judgment that the existence of significant competition does not of itself permit the conclusion that there is no need in the general interest not having an industrial or commercial character (see Adolf Truley , paragraph 61). The same applies to the fact that the body in question aims specifically to meet the needs of commercial undertakings. Other factors must be taken into account before reaching such a conclusion, in particular the question of the conditions in which the body in question carries on its activities.

51. If the body operates in normal market conditions, aims to make a profit, and bears the losses associated with the exercise of its activity, it is unlikely that the needs it aims to meet are not of an industrial or commercial nature. In such a case, the application of the Community directives relating to the coordination of procedures for the award of public contracts would not be necessary, moreover, because a body acting for profit and itself bearing the risks associated with its activity will not normally become involved in an award procedure on conditions which are not economically justified.

52. According to settled case-law, the purpose of those directives is to avert both the risk of preference being given to national tenderers or applicants whenever a contract is awarded by the contracting authorities and the possibility that a body financed or controlled by the State, regional or local authorities or other bodies governed by public law may choose to be guided by other than economic considerations (see, in particular, Case C-380/98 University of Cambridge [2000] ECR I-8035, paragraph 17; Case C-470/99 Universale-Bau and Others [2002] ECR I-11617, paragraph 52; and Adolf Truley , paragraph 42).

53. In reply to a written question put by the Court, the Finnish Government stated at the hearing that although, from a legal point of view, there are few differences between companies such as Taitotalo and limited companies owned by private operators, in that they bear the same economic risks as the latter and may similarly be declared bankrupt, the regional and local authorities to which they

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belong rarely allow such a thing to happen and will, if appropriate, recapitalise those companies so that they can continue to look after the tasks for which they were established, essentially the improvement of the general conditions for the pursuit of economic activity in the local authority area in question.

54. In reply to a question put by the Court at the hearing, the Finnish Government further stated that, while it is not impossible that the activities of companies such as Taitotalo may generate profits, the making of such profits can never constitute the principal aim of such companies, since under Finnish law they must always aim primarily to promote the general interest of the inhabitants of the local authority area concerned.

55. In such conditions, and having regard to the fact mentioned by the national court that Taitotalo received public funding for carrying out the building project at issue in the main proceedings, it appears probable that an activity such as that pursued by Taitotalo in this case meets a need in the general interest not having an industrial or commercial character.

56. It is nevertheless for the national court, the only one to have detailed knowledge of the facts of the case, to assess the circumstances which prevailed when that body was set up and the conditions in which it carries on its activity, including in particular whether it aims at making a profit and bears the risks associated with its activity.

57. As to the Commission's observation that it cannot be excluded that the activity at issue in the main proceedings represents only a minor part of Taitotalo's activities, that fact, even were it to be established, would be of no relevance to the outcome of the main proceedings, in so far as that company continues to look after needs in the general interest.

58. According to settled case-law, the status of a body governed by public law is not dependent on the relative importance, within that body's activity, of the meeting of needs in the general interest not having an industrial or commercial character (see Mannesmann Anlagenbau Austria and Others , paragraphs 25, 26 and 31; BFI Holding , paragraphs 55 and 56; and Adolf Truley , paragraph 56).

59. In the light of the above considerations, the answer to the first and second questions must be that a limited company established, owned and managed by a regional or local authority meets a need in the general interest, within the meaning of the second subparagraph of Article 1(b) of Directive 92/50, where it acquires services with a view to promoting the development of industrial or commercial activities on the territory of that regional or local authority. To determine whether that need has no industrial or commercial character, the national court must assess the circumstances which prevailed when that company was set up and the conditions in which it carries on its activity, taking account in particular of the fact that it does not aim primarily at making a profit, the fact that it does not bear the risks associated with the activity, and any public financing of the activity in question.

The third question

60. By its third question, the national court essentially asks whether the fact that the offices to be constructed are leased only to a single undertaking is capable of calling into question the lessor's status of a body governed by public law.

61. It suffices to state that it is clear from the answer to the first two questions that such a circumstance does not in principle prevent the lessor of the offices to be built from being classified as a body governed by public law, since, as the Advocate General observes in point 92 of his Opinion, the general interest is not measured by the number of direct users of an activity or service.

62. First, it is undeniable that the location of a single undertaking on the territory of a regional

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or local authority may likewise give a stimulus to trade and bring about favourable economic and social repercussions for that local authority and for all its inhabitants, since the location of that undertaking may inter alia act as a catalyst and stimulate the location of other undertakings in the region concerned.

63. Second, that interpretation is also consistent with the purpose of Directive 92/50, which, according to the 20th recital in its preamble, is intended inter alia to eliminate practices that restrict competition in general and participation in contracts by other Member States' nationals in particular. As the Finnish Government has observed, to accept that a body may fall outside the scope of that directive solely because the activity it carries on benefits one company only would amount to disregarding the very purpose of the directive, since, to avoid the rules it lays down, it would suffice for a company such as Taitotalo to maintain that the premises to be constructed were intended to be let to a single undertaking, which could then, as soon as the transaction were completed, transfer the premises to other undertakings.

64. In the light of the above considerations, the answer to the third question must therefore be that the fact that the premises to be constructed are leased only to a single undertaking is not capable of calling into question the lessor's status of a body governed by public law, where it is shown that the lessor meets a need in the general interest not having an industrial or commercial character.

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CONCERNS	Interprets 31992L0050 -A01LBL2
SUB	Freedom of establishment and services ; Right of establishment ; Free movement of services
AUTLANG	Finnish
OBSERV	Finland ; France ; Austria ; Member States ; Commission ; Institutions
NATIONA	Finland
NATCOUR	*A9* Kilpailuneuvosto, välipäätös 14/12/2000
NOTES	Ritleng, D.: Notion de pouvoir adjudicateur, Europe 2003 Juillet Comm. no 247 p.17-18 ; Fruhmann, Michael: Technologiecenter und Ansiedlungsgesellschaften als öffentliche Auftraggeber, Zeitschrift für Vergaberecht und Beschaffungspraxis 2003 p.254-255 ; Senn, Myriam: Zu den Begriffen des "öffentlichen Auftraggebers" und der "Einrichtung des öffentlichen Rechts", European Law Reporter 2003 p.345-346 ; Guccione, Claudio: La nozione di organismo di diritto pubblico nella più recente giurisprudenza comunitaria, Giornale di diritto amministrativo 2003 p.1032-1036 ; Brown, Adrian: Wether a Publicly Owned Property Developer is a "Contracting Authority": A Note on Case C-18/01 Arkkitehtuuritoimisto Riitta Korhonen Oy v Varkauden Taitotalo Oy, Public Procurement Law Review 2003 p.NA139-NA143 ; Perfetti, R. Luca: Organismo di diritto pubblico e rischio di impresa, Il Foro amministrativo 2003 p.2498-2509 ; Di Plinio, Giampiero: Le S.p.a. comunali finlandesi davanti alla Corte: organismi di diritto pubblico, o cosa?, Diritto pubblico comparato ed europeo 2003 p.2019-2024 ; Belorgey, Jean-Marc ; Gervasoni, Stéphane ; Lambert, Christian: Définition du pouvoir adjudicateur, L'actualité juridique ; droit administratif 2003 p.2153 ; Karpenschif, Michael: Définition du pouvoir adjudicateur par la Cour de justice des Communautés européennes, L'actualité juridique ; droit administratif 2004 p.526-533 ; Gliozzo, Thomas: La notion d'organisme de droit public au sens de la directive 92/50/CE, L'actualité juridique ; droit administratif 2004 p.1559-1561
PROCEDU	Reference for a preliminary ruling
ADVGEN	Alber
JUDGRAP	Timmermans
DATES	of document: 22/05/2003 of application: 16/01/2001

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Judgment of the Court (Sixth Chamber)
of 7 December 2000
Telaustria Verlags GmbH and Telefonadress GmbH v Telekom Austria AG, joined party: Herold Business Data AG.
Reference for a preliminary ruling: Bundesvergabeamt - Austria.
Public service contracts - Directive 92/50/EEC - Public service contracts in the telecommunications sector - Directive 93/38/EEC - Public service concession.
Case C-324/98.

Approximation of laws Public procurement procedures of entities operating in the water, energy, transport and telecommunications sectors Directive 93/38 Scope Contract for pecuniary interest concluded in writing between a contracting authority and a private undertaking for the provision of public telecommunication services Included Consideration consisting in an exploitation right Excluded Obligations of the contracting entities

(Council Directive 93/38)

$$Directive 93/38 coordinating the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors covers a contract for pecuniary interest concluded in writing between, on the one hand, an undertaking which is specifically responsible under the legislation of a Member State for operating a telecommunications service and whose capital is wholly held by the public authorities of that State and, on the other, a private undertaking, where under that contract the first undertaking entrusts the second with the production and publication, for the purpose of distribution to the public, of printed and electronically accessible lists of telephone subscribers (telephone directories).

However, although it is covered by Directive 93/38, such a contract is excluded, under Community law as it stands at present, from the scope of that directive by reason of the fact, in particular, that the consideration provided by the first undertaking to the second consists in the second obtaining the right to exploit for payment its own service.

Notwithstanding the fact that, as Community law stands at present, such contracts are excluded from the scope of Directive 93/38, the contracting entities concluding them are, none the less, bound to comply with the fundamental rules of the Treaty, in general, and the principle of non-discrimination on the ground of nationality, in particular, that principle implying, in particular, an obligation of transparency in order to enable the contracting authority to satisfy itself that the principle has been complied with.

That obligation of transparency which is imposed on the contracting authority consists in ensuring, for the benefit of any potential tenderer, a degree of advertising sufficient to enable the services market to be opened up to competition and the impartiality of procurement procedures to be reviewed.

It is for the national court to rule on the question whether that obligation was complied with in the case in the main proceedings and also to assess the materiality of the evidence produced to that effect.

(see paras 58, 60-63, and operative parts 1-4)

In Case C-324/98,

REFERENCE to the Court under Article 177 of the EC Treaty (now Article 234 EC) by the Bundesvergabeamt, Austria, for a preliminary ruling in the proceedings pending before that court between

Telaustria Verlags GmbH,

Telefonadress GmbH

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and

Telekom Austria AG, formerly Post & Telekom Austria AG,

joined party:

Herold Business Data AG,

on the interpretation of Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts (OJ 1992 L 209, p. 1) and of Council Directive 93/38/EEC of 14 June 1993 coordinating the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors (OJ 1993 L 199, p. 84),

THE COURT (Sixth Chamber),

composed of: V. Skouris (Rapporteur), President of the Second Chamber, acting as President of the Sixth Chamber, J.-P. Puissochet and F. Macken, Judges,

Advocate General: N. Fennelly,

Registrar: L. Hewlett, Administrator,

after considering the written observations submitted on behalf of:

Telaustria Verlags GmbH, by F.J. Heidinger, Rechtsanwalt, Vienna,

Telekom Austria AG, by C. Kerres and G. Diwok, Rechtsanwälte, Vienna,

the Austrian Government, by W. Okresek, Sektionschef in the Federal Chancellor's Office, acting as Agent,

the Danish Government, by J. Molde, Head of Division in the Ministry of Foreign Affairs, acting as Agent,

the French Government, by K. Rispal-Bellanger, Head of Subdirectorate at the Legal Affairs Directorate of the Ministry of Foreign Affairs, and A. Bréville-Viéville, Chargé de Mission in the same directorate, acting as Agents,

the Netherlands Government, by M.A. Fierstra, Deputy Legal Adviser in the Ministry of Foreign Affairs, acting as Agent,

the Commission of the European Communities, by M. Nolin and J. Schieferer, of its Legal Service, acting as Agents, assisted by R. Roniger, of the Brussels Bar,

having regard to the Report for the Hearing,

after hearing the oral observations of Telaustria Verlags GmbH, represented by F.J. Heidinger; of Telekom Austria AG, represented by C. Kerres, P. Asenbauer, and M. Gregory, Director of Commercial Law in the office of the Legal Service of Telekom Austria AG, acting as Agent; of Herold Business Data AG, represented by T. Schirmer, Rechtsanwalt, Vienna; of the Austrian Government, represented by M. Fruhmann, of the Federal Chancellor's Office, acting as Agent; of the French Government, represented by S. Pailler, Chargé de Mission in the Legal Affairs Directorate of the Ministry of Foreign Affairs, acting as Agent; and of the Commission, represented by M. Nolin, assisted by R. Roniger, at the hearing on 23 March 2000,

after hearing the Opinion of the Advocate General at the sitting on 18 May 2000,

gives the following

Judgment

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Costs

67 The costs incurred by the Austrian, Danish, French and Netherlands Governments and by the Commission, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT (Sixth Chamber),

in answer to the questions referred to it by the Bundesvergabeamt by order of 23 April 1998, hereby rules:

1. Council Directive 93/38/EEC of 14 June 1993 coordinating the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors covers a contract for pecuniary interest concluded in writing between, on the one hand, an undertaking which is specifically responsible under the legislation of a Member State for operating a telecommunications service and whose capital is wholly held by the public authorities of that State and, on the other, a private undertaking, where under that contract the first undertaking entrusts the second with the production and publication, for the purpose of distribution to the public, of printed and electronically accessible lists of telephone subscribers (telephone directories);

although it is covered by Directive 93/38, such a contract is excluded, under Community law as it stands at present, from the scope of that directive by reason of the fact, in particular, that the consideration provided by the first undertaking to the second consists in the second obtaining the right to exploit for payment its own service.

2. Notwithstanding the fact that, as Community law stands at present, such contracts are excluded from the scope of Directive 93/38, the contracting entities concluding them are, none the less, bound to comply with the fundamental rules of the Treaty, in general, and the principle of non-discrimination on the ground of nationality, in particular, that principle implying, in particular, an obligation of transparency in order to enable the contracting authority to satisfy itself that the principle has been complied with.

3. That obligation of transparency which is imposed on the contracting authority consists in ensuring, for the benefit of any potential tenderer, a degree of advertising sufficient to enable the services market to be opened up to competition and the impartiality of procurement procedures to be reviewed.

4. It is for the national court to rule on the question whether that obligation was complied with in the case in the main proceedings and also to assess the materiality of the evidence produced to that effect.

1 By order of 23 April 1998, received at the Court on 26 August 1998, the Bundesvergabeamt (Federal Procurement Office) referred for a preliminary ruling under Article 177 of the EC Treaty (now Article 234 EC) seven questions on the interpretation of Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts (OJ 1992 L 209, p. 1) and of Council Directive 93/38/EEC of 14 June 1993 coordinating the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors (OJ 1993 L 199, p. 84).

2 Those questions have been raised in proceedings between Telaustria Verlags GmbH (Telaustria) and Telefonadress GmbH (Telefonadress), on the one hand, and Telekom Austria AG (Telekom Austria), on the other, concerning the conclusion by Telekom Austria of a concession contract with Herold Business Data AG (Herold) for the production and publication of printed and electronically accessible

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lists of telephone subscribers (telephone directories).

Legislative framework

Community legislation

Directive 92/50

3 Article 1 of Directive 92/50 states:

For the purposes of this directive:

(a) public service contracts shall mean contracts for pecuniary interest concluded in writing between a service provider and a contracting authority, to the exclusion of:

....

4 The eighth recital in the preamble to Directive 92/50 states:

... the provision of services is covered by this directive only in so far as it is based on contracts;... the provision of services on other bases, such as law or regulations, or employment contracts, is not covered.

5 Furthermore, the 17th recital in the preamble to Directive 92/50 states:

... the rules concerning service contracts as contained in Council Directive 90/531/EEC of 17 September 1990 on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors [OJ 1990 L 297, p. 1] should remain unaffected by this directive.

Directive 93/38

6 Under Article 45(3) of Directive 93/38, Directive 90/531 is to cease to have effect as from the date on which Directive 93/38 is applied. Article 45(4) states, moreover, that references to Directive 90/531 are to be construed as referring to Directive 93/38.

7 Under the 24th recital in the preamble to Directive 93/38:

... the provision of services is covered by this directive only in so far as it is based on contracts;... the provision of services on other bases, such as law, regulations or administrative provisions or employment contracts, is not covered.

8 Article 1(2) of Directive 93/38 defines public undertaking as any undertaking over which the public authorities may exercise directly or indirectly a dominant influence by virtue of their ownership of it, their financial participation therein, or the rules which govern it. A dominant influence on the part of the public authorities shall be presumed when these authorities, directly or indirectly, in relation to an undertaking:

hold the majority of the undertaking's subscribed capital....

9 Article 1(4) of Directive 93/38 defines supply, works and service contracts as contracts for pecuniary interest concluded in writing between one of the contracting entities referred to in Article 2, and a supplier, a contractor or a service provider, having as their object:

(a) in the case of supply contracts...

(b) in the case of works contracts...

(c) in the case of service contracts, any object other than those referred to in (a) and (b) and to the exclusion of:

....

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10 The last indent of Article 1(4) thereof states:

Contracts which include the provision of services and supplies shall be regarded as supply contracts if the total value of supplies is greater than the value of the services covered by the contract.

11 Furthermore, Article 1(15) of Directive 93/38 defines public telecommunications services and telecommunications services as follows:

"public telecommunications services" shall mean telecommunications services the provision of which the Member States have specifically assigned notably to one or more telecommunications entities;

"telecommunications services" shall mean services the provision of which consists wholly or partly in the transmission and routing of signals on the public telecommunications network by means of telecommunications processes, with the exception of radio-broadcasting and television.

12 Article 2(1) and (2) of Directive 93/38 states:

1. This directive shall apply to contracting entities which:

(a) are public authorities or public undertakings and exercise one of the activities referred to in paragraph 2;

...

2. Relevant activities for the purposes of this directive shall be:

...

(d) the provision or operation of public telecommunications networks or the provision of one or more public telecommunications services.

The national legislation

13 The Telekommunikationsgesetz (Telecommunications Law, BGBl. I No 100/1997), which entered into force on 1 August 1997, determines, in particular, the obligations of providers, concessionaires and operators of a voice telephony service.

14 Under Paragraph 19 of the Telekommunikationsgesetz, every provider of a public voice telephony service must maintain an up-to-date list of subscribers, maintain an information service about subscribers' numbers, provide for calls free of charge to emergency services, and make telephone directories available at least weekly in electronically readable form on request to the regulatory authority free of charge and to other providers for an appropriate charge, for the purposes of giving information or publishing directories.

15 Under Paragraph 26(1) of the Telekommunikationsgesetz, the regulatory authority is to ensure that a comprehensive directory of all subscribers to public voice telephony services is available. Concessionaires who offer a public voice telephony service via a fixed or mobile network are obliged to transmit subscriber data to the regulatory authority, against payment, for that purpose.

16 Furthermore, under Paragraph 96(1) of that Law, the operator of a public telecommunications service must produce a directory of telephone subscribers. This may take the form of a printed document or a telephone information service, Bildschirmtext (videotex system), electronic data support or any other technical form of communication. Paragraph 96 further regulates the minimum requirements for the data and the structure of those directories and the communication of subscriber data to the regulatory authority or to third parties.

The main proceedings and the questions referred for a preliminary ruling

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17 Telekom Austria, founded under the Telekommunikationsgesetz, is a limited company in which the Republic of Austria holds all the shares. It is the successor to the former Post & Telegraphenverwaltung (Post and Telegraph Administration; the PTV) and carries out the former functions of the PTV, including the obligation to ensure that a directory of all subscribers to public voice telephony services is available.

18 Whereas until 1992 the PTV fulfilled by its own means its obligation to publish, in particular, an official telephone directory known as the White Pages, in 1992, because of the high cost of printing and distributing that directory, it decided to seek a partner and concluded a contract with a private undertaking for the publication of that directory.

19 Since that contract was to expire on 31 December 1997, on 15 May 1997, Telekom Austria, which had replaced the PTV, published in the Amtsblatt zur Wiener Zeitung (bulletin annexed to the Austrian Official Journal) an invitation to submit tenders for a public service concession for the production and publication of printed and electronically accessible lists of telephone subscribers (telephone directories) commencing with the 1998/99 edition and then for an indefinite period.

20 Since Telaustria and Telefonadress took the view that the procedures prescribed by Community and national law for the award of public contracts should have been applied to the contract which would be concluded as a result of the abovementioned invitation to submit tenders, on 12 and 17 June 1997 respectively, they made applications to the Bundes-Vergabekontrollkommission (Federal Procurement Review Commission) for an arbitration procedure to be initiated under Paragraph 109 of the Bundesvergabegesetz 1997 (Federal Procurement Law, BGBl. I No 56/1997; the BVergG).

21 After having joined those two applications, the Bundes-Vergabekontrollkommission issued a reasoned recommendation in favour of the applicants, concluding on 20 June 1997 that the provisions of the BVergG applied to the planned contract.

22 Since Telekom Austria had continued negotiations on the conclusion of that contract, on 24 June 1997, Telaustria made an application to the Bundesvergabeamt for a re-examination procedure to be initiated, combined with an application for an interim order. By application of 4 July 1997, Telefonadress applied to be joined in those proceedings. On 8 July 1997, Herold, which is the company with which Telekom Austria was negotiating, also joined in the proceedings as a third party in support of the forms of order sought by Telekom Austria.

23 Before the Bundesvergabeamt, Telekom Austria submitted that the contract to be concluded fell outside the scope of the directives on the award of public service contracts on the grounds, first, that the contract was not for pecuniary interest and, second, that the case concerned a public service concession excluded from the scope of Directives 92/50 and 93/38.

24 Having first adopted an interim order in favour of the applicants, on 10 July 1997, the Bundesvergabeamt replaced that order with a new order giving provisional permission for the conclusion of the contract between Telekom Austria and Herold, on condition that provision be made for the possibility for that contract to be terminated in order to resume a proper procurement procedure if it transpired that the planned contract fell within the scope of the Community and national rules on public procurement.

25 On 1 December 1997, Herold, to which the concession was to be granted shortly thereafter, passed into the ownership of the undertaking GTE which, on 3 December 1997, ceded to Telekom Austria a holding of 26% in the capital of Herold, which thus became a joint subsidiary of GTE and Telekom Austria. On 15 December 1997, the contract at issue in the main proceedings was formally concluded between Herold and its minority shareholder, namely Telekom Austria.

26 In the grounds of its order for reference, the Bundesvergabeamt observes that that contract, consisting of several, partly interlocking contracts, concerns the production of printed telephone

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directories and provides, in particular, for the provision of the following services on the part of Herold: collecting, processing and arranging subscriber data, production of telephone directories and certain advertising services. As regards the payment of the other contracting party, the contract stipulates that Herold is not to be directly remunerated for providing the services, but that it may exploit them commercially.

27 In view of all those facts, and in particular of the method by which the service provider is to be remunerated, such as to result in the classification of that contract as one of service concession, and in view of its own considerations, the Bundesvergabeamt, being uncertain as to the interpretation of Directives 92/50 and 93/38, decided to stay proceedings and to refer the following questions to the Court of Justice.

Principal question:

Can it be inferred from the legislative history of Directive 92/50/EEC, in particular the proposal of the Commission (COM (90) 372 final, OJ 1991 C 23, p. 1), or from the definition of the term "public service contract" in Article 1(a) of Directive 92/50/EEC, that certain categories of contracts concluded by contracting authorities subject to that directive with undertakings which provide services are to be excluded a priori from the scope of the directive, solely on the basis of certain common characteristics as specified in that proposal of the Commission, without the need to rely on Article 1(a)(i) to (viii) or Articles 4 to 6 of Directive 92/50/EEC?

If the principal question is answered in the affirmative:

Do such categories of contracts also exist, having regard in particular to the 24th recital in the preamble to Directive 93/38/EEC, within the scope of Directive 93/38/EEC?

If the second question is answered in the affirmative:

May those categories of contracts excluded from the scope of Directive 93/38/EEC be adequately described, by analogy with Commission Proposal COM (90) 372 final, as having as their essential feature that a contracting entity which falls within the scope ratione personae of Directive 93/38/EEC cedes a service for which it is responsible to an undertaking of its choice in return for the right to operate the service concerned for financial gain?

Supplementary to the first three questions:

Is a contracting entity which falls within the scope ratione personae of Directive 93/38/EEC obliged, where a contract concluded by it contains elements of a service contract within the meaning of Article 1(4)(a) of Directive 93/38/EEC together with elements of a different contractual nature which are not within the scope of that directive, to sever the part of the overall contract which is subject to Directive 93/38/EEC, in so far as that is technically possible and economically reasonable, and make that part the subject of a procurement procedure under Article 1(7) of that directive, as the Court of Justice held in Case C-3/88 before the entry into force of Directive 92/50/EEC with respect to a contract which was not subject as a whole to Directive 77/62/EEC?

If that question is answered in the affirmative,

Is the contractual concession of the exclusive right to operate a service for financial gain, which will give the service provider an income which cannot be determined but which in the light of general experience will not be inconsiderable and may be expected to exceed the costs of providing the service, to be regarded as payment for the provision of the service, as the Court of Justice held in Case C-272/91 in connection with a supply contract and a right ceded by the public authorities in lieu of payment?

Supplementary to the above questions:

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Are the provisions of Article 1(4)(a) and (c) of Directive 93/38/EEC to be interpreted as meaning that a contract which provides for the provision of services within the meaning of Annex XVI A, category 15, loses the nature of a service contract and becomes a supply contract if the result of the service is the production of a large number of identical tangible objects which have an economic value and thus constitute goods within the meaning of Articles 9 and 30 of the EC Treaty?

If that question is answered in the affirmative,

Is the judgment of the Court of Justice in Case C-3/88 to be interpreted as meaning that such a supply contract is to be severed from the other components of the service contract and made the subject of a procurement procedure under Article 1(7) of Directive 93/38/EEC, in so far as this is technically possible and economically reasonable?

The first and second questions

28 By the first and second questions, which can be examined together, the national court raises essentially two issues.

29 The first is whether a contract for pecuniary interest is covered, by reason of the contracting parties and its specific object, by Directives 92/50 or 93/38 where under that contract, which was concluded in writing between, on the one hand, an undertaking which is specifically responsible under the legislation of a Member State for operating a telecommunications service and whose capital is wholly held by the public authorities of that State and, on the other, a private undertaking, the first undertaking entrusts the second with the production and publication, for the purpose of distribution to the public, of printed and electronically accessible lists of telephone subscribers (telephone directories).

30 By the second issue raised, the national court seeks essentially to ascertain whether such a contract, whose specific object is the services mentioned in the preceding paragraph, although it is covered by one of those directives, is excluded, as Community law stands at present, from the scope of the directive which covers it, because, in particular, the consideration provided by the first undertaking to the second consists in the second obtaining the right to exploit for payment its own service.

31 In order to deal with the first issue raised, it should be noted at the outset that, as is clear from the 17th recital in the preamble to Directive 92/50, the provisions of that directive must not affect those of Directive 90/531 which, since it preceded Directive 93/38, also applied, like that directive, to procurement procedures in the water, energy, transport and telecommunications sectors.

32 Since Directive 90/531 was replaced by Directive 93/38, as is clear from Article 45(3) of that directive, and since the references to Directive 90/531 are to be construed, according to Article 45(4) of Directive 93/38, as referring to Directive 93/38, it must be concluded, as under the regime applicable when the sectoral Directive 90/531 was in force, that the provisions of Directive 92/50 must not affect those of Directive 93/38.

33 Consequently, where a contract is covered by Directive 93/38 governing a specific sector of services, the provisions of Directive 92/50, which are intended to apply to services in general, are not applicable.

34 In those circumstances, it is necessary only to examine whether the contract at issue in the main proceedings can be covered, by reason of the contracting parties and its specific object, by Directive 93/38.

35 In this respect, it is necessary to determine, first, whether an undertaking, such as Telekom Austria, falls within the scope ratione personae of Directive 93/38 and, second, whether a contract,

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whose object is the services mentioned in paragraph 26 above, comes within the material scope of that directive.

36 As regards the scope ratione personae of Directive 93/38, it is common ground, as is clear from the order for reference, that Telekom Austria, whose capital belongs entirely to the Austrian public authorities, constitutes a public undertaking over which those authorities may, by virtue of the fact that the Republic of Austria holds the entire capital, exercise a dominant influence. It follows that Telekom Austria must be regarded as a public undertaking for the purpose of Article 1(2) of that directive.

37 Furthermore, it is common ground that, under the Telekommunikationsgesetz under which it was founded, that public undertaking carries on the activity which consists in the provision of public telecommunications services. It follows that Telekom Austria constitutes a contracting entity for the purpose of Article 2(1)(a) of Directive 93/38 in conjunction with Article 2(2)(d) thereof.

38 Moreover, since it is also common ground that the aforementioned contract provides for the performance of services which are Telekom Austria's responsibility under the Telekommunikationsgesetz and consist in the provision of public telecommunications services, it is sufficient, in order to determine whether the contract at issue in the main proceedings comes within the material scope of Directive 93/38, to determine whether the specific object of that contract is covered by the provisions of Directive 93/38.

39 In this respect, it should be noted, as in the order for reference, that the services which are Herold's responsibility include:

collecting, processing and arranging of subscriber data, in order to make them technically accessible, operations which require data gathering, data processing and tabulation, and services of data banks, which are in category 7, entitled Computer and related services, of Annex XVI A to Directive 93/38;

production of printed telephone directories, which comes under category 15 of Annex XVI A to that directive, a category covering Publishing and printing services on a fee or contract basis;

advertising services, which come under category 13 of Annex XVI A to Directive 93/38.

40 Since those services are directly linked to an activity relating to the provision of public telecommunications services, it must be concluded that the contract at issue in the main proceedings, whose specific object is the services referred to in the preceding paragraph, is covered by Directive 93/38.

41 In answering the second issue raised by the national court, it must be noted at the outset that the court links its questions to Proposal 91/C 23/01 of 13 December 1990 for a Council Directive relating to the coordination of procedures on the award of public service contracts (OJ 1991 C 23, p. 1; the proposal of 13 December 1990) and adopts the definition of public service concession proposed in that document by the Commission.

42 In that regard, it is necessary to state that the Court is in a position to deal with the second issue raised without its being necessary for it to adopt the definition of public service concession referred to in Article 1(h) of the proposal of 13 December 1990.

43 It should be noted at the outset that Article 1(4) of Directive 93/38 refers to contracts for pecuniary interest concluded in writing and, without making express reference to public service concessions, provides only indications about the contracting parties and about the object of the contract, defining them in particular in the light of the method of remunerating the service provider and without drawing any distinction between contracts in which the consideration is fixed and those in which the consideration consists in a right of exploitation.

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44 Telaustria proposes that Directive 93/38 be interpreted as meaning that a contract under which the consideration consists in a right of exploitation also comes within its scope. In its submission, in order for Directive 93/38 to apply to such a contract, it is sufficient, in accordance with Article 1(4) of that directive, for the contract to be for pecuniary interest and concluded in writing. It would therefore be unjustified to infer that such contracts are excluded from the scope of Directive 93/38 simply because that directive is silent about the method by which the service provider is to be remunerated. Telaustria adds that the fact that the Commission did not propose to include provisions about that type of contract within the scope of the Directive indicates that it considered that the Directive covers any contract for the provision of services, regardless of the arrangements for remunerating the provider.

45 Since Telekom Austria, the Member States which have submitted observations and the Commission dispute that interpretation, it is necessary to assess its merits in the light of the history of the relevant directives, in particular in the field of public service contracts.

46 In that regard, it should be recalled that both in its proposal of 13 December 1990 and in its amended proposal 91/C 250/05 of 28 August 1991 for a Council Directive relating to the coordination of procedures on the award of public service contracts (OJ 1991 C 250, p. 4; the proposal of 28 August 1991), which resulted in the adoption of Directive 92/50 which covers public service contracts in general, the Commission had expressly proposed that public service concessions be included within the scope of that directive.

47 Since that inclusion was justified by the intention to ensure coherent award procedures, the Commission stated, in the 10th recital in the preamble to the proposal of 13 December 1990, that public service concessions should be covered by this directive in the same way as Directive 71/305/EEC applies to public works concessions. Although the reference to 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) was withdrawn from the 10th recital in the preamble to the proposal of 28 August 1991, that proposal none the less expressly maintained the purpose of ensuring coherent award procedures in that recital.

48 However, during the legislative process, the Council eliminated all references to public service concessions, in particular because of the differences between the Member States as regards the delegation of the management of public services and modes of delegation, which could create a situation of very great imbalance in the opening-up of the public concession contracts (see point 6 of document No 4444/92 ADD 1 of 25 February 1992, entitled Statement of reasons of the Council and annexed to the common position of the same date).

49 The outcome was the same for the Commission's position expressed in its amended proposal 89/C 264/02 of 18 July 1989 for a Council Directive on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors (OJ 1989 C 264, p. 22), which resulted in the adoption of Directive 90/531, which was the first directive in those sectors on the award of public contracts and preceded Directive 93/38, in which the Commission had also proposed for those sectors certain provisions designed to govern public service concessions.

50 None the less, as is clear from point 10 of document No 5250/90 ADD 1 of 22 March 1990, entitled Statement of reasons of the Council and annexed to the Council's common position of the same date on the amended proposal for a Council Directive on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors, the Council did not act on that Commission proposal to include in Directive 90/531 rules on public service concessions, on the ground that such concessions existed in only one Member State and that it was inappropriate to proceed with their regulation in the absence of a detailed study of the various forms of public service concessions granted in the Member States in those sectors.

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51 In view of those circumstances, the Commission did not propose the inclusion of public service concessions in its proposal 91/C 337/01 of 27 September 1991 for a Council Directive amending Directive 90/531 (OJ 1991 C 337, p. 1), which subsequently resulted in the adoption of Directive 93/38.

52 That finding is also supported by the way in which the scope of the directives on public works contracts evolved.

53 Article 3(1) of Directive 71/305, which was the first directive on the subject, expressly excluded concession contracts from its scope.

54 None the less, Council Directive 89/440/EEC of 18 July 1989 amending Directive 71/305 (OJ 1989 L 210, p. 1) inserted in Directive 71/305 Article 1b which expressly addressed public works concessions by making the advertising rules laid down in Articles 12(3), (6), (7), (9) to (13) and 15a thereof applicable to them.

55 Subsequently, 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), which replaced Directive 71/305 as amended, expressly refers to public works concessions among the contracts within its scope.

56 On the other hand, Directive 93/38, adopted on the same day as Directive 93/37, provided for no rule on public service concessions. It follows that the Community legislature decided not to include such concessions within the scope of Directive 93/38. If it had wished to, it would have done so expressly, as it did when adopting Directive 93/37.

57 Since public service concession contracts do not therefore come within the scope of Directive 93/38, it must be concluded that, contrary to the interpretation proposed by Telaustria, such contracts are not included in the concept of contracts for pecuniary interest concluded in writing appearing in Article 1(4) of that directive.

58 The answers to the first and second questions must therefore be that:

Directive 93/38 covers a contract for pecuniary interest concluded in writing between, on the one hand, an undertaking which is specifically responsible under the legislation of a Member State for operating a telecommunications service and whose capital is wholly held by the public authorities of that State and, on the other, a private undertaking, where under that contract the first undertaking entrusts the second with the production and publication, for the purpose of distribution to the public, of printed and electronically accessible lists of telephone subscribers (telephone directories);

although it is covered by Directive 93/38, such a contract is excluded, under Community law as it stands at present, from the scope of that directive by reason of the fact, in particular, that the consideration provided by the first undertaking to the second consists in the second obtaining the right to exploit for payment its own service.

59 However, the fact that such a contract does not fall within the scope of Directive 93/38 does not preclude the Court from helping the national court which has sent it a series of questions for a preliminary ruling. To that end, the Court may take into consideration other factors in making an interpretation which may assist the determination of the main proceedings.

60 In that regard, it should be borne in mind that, notwithstanding the fact that, as Community law stands at present, such contracts are excluded from the scope of Directive 93/38, the contracting entities concluding them are, none the less, bound to comply with the fundamental rules of the Treaty, in general, and the principle of non-discrimination on the ground of nationality, in particular.

61 As the Court held in Case C-275/98 Unitron Scandinavia and 3-S [1999] ECR I-8291, paragraph 31, that principle implies, in particular, an obligation of transparency in order to enable the

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contracting authority to satisfy itself that the principle has been complied with.

62 That obligation of transparency which is imposed on the contracting authority consists in ensuring, for the benefit of any potential tenderer, a degree of advertising sufficient to enable the services market to be opened up to competition and the impartiality of procurement procedures to be reviewed.

63 It is for the national court to rule on the question whether that obligation was complied with in the case in the main proceedings and also to assess the materiality of the evidence produced to that effect.

The third and fifth questions

64 In view of the answers given to the first and second questions, it is not necessary to answer the third, since it was raised only in the event that the Court answered the second question in the affirmative.

65 Furthermore, since the fifth question was referred to the Court for the purpose of clarification on the third question, it is not necessary to answer that question either.

The fourth, sixth and seventh questions

66 In view of the answers given to the first and second questions, it is likewise unnecessary to answer the fourth, sixth or seventh questions, since they were raised only in the event that the Court declared that Directive 93/38 was applicable to the contract at issue in the main proceedings.

DOCNUM	61998J0324
AUTHOR	Court of Justice of the European Communities
FORM	Judgment
TREATY	European Economic Community
TYPDOC	6 ; CJUS ; cases ; 1998 ; J ; judgment
PUBREF	European Court reports 2000 Page I-10745
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LODGED	1998/08/26
JURCIT	31971L0305-A03P1 : N 53 31971L0305 : N 47 55 31977L0062 : N 27 61988J0003 : N 27 31989L0440 : N 54 31990L0531 : N 6 31 32 49 51 61991J0272 : N 27 31992L0050-A01 : N 3 31992L0050-A01LA : N 27 31992L0050-C17 : N 5 31

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31992L0050-C8 : N 4
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31993L0038-A01PT15 : N 11
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31993L0038-A01PT7 : N 27
31993L0038-A02P1 : N 12
31993L0038-A02P1LA : N 38
31993L0038-A02P1LD : N 38
31993L0038-A02P2 : N 12
31993L0038-A45P3 : N 6 32
31993L0038-A45P4 : N 6 32
31993L0038-C24 : N 7 27
31993L0038-N16 : N 27 39
31993L0038 : N 1 27 29 31 34 - 36 38 40 44 56 - 60 66
61998J0275 : N 61

CONCERNS Interprets 31992L0050
Interprets 31993L0038

SUB Free movement of goods ; Quantitative restrictions ; Measures having equivalent effect ; Freedom of establishment and services ; Right of establishment ; Free movement of services ; Approximation of laws

AUTLANG German

OBSERV Austria ; Denmark ; France ; Netherlands ; Commission ; Member States ; Institutions

NATIONA Austria

NATCOUR *A9* Bundesvergabeamt, Beschluß vom 23/04/1998
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P1 Bundesvergabeamt, Bescheid vom 23/03/2001

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PROCEDU Reference for a preliminary ruling

ADVGEN Fennelly

JUDGRAP Skouris

DATES of document: 07/12/2000
of application: 26/08/1998

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Judgment of the Court
of 22 June 1993
Commission of the European Communities v Kingdom of Denmark. Award of a works contract - Bridge over the "Storebaelt". Case C-243/89.

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1. Actions against Member States for failure to fulfil obligations ° Subject-matter of the proceedings ° Determination during the pre-litigation procedure ° Subject-matter subsequently widened ° Not permissible

(EEC Treaty, Art. 169)

2. Actions against Member States for failure to fulfil obligations ° Examination by the Court as to whether an action is well founded ° Acknowledgement by the Member State concerned of its failure to fulfil its obligations and of its liability with regard to individuals ° Not material

(EEC Treaty, Art. 169)

3. Approximation of laws ° Procedures for the award of public works contracts ° Directive 71/305 ° Award of contracts ° Condition requiring the use to the greatest possible extent of national products and labour ° Negotiations with a tenderer on the basis of a tender not complying with the tender conditions ° Free movement of goods ° Freedom of movement for persons ° Freedom to provide services ° Not permissible

(EEC Treaty, Arts 30, 48 and 59; Council Directive 71/305)

1. In actions brought under Article 169, the pre-litigation stage defines the subject-matter of the proceedings and this cannot subsequently be widened. The possibility for the Member State concerned to submit its observations constitutes an indispensable guarantee required by the Treaty and observance of that guarantee is an essential formal requirement of the procedure for establishing that a Member State has failed to fulfil its obligations.

2. In an action for failure to fulfil obligations, brought by the Commission under Article 169 of the Treaty, whose expediency only the Commission decides, it is for the Court to determine whether or not the alleged breach of obligations exists, even if the State concerned no longer denies the breach and recognizes that any individuals who have suffered damage because of it have a right to compensation. Otherwise, by admitting their breach of obligations and accepting any ensuing liability, Member States would be at liberty at any time during Article 169 proceedings before the Court to have them brought to an end without any judicial determination of the breach of obligations and of the basis of their liability.

3. By letting tenders be invited, in a procedure for the award of public works contracts, on the basis of a condition requiring the use to the greatest possible extent of national materials, consumer goods, labour and equipment and by letting negotiations be conducted with the selected tenderer on the basis of a tender not complying with the tender conditions, a Member State fails to fulfil its obligations under Articles 30, 48 and 59 of the Treaty and under Directive 71/305.

In Case C-243/89,

Commission of the European Communities, represented by Hans Peter Hartvig and Richard Wainwright, Legal Advisers, acting as Agents, with an address for service in Luxembourg at the office of Nicola Annecchino, of its Legal Service, Wagner Centre, Kirchberg,

applicant,

v

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Kingdom of Denmark, represented by Joergen Molde, Legal Adviser at the Ministry of Foreign Affairs, acting as Agent, assisted by Gregers Larsen, Advokat, with an address for service in Luxembourg at the Danish Embassy, 4 Boulevard Royal,

defendant,

APPLICATION for a declaration that, since Aktieselskabet Storebaeltsforbindelsen invited tenders on the basis of a condition requiring the use to the greatest possible extent of Danish materials, consumer goods, labour and equipment, and negotiations were conducted with the selected consortium on the basis of a tender which did not comply with the tender conditions, the Kingdom of Denmark has failed to fulfil its obligations under Community law and in particular infringed Articles 30, 48 and 59 of the EEC Treaty as well as 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),

THE COURT,

composed of: O. Due, President, C.N. Kakouris, G.C. Rodríguez Iglesias, M. Zuleeg and J.L. Murray (Presidents of Chambers), G.F. Mancini, R. Joliet, F.A. Schockweiler, J.C. Moitinho de Almeida, F. Grévisse and P.J.G. Kapteyn, Judges,

Advocate General: G. Tesauro,

Registrar: H. von Holstein, Deputy Registrar,

having regard to the Report for the Hearing,

after hearing oral argument from the parties at the hearing on 29 September 1992, at which the Kingdom of Denmark was represented by Joergen Molde, acting as Agent, assisted by Gregers Larsen and Sune F. Svendsen, Advokater,

after hearing the Opinion of the Advocate General at the sitting on 17 November 1992,

gives the following

Judgment

Costs

46 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs. Since the Kingdom of Denmark has been unsuccessful, it must be ordered to pay the costs.

On those grounds,

THE COURT

hereby:

1. Declares that, by reason of the fact that Aktieselskabet Storebaeltsforbindelsen invited tenders on the basis of a condition requiring the use to the greatest possible extent of Danish materials, consumer goods, labour and equipment and the fact that negotiations with the selected consortium took place on the basis of a tender which did not comply with the tender conditions, the Kingdom of Denmark failed to fulfil its obligations under Community law and in particular infringed Articles 30, 48 and 59 of the Treaty as well as Council Directive 71/305/EEC;

2. Orders the Kingdom of Denmark to pay the costs.

1 By application lodged at the Court Registry on 2 August 1989, the Commission of the European Communities brought an action under Article 169 of the EEC Treaty for a declaration that, since

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° Aktieselskabet Storebaeltsforbindelsen invited tenders on the basis of a condition requiring the use to the greatest possible extent of Danish materials, consumer goods, labour and equipment, and

° negotiations with the selected consortium were conducted on the basis of a tender which did not comply with the tender conditions,

the Kingdom of Denmark had failed to fulfil its obligations under Community law and in particular infringed Articles 30, 48 and 59 of the EEC Treaty as well as 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, hereinafter "the directive").

2 Aktieselskabet Storebaeltsforbindelsen (hereinafter "Storebaelt") is a company wholly controlled by the Danish State. It is responsible for drawing up the project and, as the contracting authority, for the construction of a road and rail link across the Great Belt. Part of the project involves the construction of a bridge across the Western Channel of the Great Belt. The value of the contract for the construction of the Western Bridge is estimated at DKR 3 billion.

3 On 9 October 1987, Storebaelt published in the supplement to the Official Journal of the European Communities (1987 S 196, p. 16) a restricted invitation to tender for the construction of a bridge over the Western Channel. On 28 April 1988 it invited five groups of companies to submit tenders.

4 Condition 6, Clause 2, of the general conditions which form part of the contract documents (hereinafter "the general conditions") provides as follows:

> "The contractor is obliged to use to the greatest possible extent Danish materials, consumer goods, labour and equipment" (hereinafter "the Danish content clause").

5 Condition 3, Clause 3, of the general conditions sets out the conditions governing alternative tenders for alternative projects instead of the three different projects for the bridge which Storebaelt itself had designed and which serve as a basis for assessment of those tenders. Condition 3, Clause 3, provides that the tender price for an alternative project is to be based on the assumption that the contractor will undertake the detailed design of the project which it will submit to the contracting authority for approval and that it will assume full responsibility for the project and for its execution. That condition also specifies that the contractor is to accept the risk of variations in the quantities on which the alternative tender is based. Lastly, according to that condition,

> "if the contractor submits a tender for an alternative project for which he assumes responsibility, he must state a price allowing for a reduction in the event that the contracting authority decides to take over the detailed planning of the project".

6 Five international consortia, comprising a total of 28 undertakings, were invited to submit tenders. One of those five consortia was the European Storebaelt Group (hereinafter "ESG"), whose members were Ballast Nedam from the Netherlands, Losinger Ltd from Switzerland, Taylor Woodrow Construction Ltd from the United Kingdom and three Danish contracting firms. ESG submitted an alternative tender to Storebaelt for the construction of a concrete bridge.

7 Storebaelt then entered into discussions with the various tenderers in order to compare and assess their respective tenders and to quantify the cost of the numerous reservations which they contained. After cutting down the number of tenders, Storebaelt continued negotiations with ESG regarding its alternative tender. Those negotiations culminated in the signature, on 26 June 1989, of a contract between ESG and Storebaelt.

8 Reference is made to the Report for the Hearing for a fuller account of the facts of the case, the course of the procedure and the pleas in law and the arguments of the parties, which are mentioned or discussed below only in so far as is necessary for the reasoning of the Court.

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Admissibility

9 Having reserved the right, at the end of its application, to supplement and develop if necessary the two grounds of its application, the Commission, in its reply, elaborated its arguments on the basis of information provided by the Danish Government in its statement of defence. The Commission also made two amendments to the forms of order sought in its application.

10 In the first place it seeks a declaration from the Court, in relation to its second ground of application, set out above (paragraph 1), that Denmark had failed to fulfil its obligations since Storebaelt had, on the basis of a tender which did not comply with the tender conditions, conducted with ESG negotiations resulting in a final contract which contained amendments to the conditions of tender favouring that tenderer alone and relating in particular to price-related factors.

11 Secondly, on the question of the legal rules allegedly infringed by the defendant, the Commission claims that the Kingdom of Denmark infringed Directive 71/305, "including the principle of equal treatment which underlies that directive".

12 The Danish Government seeks from the Court a declaration that the application is inadmissible in so far as the Commission extended the subject-matter of the action beyond that of the pre-litigation procedure.

13 Before considering that claim, it should be recalled that, according to the case-law of the Court (see the judgment in Case C-306/91 Commission v Italy [1993] ECR I-2151, paragraph 22), in actions brought under Article 169 the pre-litigation stage defines the subject-matter of the proceedings and this cannot subsequently be widened. The possibility for the Member State concerned to submit its observations constitutes an indispensable guarantee required by the Treaty and observance of that guarantee is an essential formal requirement of the procedure for establishing that a Member State has failed to fulfil its obligations.

14 The Danish Government contends, first, that the Commission may not widen the subject-matter of the proceedings, either in its application or, in particular, in its reply, beyond the matters of fact and law mentioned in the letter of formal notice and the reasoned opinion.

15 On this issue the Court must find that the only matters at issue at the pre-litigation stage were Condition 6, Clause 2, of the general conditions, that is to say, the Danish content clause, and the commencement of negotiations on the basis of a tender which did not comply with Condition 3, Clause 3, of those conditions, concerning the tenderer' s responsibilities where an alternative project was tendered for.

16 It follows that the action is admissible only in so far as the two grounds of application relate to those two provisions of the general conditions.

17 As regards the ground of application relating to the Danish content clause, the Commission is not, however, barred from supporting its arguments in that regard by referring to other provisions of the contract documents which amplify that clause on specific points.

18 The Danish Government further contends that, by altering in the course of the proceedings the terms of the form of order sought, the Commission changed the subject-matter of the proceedings and infringed the rights of the defence in so far as it had no opportunity, as the defendant State, to submit its observations on the new points in good time and in the prescribed manner. Consequently, according to the Danish Government, the question whether the action is well founded must be considered only in relation to the form of order sought in the application initiating the proceedings.

19 That plea in law raises the question whether the re-wording of the second part of the form of order sought widens its scope and, secondly, the question whether the reference, in the reply, to the "principle of equal treatment underlying that directive" introduces a new element into the legal

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basis of the alleged failure to fulfil obligations.

20 With respect to the first point, it need only be observed that the Commission was entitled to clarify the form of order sought in order to take into account the information, furnished by the Danish Government in its defence, concerning the conduct of the tendering procedure and the negotiations between Storebaelt and ESG.

21 With regard to the second point, first of all, as the Advocate General points out in point 13 of his Opinion, the Commission had already complained in the course of the pre-litigation procedure that the Danish Government had acted in breach of that principle and both the reasoned opinion and the application make express mention of this. It follows that the Danish Government had the opportunity to submit observations in that connection, as is evident from its reply to the reasoned opinion and from the terms of its defence.

22 Secondly, the Danish Government' s argument that the principle of equal treatment constitutes a new legal basis for the charge of failure to fulfil obligations raises a question concerning the interpretation of the directive which will be examined together with the issues of substance.

Substance

The first ground of application, concerning the Danish content clause

23 The Danish content clause, as set out in Condition 6, Clause 2, of the general conditions, is incompatible with Articles 30, 48 and 59 of the Treaty, a fact which is moreover undisputed by the Danish Government.

24 However, the Danish Government contends, first, that it deleted the clause in question before the signature of the contract with ESG on 26 June 1989 and that it thereby complied with the reasoned opinion even before it was notified on 14 July 1989. At the hearing, the Danish Government, relying on the judgment in Case C-362/90 Commission v Italy [1992] ECR I-2353 also argued that the Commission had failed to act in good time to prevent, by the procedures available to it, the infringement complained of from producing legal effects.

25 That argument cannot be accepted.

26 In the first place, even though the clause in question was deleted shortly before signature of the contract with ESG and consequently before notification of the reasoned opinion, the fact remains that the tendering procedure was conducted on the basis of a clause which was not in conformity with Community law and which, by its nature, was likely to affect both the composition of the various consortia and the terms of the tenders submitted by the five preselected consortia. It follows that the mere deletion of that clause at the final stage of the procedure cannot be regarded as sufficient to make good the breach of obligations alleged by the Commission.

27 It should also be noted that, in its letter of formal notice of 21 June 1989, the Commission requested the Danish Government to arrange for signature of the contract in dispute to be postponed and that if the Danish Government had acceded to that request the breach of obligations complained of would not have produced any legal effects.

28 The Danish Government contends, secondly, that in its statement of 22 September 1989, delivered to the Court at the hearing of the application for interim measures, it not only recognized that the Danish content clause constituted an infringement of Community law but also accepted liability towards the tenderers, so that the action on this point is devoid of purpose.

29 That argument must also be rejected.

30 In an action for failure to fulfil obligations, brought by the Commission under Article 169 of the Treaty, whose expediency only the Commission decides, it is for the Court to determine

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whether or not the alleged breach of obligations exists, even if the State concerned no longer denies the breach and recognizes that any individuals who have suffered damage because of it have a right to compensation. Otherwise, by admitting their breach of obligations and accepting any ensuing liability, Member States would be at liberty at any time during Article 169 proceedings before the Court to have them brought to an end without any judicial determination of the breach of obligations and of the basis of their liability.

31 It follows from those considerations that the Commission' s application is well founded in relation to the first ground of application, concerning the Danish content clause.

The second ground of application, concerning negotiations on the basis of a tender which did not comply with the tender conditions

32 Since the Commission claims in its pleadings, which were re-worded in its reply, that Storebaelt acted in breach of the principle that all tenderers should be treated alike, the Danish Government' s argument that that principle is not mentioned in the directive and therefore constitutes a new legal basis for the complaint of breach of State obligations must be considered first.

33 On this issue, it need only be observed that, although the directive makes no express mention of the principle of equal treatment of tenderers, the duty to observe that principle lies at the very heart of the directive whose purpose is, according to the ninth recital in its preamble, to ensure in particular the development of effective competition in the field of public contracts and which, in Title IV, lays down criteria for selection and for award of the contracts, by means of which such competition is to be ensured.

34 In its reply the Commission based its claims on a series of provisions in the final version of the contract which, in its view, constituted amendments to the tender conditions and had some effect on prices. However, as was explained above (paragraphs 14 and 15), only the amendments relating to Condition 3, Clause 3, of the general conditions may be taken into consideration by the Court.

35 The Commission' s second ground of application, so defined, is essentially that the Kingdom of Denmark infringed the principle of equal treatment of tenderers by reason of the fact that Storebaelt, on the basis of a tender which did not comply with the tender conditions, conducted negotiations with ESG, which, in the final version of the contract, led to amendments to Condition 3, Clause 3, concerning price-related factors which favoured that tenderer alone.

36 In order to assess the compatibility of the negotiations so conducted by Storebaelt with the principle of equal treatment of tenderers, it must first be considered whether that principle precluded Storebaelt from taking ESG' s tender into consideration.

37 In this regard, it must be stated first of all that observance of the principle of equal treatment of tenderers requires that all the tenders comply with the tender conditions so as to ensure an objective comparison of the tenders submitted by the various tenderers.

38 This is confirmed by Article 11 of the directive, which, whilst allowing a tenderer, where there is the option of submitting variations on a project of the administration, to use a method for pricing the works which differs from that used in the country where the contract is being awarded, nevertheless requires that the tender accord with the tender conditions.

39 With regard to the Danish Government' s argument that Danish legislation governing the award of public contracts allows reservations to be accepted, it should be observed that when that legislation is applied, the principle of equal treatment of tenderers, which lies at the heart of the directive and which requires that tenders accord with the tender conditions, must be fully respected.

40 That requirement would not be satisfied if tenderers were allowed to depart from the basic terms of the tender conditions by means of reservations, except where those terms expressly allow them

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to do so.

41 The tender submitted by ESG, concerning an alternative project for the construction of a concrete bridge, did not comply with Condition 3, Clause 3, of the general conditions in so far as it failed to satisfy the requirements stipulated therein, that is to say that the proposed price was not based on the fact that, as tenderer, it had to undertake the detailed design of a project and assume full responsibility for it, as regards both its planning and its execution, as well as accept the risk of variation in quantities in relation to those envisaged.

42 Lastly, it should be noted that Condition 3, Clause 3, of the general conditions constitutes a fundamental requirement of the tender conditions, since it specifies the conditions governing the calculation of prices, taking into account the tenderer' s responsibility for the detailed design and execution of the project and for accepting the risks.

43 In those circumstances, and since the condition in question did not give tenderers the option of incorporating reservations into their tenders, the principle of equal treatment precluded Storebaelt from taking into consideration the tender submitted by ESG.

44 Consequently, the second ground of application concerning the conduct of negotiations on the basis of a tender which did not comply with the tender conditions is well founded.

45 It follows from all the foregoing considerations that, by reason of the fact that Aktieselskabet Storebaeltsforbindelsen invited tenders on the basis of a condition requiring the use to the greatest possible extent of Danish materials, consumer goods, labour and equipment and the fact that negotiations with the selected consortium took place on the basis of a tender which did not comply with the tender conditions, the Kingdom of Denmark failed to fulfil its obligations under Community law and in particular infringed Articles 30, 48 and 59 of the Treaty as well as Council Directive 71/305/EEC.

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LODGED	1989/08/02
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61990J0362 : N 24
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31971L0305-A11 : N 38

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Failure concerning 11957E048 -
Failure concerning 11957E059 -
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SUB Free movement of goods ; Quantitative restrictions ; Measures having equivalent effect ; Freedom of establishment and services ; Right of establishment ; Free movement of services ; Approximation of laws

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APPLICA Commission ; Institutions

DEFENDA Denmark ; Member States

NATIONA Denmark

NOTES La Marca, Luigi: Sospensione cautelare dell'appalto già aggiudicato e conciliazione giudiziale: il caso Storebaelt, Rivista di diritto europeo 1990 p.803-859 ; Gormley, Laurence: Buy-National Policies are Still Bad for You, European Business Law Review 1993 p.166 ; Boutard-Labarde, Marie-Chantal: Chronique de jurisprudence du Tribunal et de la Cour de justice des Communautés européennes. Libre circulation des personnes et des services, Journal du droit international 1994 p.499-500

PROCEDU Action for failure to fulfil obligations - successful

ADVGEN Tesauro

JUDGRAP Kapteyn

DATES of document: 22/06/1993
of application: 02/08/1989

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Judgment of the Court (Sixth Chamber)
of 18 June 2002
Hospital Ingenieure Krankenhaustechnik Planungs-Gesellschaft mbH (HI) v Stadt Wien. Reference for a preliminary ruling: Vergabekontrollsenat des Landes Wien - Austria. Public service contracts - Directive 92/50/EEC - Procedure for the award of public service contracts - Directive 89/665/EEC - Scope - Decision to withdraw an invitation to tender - Judicial review - Scope. Case C-92/00.

1. Preliminary rulings - Reference to the Court - National court or tribunal within the meaning of Article 234 EC - Definition - Body competent to hear appeals concerning the award of public contracts

(Art. 234 EC)

2. Approximation of laws - Review procedures relating to the award of public supply and public works contracts - Directives 89/665 and 92/50 - Withdrawal of an invitation to tender - Member States under an obligation to provide for review procedures - Limitation of the extent of the review of the legality of the decision - None - Determination of the time to be taken into consideration for assessing the legality of the decision - Jurisdiction of the national court - Limits

(Council Directives 89/665, Art. 1(1), and 92/50)

$$1. In order to determine whether a body making a reference for a preliminary ruling is a court or tribunal within the meaning of Article 234 EC, which is a question governed by Community law alone, the Court takes account of a number of factors, such as whether the body is established by law, whether it is permanent, whether its jurisdiction is compulsory, whether its procedure is inter partes, whether it applies rules of law and whether it is independent

Those criteria are satisfied by the Vergabekontrollsenat des Landes Wien (Public-Procurement Review Chamber of the Vienna Region), which is established by the Viennese law on public procurement as a body with jurisdiction to rule, applying rules of law, following an inter partes procedure, and by decision with binding force, on review proceedings concerning procedures for the award of contracts. Moreover, the provisions governing the composition and functioning of that body guarantee its permanence and independence.

(see paras 25-27)

2. Article 1(1) of Directive 89/665 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 Directive 92/50 relating to the coordination of procedures for the award of public service contracts, requires the decision of the contracting authority to withdraw the invitation to tender for a public service contract to be open to a review procedure, and to be capable of being annulled where appropriate, on the ground that it has infringed Community law on public contracts or national rules implementing that law.

That decision is subject to fundamental rules of Community law, and in particular to the principles laid down by the Treaty on the right of establishment and the freedom to provide services. It also falls within the rules laid down by Directive 89/665 in order to ensure compliance with the rules of Community law on public contracts.

In the context of such a review procedure, Directive 89/665, as amended by Directive 92/50, precludes national legislation from limiting review of the legality of the withdrawal of an invitation to tender to mere examination of whether it was arbitrary.

Determination of the time to be taken into consideration for assessing the legality of the decision by the contracting authority to withdraw an invitation to tender is a matter for national law, provided that the relevant national rules are not less favourable than those governing similar domestic actions

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and that they do not make it practically impossible or excessively difficult to exercise rights conferred by Community law.

(see paras 42, 48, 55, 64, 68, operative parts 1-3)

In Case C-92/00,

REFERENCE to the Court under Article 234 EC by the Vergabekontrollsenat des Landes Wien (Austria) for a preliminary ruling in the proceedings pending before that court between

Hospital Ingenieure Krankenhaustechnik Planungs-GmbH (HI)

and

Stadt Wien,

on the interpretation of Article 2(1)(b) 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 relating to the coordination of procedures for the award of public service contracts (OJ 1992 L 209, p. 1) and of Directive 92/50 in the version thereof resulting from European Parliament and Council Directive 97/52/EC of 13 October 1997 amending Directives 92/50/EEC, 93/36/EEC and 93/37/EEC concerning the coordination of procedures for the award of public service contracts, public supply contracts and public works contracts respectively (OJ 1997 L 328, p. 1),

THE COURT (Sixth Chamber),

composed of: F. Macken, President of the Chamber, C. Gulmann, J.-P. Puissochet, V. Skouris (Rapporteur), and J.N. Cunha Rodrigues, Judges,

Advocate General: A. Tizzano,

Registrar: R. Grass,

after considering the written observations submitted on behalf of:

- Hospital Ingenieure Krankenhaustechnik Planungs-GmbH (HI), by R. Kurbos, Rechtsanwalt,

- the Austrian Government, by H. Dossi, acting as Agent,

- the Commission of the European Communities, by M. Nolin, acting as Agent, assisted by R. Roniger, Rechtsanwalt,

having regard to the report of the Judge-Rapporteur,

after hearing the Opinion of the Advocate General at the sitting on 28 June 2001,

gives the following

Judgment

Costs

69 The costs incurred by the Austrian Government and by the Commission, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court.

On those grounds,

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THE COURT (Sixth Chamber),

in answer to the questions referred to it by the Vergabekontrollsenat des Landes Wien by order of 17 February 2000, hereby rules:

1. 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 relating to the coordination of procedures for the award of public service contracts, requires the decision of the contracting authority to withdraw the invitation to tender for a public service contract to be open to a review procedure, and to be capable of being annulled where appropriate, on the ground that it has infringed Community law on public contracts or national rules implementing that law.

2. Directive 89/665, as amended by Directive 92/50, precludes national legislation from limiting review of the legality of the withdrawal of an invitation to tender to mere examination of whether it was arbitrary.

3. Determination of the time to be taken into consideration for assessing the legality of the decision by the contracting authority to withdraw an invitation to tender is a matter for national law, provided that the relevant national rules are not less favourable than those governing similar domestic actions and that they do not make it practically impossible or excessively difficult to exercise rights conferred by Community law.

1 By order of 17 February 2000, received at the Court on 10 March 2000, the Vergabekontrollsenat des Landes Wien (Public-Procurement Review Chamber of the Vienna Region) referred to the Court for a preliminary ruling under Article 234 EC three questions on the interpretation of Article 2(1)(b) 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 relating to the coordination of procedures for the award of public service contracts (OJ 1992 L 209, p. 1; hereinafter Directive 89/665) and of Directive 92/50 in the version thereof resulting from European Parliament and Council Directive 97/52/EC of 13 October 1997 amending Directives 92/50/EEC, 93/36/EEC and 93/37/EEC concerning the coordination of procedures for the award of public service contracts, public supply contracts and public works contracts respectively (OJ 1997 L 328, p. 1; hereinafter Directive 92/50).

2 Those questions were raised in a dispute between the German company Hospital Ingenieure Krankenhaustechnik Planungs-GmbH (hereinafter HI) and the City of Vienna, concerning the latter's withdrawal of an invitation to tender for a public service contract for which HI had submitted a tender.

Legal background

Community legislation

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

1. The Member States shall take the measures necessary to ensure that, as regards contract award procedures falling within the scope of Directives 71/305/EEC, 77/62/EEC, and 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, in 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.

4 Under Article 2(1) and (5) of Directive 89/665:

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1. 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;

...

...

5. The Member States may provide that where damages are claimed on the grounds that a decision was taken unlawfully, the contested decision must first be set aside by a body having the necessary powers.

5 Article 12(2) of Directive 92/50 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 to a contract for which there has been an invitation to tender or to start the procedure again, and shall do so in writing if required. They shall also inform the Office for Official Publications of the European Communities of such decisions.

The national legislation

6 Paragraphs 32(2) to (4) of the Wiener Landesvergabegesetz (Viennese law on public procurement, hereinafter the WLVergG), LGBl. No 36/1995, in the version published in LGBl. No 30/1999, provide, under the heading Rectification and withdrawal of invitations to tender:

2. An invitation to tender may be withdrawn during the period for submission of tenders where events occur which, had they been previously known, would have excluded an invitation to tender being made or led to an invitation to tender with a substantially different content.

3. At the expiry of the period for submitting tenders, the invitation to tender must be withdrawn where compelling grounds exist. Compelling grounds exist in particular

(1) where the events described in subparagraph 2 are not known until after the expiry of the period for submitting tenders,

or

(2) where all the tenders had to be excluded.

4. An invitation to tender may be withdrawn, for example, where

(1) no tender acceptable from an economic point of view has been submitted,

or

(2) ... only one tender remains after the exclusion of other tenders.

7 Under the WLVergG, the Vergabekontrollsenat des Landes Wien has jurisdiction to rule on review proceedings concerning procedures for the award of public supply, works and service contracts.

8 In particular, Paragraph 94(2) of the WLVergG provides that the Vergabekontrollsenat is to

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rule at first and last instance in review proceedings, and that its decisions cannot be amended or annulled through administrative channels. Under Paragraph 94(3), the procedure in such review proceedings is governed by the Allgemeine Verwaltungsverfahrensgesetz (General Code of Administrative Procedure) and the Verwaltungsvollstreckungsgesetz (Law on Execution in Administrative Matters), save where provision is made otherwise in the WLVergG.

9 Paragraph 95 of the WLVergG is worded as follows:

1. The Vergabekontrollsenat shall be composed of seven members, nominated by the Government of the Land for a mandate of six years. Mandates are renewable. Three members, who may also be employees of the Viennese municipal administration qualified in the area, shall be appointed after consultation with the municipal administration; one member shall be appointed after consultation with the Wirtschaftskammer (Vienna Chamber of Commerce); one member shall be appointed after consultation with the Kammer für Arbeiter und Angestellte (Chamber for Workers and Employees) of Vienna; and one member shall be appointed after consultation with the Architekten- und Ingenieurkonsultenkammer (Chamber of Architects and Consulting Engineers) for the Länder of Vienna, Lower Austria and Burgenland. The chairman shall be a judge, appointed after consultation with the President of the Oberlandesgericht Wien (Higher Regional Court, Vienna) ...

2. The members and their substitutes must have extensive knowledge of the are of the award of public contracts, especially, as regards members appointed after consultation with the municipal council, from the economic and technical standpoint:

...

3a. Any member under long-term incapacity from exercising his functions normally on account of physical or mental disability, or who has committed serious failures to fulfil his obligations, shall be removed from his mandate by decision of the Vergabekontrollsenat. That decision must be taken after hearing the person concerned, who may not take part in the vote.

4. The members of the Vergabekontrollsenat shall carry out their functions in full independence and shall not be bound by instructions.

5. The members of the Vergabekontrollsenat are under the duty of confidentiality, in accordance with Paragraph 20(3) of the Bundesverfassungsgesetz (Federal Constitutional Law).

6. The Vergabekontrollsenat shall sit when convened by the chairman. Where a member has a personal interest, or is temporarily prevented from fulfilling his functions, his substitute must be called. Members of the Vergabekontrollsenat may not adjudicate on a proceeding which involves the award of a contract within the area of operation of the institution (in the case of employees of the Vienna municipal administration, the service, the sub-contracting undertaking or the establishment) of which they form part. If there are serious reasons for doubting the impartiality of a member, he must refrain from exercising his functions and ask to be replaced. The parties may object to members of the Vergabekontrollsenat on grounds of partiality. Where the Vergabekontrollsenat rules on the possible partiality of a member and on objections, the member concerned shall not be entitled to vote. The names of the members of the Vergabekontrollsenat and of the institution (in the case of employees of the Vienna municipal administration, the service, the sub-contracting undertaking or the establishment) of which they form part shall be published in the Amtsblatt der Stadt Wien (Official Journal of the City of Vienna) at the beginning of each calendar year on the initiative of the chairman.

7. Review proceedings must be submitted to a vote in the order determined by the chairman. Five members constitute a quorum, decisions being taken by an absolute majority. Abstention is not allowed. The Vergabekontrollsenat does not sit in public. Sessions are minuted. Decisions must be adopted

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in writing and mention the names of the members of the Vergabekontrollsenat who took part in the vote. The decision must be signed by the chairman....

8. Members of the Vergabekontrollsenat perform that activity without remuneration. They are to be sworn in before the Landeshauptmann (Prime Minister of the Land).

...

10. The Vergabekontrollsenat shall adopt rules of procedure.

...

10 Paragraph 99 of the WLVergG, headed Jurisdiction of the Vergabekontrollsenat, provides:

1. The Vergabekontrollsenat shall have jurisdiction, on request, over review proceedings in accordance with the following provisions:

(1) until the date of the award to issue interim orders and to annul unlawful decisions of the award section of the awarding authority in order to eliminate infringements of the law within the meaning of Paragraph 101;

(2) after the award of the contract to hold that the contract was not awarded to the tenderer who submitted the best tender, by reason of an infringement of this law within the meaning of Paragraphs 47 and 48(2). In such proceedings, the Vegabekontrollsenat also has jurisdiction to make a finding, at the request of the awarding authority, whether the contract would have been awarded to a candidate or tenderer whose tender was not accepted in the absence of the legal infringements found.

2. The Vergabekontrollsenat shall be obliged to entertain review proceedings only in so far as the decision alleged to be unlawful is essential to the outcome of the contract awarding procedure.

11 Paragraph 101 of the WLVergG provides:

The Vergabekontrollsenat must set aside decisions of the awarding authority adopted in the course of a contract awarding procedure:

(1) where discriminatory technical, economic or financial specifications appear in the tender notice inviting undertakings to participate in a closed procedure or a negotiated tender, or in the invitation to tender or tender specifications; or

(2) where a tenderer is passed over in breach of the criteria appearing in the tender notice in which undertakings are invited to participate in a closed procedure or a negotiated tender and the awarding authority might have come to a decision more favourable to the applicant if the infringed provisions had been complied with.

The dispute in the main proceedings and the questions referred

12 The order for reference shows that the Mayor of the City of Vienna, acting on behalf of the contracting authority, the Wiener Krankenanstaltenverbund (Vienna Associated Hospitals), published an invitation to tender for a contract entitled Implementation of project management for realisation of the overall catering-supply concept in the premises of the Viennese associated hospitals in the Official Journal of the European Communities of 24 December 1996 and in the legal notices section of the Wiener Zeitung (Viennese Journal) of 30 December 1996.

13 After the submission of tenders, including the tender by HI, the City of Vienna withdrew the invitation to tender within the period for awarding the contract. It informed HI, by letter of 25 March 1997, that it had decided to abandon the procedure for compelling reasons in accordance with the first subparagraph of Paragraph 32(3) of the WLVergG.

14 Following a request for information sent to it by HI, the City of Vienna explained the withdrawal

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of the invitation to tender as follows in a letter of 14 April 1997:

Having regard to the results of the project carried out by the Humanomed company in 1996, the initial plan has been modified. In the discussion of these circumstances, which took place at the end of the period laid down for the submission of tenders and during the period for the award of the contract within the coordination committee, it was found that the project would in future have to be developed in a decentralised manner. It was therefore decided not to make provision for a coordinating body and the award of the contract to an outside project leader was therefore not necessary.

It is thus clear that the reasons in question would have excluded an award if they had been known previously. If another project management were to be found necessary in the context of the "provision of meals" project, an invitation to tender with a different content would have to be carried out.

15 HI then brought a number of claims before the Vergabekontrollsenat, seeking, inter alia, the opening of review proceedings, an interim order, the annulment of certain tender documents and the annulment of the withdrawal of the invitation to tender. In an adjunct to the latter claim, HI cited new evidence proving, in its submission, that the decision to withdraw the invitation to tender was unlawful and again requesting that the latter be annulled.

16 In particular, HI referred to its suspicions that the City of Vienna had a direct or indirect stake in the capital of Humanomed. HI argued that that company had carried out substantial preparatory work for the invitation to tender, carried out project management and influenced the preparation of the masterplan, and that the City of Vienna had withdrawn the invitation to tender in order to circumvent the obligation to exclude Humanomed's tender with the aim of continuing its collaboration with that company. HI concluded therefrom that the withdrawal decision was discriminatory in so far as it was designed to favour an Austrian company to the detriment of a candidate from a Member State other than the Republic of Austria.

17 By decisions of 30 April and 10 June 1997, the Vergabekontrollsenat dismissed the claims for annulment of the withdrawal of the invitation to tender as inadmissible on the ground that, pursuant to Paragraph 101 of the WLVergG, only certain decisions adopted in the course of a tendering procedure, exhaustively listed, may be annulled.

18 The Verfassungsgerichtshof (Constitutional Court) (Austria), before which HI brought actions against those dismissal decisions, annulled them for infringement of the right to have the matter tried before a regular court. It held that the Vergabekontrollsenat was required to make a reference to the Court of Justice for a preliminary ruling as to whether the decision to withdraw an invitation to tender constituted a decision within the meaning of Article 2(1)(b) of Directive 89/665.

19 The referring court states at the outset that, in the event of unlawful withdrawal of an invitation to tender, the undertaking concerned may bring a civil action for damages under national law before the ordinary courts.

20 The order for reference further shows that the Vergabekontrollsenat considers that, since detailed rules for withdrawing an invitation to tender do not appear in the directives laying down substantive rules concerning public contracts, the decision to make such a withdrawal is not a decision covered by Article 2(1)(b) of Directive 89/665 and, therefore, is not a decision which, pursuant to that directive, must be capable of being the subject-matter of review proceedings.

21 Taking the view that the City of Vienna complied with the procedure laid down in Article 12(2) of Directive 92/50, the Vergabekontrollsenat is unsure whether, assuming Community law requires review of a decision withdrawing an invitation to tender, that review may concern solely the arbitrary or fictitious character of that decision.

22 Concerning the date to be taken into consideration in order to assess the legality of such a

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decision, the referring court considers that the fact that the decision of the awarding authority is subject to review and thus constitutes the subject-matter of the dispute would lead to the date of that decision being used, but concedes that the principle of effectiveness, as contained in the recitals in the preamble to Directive 89/665, would lead rather to the date of the decision of the review body being used.

23 In the light of those considerations, the Vergabekontrollsenat des Landes Wien decided to stay the proceedings and refer the following questions to the Court of Justice for a preliminary ruling:

(1) Does Article 2(1)(b) of Directive 89/665/EEC... require the decision of a contracting authority to cancel the procedure for the award of a contract for services to be reviewable in review proceedings leading, if appropriate, to its being set aside?

(2) If Question 1 is answered affirmatively, is there any provision of Directive 89/665 or of Directive 92/50/EEC which precludes a review limited to examination of the issue whether cancellation of the award procedure was arbitrary or a sham?

(3) If Question 1 is answered affirmatively, which is the relevant moment in time for assessing whether the decision of the contracting authority to cancel he award procedure is lawful?

Admissibility of the questions referred

24 As a preliminary, it must be examined whether the Vergabekontrollsenat constitutes a court or tribunal within the meaning of Article 234 EC, and thus whether its questions are admissible.

25 It is settled case-law that, in order to determine whether a body making a reference for a preliminary ruling is a court or tribunal within the meaning of Article 234 EC, which is a question governed by Community law alone, the Court takes account of a number of factors, such as whether the body is established by law, whether it is permanent, whether its jurisdiction is compulsory, whether its procedure is inter partes, whether it applies rules of law and whether it is independent (see, in particular, Case C-54/96 Dorsch Consult v Bundesbaugesellschaft Berlin [1997] ECR I-4961, paragraph 23, and Case C-103/97 Köllensperger and Atzwanger v Gemeindeverband Bezirkskrankenhaus Schwaz [1999] ECR I-551, paragraph 17).

26 In this case, Paragraph 94 of the WLVergG clearly shows that the Vergabekontrollsenat complies with the criteria of being established by law, having compulsory jurisdiction and an inter partes procedure, and applying rules of law.

27 In addition, Paragraph 95 of the WLVergG, which governs the composition and functioning of this body, guarantees its permanence and, in conjunction with Paragraph 94(3), its independence.

28 It follows that the Vergabekontrollsenat des Landes Wien must be regarded as a court or tribunal within the meaning of Article 234 EC and that its questions are admissible.

Substance

The first question

29 As the order for reference shows, the Vergabekontrollsenat wishes to know, in answer to its first question, whether the decision to withdraw an invitation to tender for a public service contract is a decision taken by the contracting authorities in respect of which Member States are required, under Article 1(1) of Directive 89/665, to establish effective review procedures in their national law which are as rapid as possible.

30 In that respect, whereas Article 2(1)(b) of Directive 89/665 delimits the scope of the directive, it does not define the unlawful decisions of which annulment may be sought, confining itself to listing measures which Member States are required to take for the purposes of the review proceedings

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referred to in Article 1 (see, to that effect, Case C-81/98 Alcatel Austria and Others v Bundesministerium für Wissenschaft und Verkehr [1999] ECR I-7671, paragraphs 30 and 31).

31 The first question must therefore be understood as asking, essentially, whether Article 1(1) of Directive 89/665 requires the decision of the awarding authority to withdraw the invitation to tender for a public service contract to be open to review proceedings, and to annulment in appropriate cases, on the ground that it infringed Community law on public contracts or the national rules transposing that law.

32 In order to reply to the question thus reformulated, it is therefore necessary to interpret the words decisions taken by the contracting authorities used in Article 1(1) of Directive 89/665.

33 The Austrian Government and the Commission essentially maintain that Member States are required to establish procedures allowing review proceedings to be brought against the withdrawal of an invitation to tender for a public service contract if that withdrawal is governed by Directive 92/50. In that respect, they consider that such withdrawal falls exclusively under national legal rules and therefore does not fall within the scope of Directive 89/665.

34 In particular, the Commission states that, in its proposal for a Council Directive 87/C 230/05 coordinating the laws, regulations and administrative provisions relating to the application of Community rules on procedures for the award of public supply and public works contracts (OJ 1987 C 230, p. 6), it expressly proposed that the obligation of Member States to establish review procedures should extend not only to decisions taken by the contracting authorities in breach of Community law but also to those infringing national legal rules. However, in the course of the legislative process, the obligation to establish a review mechanism was limited to its present scope, so as to cover only decisions which infringe Community law on public contracts or the national rules transposing that law.

35 The Austrian Government argues that the conclusion that the decision to withdraw an invitation to tender does not constitute a decision within the meaning of Directive 89/665 is confirmed by Article 2(1)(b) of that directive, which exclusively concerns decisions which the contracting authority adopts during the procedure for the award of a public contract, whereas a decision to withdraw an invitation to tender brings such a procedure to an end. Thus, the Government argues, where an invitation to tender is withdrawn unlawfully, the national legislature is required, under Directive 89/665, only to ensure that the candidates and tenderers are given a right to damages.

36 It should be recalled as a preliminary observation that Article 1(1) of Directive 89/665 places an obligation on Member States to lay down procedures enabling review of decisions taken in a tender procedure on the ground that those decisions infringed Community law on public contracts or national rules transposing that law.

37 It follows that, if a decision taken by a contracting authority in a procedure for awarding a public contract is made subject to the Community law rules on public contracts and is therefore capable of infringing them, Article 1(1) of Directive 89/665 requires that that decision be capable of forming the subject-matter of an action for annulment.

38 Therefore, in order to determine whether the decision of the contracting authority to withdraw an invitation to tender for a public service contract may be regarded as one of those decisions in respect of which Member States are required, under Directive 89/665, to establish annulment action procedures, it needs to be examined whether such a decision falls within Community law rules on public contracts.

39 In that respect, it should be noted that the only provision in Directive 92/50 relating specifically to the decision to withdraw an invitation to tender is Article 12(2), which provides, inter alia,

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that where the contracting authorities have decided to abandon an award procedure, they must inform candidates and tenderers of the reasons for their decision as soon as possible.

40 The Court of Justice has already had occasion to define the scope of the obligation to notify reasons for abandoning the award of a contract in the context 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), in the version thereof resulting from Directive 97/52 (hereinafter Directive 93/37), which contains in Article 8(2) a provision similar to Article 12(2) of Directive 92/50. In particular, in its judgment in Case C-27/98 Fracasso and Leitschutz v Salzburger Landesregierung [1999] ECR I-5697, paragraphs 23 and 25, the Court held that Article 8(2) of Directive 93/37 does not provide that the option of the contracting authority to decide not to award a contract put out to tender, implicity allowed by Directive 93/37, is limited to exceptional cases or must necessarily be based on serious grounds.

41 It follows that, on a proper interpretation of Article 12(2) of Directive 92/50, although that provision requires the contracting authority to notify candidates and tenderers of the grounds for its decision if it decides to withdraw the invitation to tender for a public service contract, there is no implied obligation on that authority to carry the award procedure to its conclusion.

42 However, even though, apart from the duty to notify the reasons for the withdrawal of the invitation to tender, Directive 92/50 contains no specific provision concerning the substantive or formal conditions for that decision, the fact remains that the latter is still subject to fundamental rules of Community law, and in particular to the principles laid down by the EC Treaty on the right of establishment and the freedom to provide services.

43 In that regard, the Court has consistently held that the purpose of coordinating at Community level the procedures for the award of public contracts is to eliminate barriers to the freedom to provide services and goods and therefore to protect the interests of traders established in a Member State who wish to offer goods or services to contracting authorities established in another Member State (see, inter alia, Case C-380/98 University of Cambridge [2000] ECR I-8035, paragraph 16; Case C-19/00 SIAC Construction [2001] ECR I-7725, paragraph 32).

44 Directive 92/50 pursues just such an objective. As the 20th recital in its preamble shows, it is designed to eliminate practices that restrict competition in general, and participation in contracts by other Member States' nationals in particular, by improving the access of service providers to procedures for the award of contracts.

45 The Court's case-law also demonstrates that the principle of equal treatment, which underlies the directives on procedures for the award of public contracts, implies in particular an obligation of transparency in order to enable verification that it has been complied with (see, to that effect, Case C-275/98 Unitron Scandinavia and 3-S v Ministeriet for Fødevarer, Landbrug og Fiskeri [1999] ECR I-8291, paragraph 31; Case C-324/98 Telaustria and Telefonadress v Telekom Austria [2000] ECR I-10745, paragraph 61).

46 In that respect, it should be noted that the duty to notify reasons for a decision to withdraw an invitation to tender, laid down by Article 12(2) of Directive 92/50, is dictated precisely by concern to ensure a minimum level of transparency in the contract-awarding procedures to which that directive applies and hence compliance with the principle of equal treatment.

47 It follows that, even though Directive 92/50 does not specifically govern the detailed procedures for withdrawing an invitation to tender for a public service contract, the contracting authorities are nevertheless required, when adopting such a decision, to comply with the fundamental rules of the Treaty in general, and the principle of non-discrimination on the ground of nationality, in particular (see, by way of analogy, concerning the conclusion of public service concessions, Telaustria

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and Telefonadress, paragraph 60).

48 Since the decision of a contracting authority to withdraw an invitation to tender for a public service contract is subject to the relevant substantive rules of Community law, it has to be concluded that it also falls within the rules laid down by Directive 89/665 in order to ensure compliance with the rules of Community law on public contracts.

49 That finding is corroborated, first, by the wording of the provisions of Directive 89/665. As the Court pointed out in paragraph 35 of its Alcatel Austria judgment, the provision in Article 1(1) of that directive does not lay down any restriction with regard to the nature and content of the decisions referred to therein. Nor can such a restriction be inferred from the wording of Article 2(1)(b) of that directive (see, to that effect, Alcatel Austria, paragraph 32). Moreover, a restrictive interpretation of the category of decisions in relation to which Member States must ensure the existence of review procedures would be incompatible with Article 2(1)(a) of the same directive, which requires Member States to make provision for interim relief procedures in relation to any decision taken by the contracting authorities.

50 Next, the general scheme of Directive 89/665 requires a broad interpretation of that category, in so far as Article 2(5) of that directive authorises Member States to provide that, where damages are claimed on the ground that a decision by the contracting authority was taken unlawfully, the contested decision must first be set aside.

51 To hold that Member States are not required to lay down review procedures for annulment in relation to decisions withdrawing invitations to tender would amount to authorising them, by availing themselves of the option provided for in the provision mentioned in the paragraph above, to deprive tenderers adversely affected by such decisions, adopted in breach of the rules of Community law, of the possibility of bringing actions for damages.

52 Finally, it must be held that any other interpretation would undermine the effectiveness of Directive 89/665. As the first and second recitals in its preamble show, that directive is designed to reinforce existing arrangements at both national and Community level for ensuring effective application of Community directives on the award of public contracts, in particular at the stage where infringements can still be rectified, and it is precisely in order to ensure compliance with those directives that Article 1(1) of Directive 89/665 requires the Member States to establish effective review procedures that are as rapid as possible (Alcatel Austria, paragraphs 33 and 34).

53 The full attainment of the objective pursued by Directive 89/665 would be compromised if it were lawful for contracting authorities to withdraw an invitation to tender for a public service contract without being subject to the judicial review procedures designed to ensure that the directives laying down substantive rules concerning public contracts and the principles underlying those directives are genuinely complied with.

54 In the light of the foregoing considerations, it must be held that the decision to withdraw an invitation to tender for a public service contract is one of those decisions in relation to which Member States are required under Directive 89/665 to establish review procedures for annulment, for the purposes of ensuring compliance with the rules of Community law on public contracts and national rules implementing that law.

55 The answer to the first question must therefore be that Article 1(1) of Directive 89/665 requires the decision of the contracting authority to withdraw the invitation to tender for a public service contract to be open to a review procedure, and to be capable of being annulled where appropriate, on the ground that it has infringed Community law on public contracts or national rules implementing that law.

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The second question

56 By its second question, the referring court asks, essentially, whether national rules limiting the extent of the review of the legality of the withdrawal of an invitation to tender for a public service contract to mere examination of whether that decision was arbitrary is compatible with Directives 89/665 and 92/50.

57 It should be noted at the outset that questions concerning the scope of judicial review of a decision adopted in the context of a procedure for the award of public contracts are not covered by Directive 92/50, but fall solely within the scope of Directive 89/665. The second question must therefore be understood as asking whether Directive 89/665 precludes national rules from limiting review of the legality of the withdrawal of an invitation to tender to mere examination of whether that decision was arbitrary.

58 Since Directive 89/665 does no more than coordinate existing mechanisms in Member States in order to ensure the full and effective application of the directives laying down substantive rules concerning public contracts, it does not expressly define the scope of the remedies which the Member States must establish for that purpose.

59 Therefore, the question of the extent of the judicial review exercised in the context of the review procedures covered by Directive 89/665 must be examined in the light of the purpose of the latter, taking care that its effectiveness is not undermined.

60 In that respect, it should be recalled that, as is shown in the sixth recital in the preamble to, and in Article 1(1) of, Directive 89/665, the latter requires Member States to establish review procedures that are appropriate in the event of procedures for the award of public contracts being unlawful.

61 Therefore, having regard to the aim of strengthening remedies pursued by Directive 89/665, and in the absence of indications to the contrary, the scope of the judicial review to be exercised in the context of the review procedures referred to therein cannot be interpreted restrictively.

62 It follows that, even in cases where, as in the main proceedings, the relevant national legislation gives the contracting authorities a wide discretion in relation to the withdrawal of invitations to tender, the national courts must be able, pursuant to Directive 89/665, to check the compatibility of a decision to withdraw an invitation to tender with the relevant rules of Community law.

63 In those circumstances, it must be held that neither the letter nor the spirit of Directive 89/665 permits the conclusion that it is lawful for Member States to limit review of the legality of a decision to withdraw an invitation to tender to mere examination of whether it was arbitrary.

64 The answer to the second question must therefore be that Directive 89/665 precludes national legislation from limiting review of the legality of the withdrawal of an invitation to tender to mere examination of whether it was arbitrary.

The third question

65 In its third question, the referring court asks what time is to be taken into consideration for assessing the legality of the decision by the contracting authority to withdraw an invitation to tender.

66 In that respect, it is sufficient to note that, since Directive 89/665 is designed only to coordinate existing mechanisms in Member States in order to ensure that Community law in the matter of public contracts is complied with, it does not contain any provision as to the decisive moment for the purposes of assessing the legality of the decision to withdraw an invitation to tender.

67 Thus, in the absence of specific Community rules governing the matter, it is for the domestic

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legal system of each Member State to determine the decisive moment for the purposes of assessing the legality of the withdrawal decision, provided that the relevant national rules are not less favourable than those governing similar domestic actions (principle of equivalence) and that they do not make it practically impossible or excessively difficult to exercise rights conferred by Community law (principle of effectiveness) (see, by analogy, Case C-390/98 Banks v Coal Authority and Secretary of State for Trade and Industry [2001] ECR I-6117, paragraph 121; Case C-453/99 Courage and Crehan [2001] ECR I-6297, paragraph 29).

68 The answer to the third question must therefore be that determination of the time to be taken into consideration for assessing the legality of the decision by the contracting authority to withdraw an invitation to tender is a matter for national law, provided that the relevant national rules are not less favourable than those governing similar domestic actions and that they do not make it practically impossible or excessively difficult to exercise rights conferred by Community law.

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CONCERNS	Interprets 31989L0665 - Interprets 31989L0665 -A02P1LB Interprets 31992L0050 -
SUB	Approximation of laws ; Freedom of establishment and services ; Right of establishment ; Free movement of services
AUTLANG	German
OBSERV	Austria ; Member States ; Commission ; Institutions
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NOTES	Fruhmann, Michael: Bekämpfbarkeit des Widerrufs einer Ausschreibung, Zeitschrift für Vergaberecht und Beschaffungspraxis 2002 p.228-231 ; Gerscha, Arnold: Nachprüfbarkeit des Widerrufs, European Law Reporter 2002 p.279-280 ; Dreher, Meinrad: Juristenzeitung 2002 p.1101-1102 ; Lotze, Andreas: Entscheidungen zum Wirtschaftsrecht 2002 p.1015-1016 ; Dischendorfer, Martin ; Fruhmann, Michael: The Reviewability under EC law of the Decsion to Withdraw an Invitation to Tender: A Note on the Judgment of the Court of Justice in Case C-92/00, Hospital Ingenieure Krankenhaustechnik Planungs-GmbH (HI) v. Stadt Wien, June 18, 2002, nyr, Public Procurement Law Review 2002 p.NA126-NA132 ; Killmann, Bernd-Roland: Osterreichische Zeitschrift für Wirtschaftsrecht 2002 p.120-124 ; Salerno, Marcello: La "sospetta" decisione della città di Vienna di revocare una gara d'appalto convince la Commissione ma non il giudice comunitario, Diritto pubblico comparato ed europeo 2002 p.1746-1750 ; Racca, Gabriella M.: Sindacato sulla decisione di non procedere all'aggiudicazione di un appalto pubblico (recesso dalle trattative) e responsabilità precontrattuale, Il Foro amministrativo 2002 p.1976-1980 ; Adamantidou, Elsa: Elliniki Epitheorisi Evropaïkou Dikaiou 2002 p.748-752 ; Marciali, Sébastien: Revue des affaires européennes 2002 p.921-929 ; Thienel, Rudolf: Grundfragen gesondert und verbunden anfechtbarer Entscheidungen nach dem Bundesvergabegesetz 2002, Zeitschrift für Vergaberecht und Beschaffungspraxis 2003 p.68-73 ; Gonzalez-Varas Ibañez, Santiago J.: El control sobre la adjudicacion mediante concurso y el Derecho Comunitario europeo: Sentencias del Tribunal de Justicia de las Comunidades Europeas de 17 de septiembre de 2002 (Asunto C-513/99) y de 18 de junio de 2002 (Asunto C-92/00), Noticias de la Union Europea 2003 no 219 p.21-25
PROCEDU	Reference for a preliminary ruling
ADVGEN	Tizzano
JUDGRAP	Skouris
DATES	of document: 18/06/2002 of application: 10/03/2000

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Judgment of the Court (Fifth Chamber)
of 10 April 2003
Commission of the European Communities v Federal Republic of Germany. Failure by a Member State to fulfil its obligations - Admissibility - Legal interest in bringing proceedings - Directive 92/50/EEC - Procedures for the award of public service contracts - Negotiated procedure without prior publication of a contract notice - Conditions. Joined cases C-20/01 and C-28/01.

1. Actions against Member States for failure to fulfil obligations - Commission's right to bring an action - Exercise of that right not dependent on a specific interest in bringing an action - (Art. 226 EC)

2. Approximation of laws - Procedures for the award of public service contracts - Directive 92/50 - Award of contracts - Negotiated procedure without prior publication of a contract notice - Conditions governing permissibility - Technical or artistic reasons, or reasons connected with the protection of exclusive rights - Meaning - Environmental protection - Whether included - (Council Directive 92/50, Art. 11(3)(b))

1. In exercising its powers under Article 226 EC the Commission does not have to show that there is a specific interest in bringing an action. The provision is not intended to protect the Commission's own rights. The Commission's function, in the general interest of the Community, is to ensure that the Member States give effect to the Treaty and the provisions adopted by the institutions thereunder and to obtain a declaration of any failure to fulfil the obligations deriving therefrom with a view to bringing it to an end. Given its role as guardian of the Treaty, the Commission alone is therefore competent to decide whether it is appropriate to bring proceedings against a Member State for failure to fulfil its obligations and to determine the conduct or omission attributable to the Member State concerned on the basis of which those proceedings should be brought. It may therefore ask the Court to find that, in not having achieved, in a specific case, the result intended by the directive, a Member State has failed to fulfil its obligations.

see paras 29-30

2. Environmental protection is capable of constituting a technical reason for the purposes of Article 11(3)(b) of Directive 92/50 relating to the coordination of procedures for the award of public service contracts. That provision stipulates that contracting authorities may award public service contracts by negotiated procedure without prior publication of a contract notice when, for technical or artistic reasons, or for reasons connected with the protection of exclusive rights, the services may be provided only by a particular service provider. However, the procedure used where there is a technical reason of that kind must comply with the fundamental principles of Community law, in particular the principle of non-discrimination as it follows from the provisions of the Treaty on the right of establishment and the freedom to provide services.

see paras 59-60, 62

In Joined Cases C-20/01 and C-28/01,

Commission of the European Communities , represented by J. Schieferer, acting as Agent, with an address for service in Luxembourg,

applicant,

v

Federal Republic of Germany , represented by W.-D. Plessing, acting as Agent, assisted by H.-J. Prieß, Rechtsanwalt,

defendant,

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supported by

United Kingdom of Great Britain and Northern Ireland , represented by R. Magrill, acting as Agent, and R. Williams, Barrister,

intervener,

APPLICATIONS for declarations that:

by failing to invite tenders for the award of the contract for the collection of waste water in the Municipality of Bockhorn (Germany) and to publish notice of the results of the procedure for the award of the contract in the Supplement to the Official Journal of the European Communities , the Federal Republic of Germany, at the time of the award of that public service contract, failed to fulfil its obligations under Article 8 in conjunction with Article 15(2) and Article 16(1) of Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts (OJ 1992 L 209, p. 1);

at the time of the award of a public service contract, the Federal Republic of Germany failed to fulfil its obligations under Article 8 and Article 11(3)(b) of Directive 92/50 by virtue of the fact that the City of Braunschweig (Germany) awarded a contract for waste disposal by negotiated procedure without prior publication of a contract notice, although the criteria laid down by Article 11(3) for an award of a contract by privately negotiated procedure without a Community-wide invitation to tender had not been met,

THE COURT (Fifth Chamber),

composed of:

W. Wathelet, President of the Chamber,

D.A.O. Edward,

A. La Pergola,

P. Jann (Rapporteur) and

A. Rosas, Judges,

Advocate General: L.A. Geelhoed,

Registrar: M.-F. Contet, Administrator,

having regard to the Report for the Hearing,

after hearing oral argument from the parties at the hearing on 10 October 2002,

after hearing the Opinion of the Advocate General at the sitting on 28 November 2002,

gives the following

Judgment

Costs

69. 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 sought an order for costs against the Federal Republic of Germany and the latter has been unsuccessful, it must be ordered to pay the costs. Under Article 69(4) of the Rules of Procedure, the United Kingdom is to bear its own costs.

On those grounds,

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THE COURT (Fifth Chamber)

hereby:

1. Declares that since the Municipality of Bockhorn (Germany) failed to invite tenders for the award of the contract for the collection of its waste water and failed to publish notice of the results of the procedure for the award of the contract in the Supplement to the *Official Journal of the European Communities*, the Federal Republic of Germany, at the time of the award of that public service contract, failed to fulfil its obligations under Article 8 in conjunction with Article 15(2) and Article 16(1) of Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts;

2. Declares that since the City of Braunschweig (Germany) awarded a contract for waste disposal by negotiated procedure without prior publication of a contract notice, although the criteria laid down in Article 11(3) of Directive 92/50 for an award by privately negotiated procedure without a Community-wide invitation to tender had not been met, the Federal Republic of Germany, at the time of the award of that public service contract, failed to fulfil its obligations under Article 8 and Article 11(3)(b) of that directive;

3. Orders the Federal Republic of Germany to pay the costs;

4. Orders the United Kingdom of Great Britain and Northern Ireland to bear its own costs.

1. By applications lodged at the Court Registry on 16 and 21 January 2001 respectively, the Commission of the European Communities brought two actions under Article 226 EC for declarations that:

by failing to invite tenders for the award of the contract for the collection of waste water in the Municipality of Bockhorn (Germany) and to publish notice of the results of the procedure for the award of the contract in the Supplement to the *Official Journal of the European Communities*, the Federal Republic of Germany, at the time of the award of that public service contract, failed to fulfil its obligations under Article 8 in conjunction with Article 15(2) and Article 16(1) of Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts (OJ 1992 L 209, p. 1);

at the time of the award of a public service contract, the Federal Republic of Germany failed to fulfil its obligations under Article 8 and Article 11(3)(b) of Directive 92/50 by virtue of the fact that the City of Braunschweig (Germany) awarded a contract for waste disposal by negotiated procedure without prior publication of a contract notice, although the criteria laid down in Article 11(3) for an award by privately negotiated procedure without a Community-wide invitation to tender had not been met.

Legal context

2. Article 8 of Directive 92/50 provides that:

> "Contracts which have as their object services listed in Annex IA shall be awarded in accordance with the provisions of Titles III to VI."

3. Title V (Articles 15 to 22) of Directive 92/50 deals with common advertising rules. Under Article 15(2) of the directive contracting authorities who wish to award a public service contract by open, restricted or, under the conditions laid down in Article 11 of the directive, negotiated procedure, make known their intention by means of a notice.

4. Article 11(3)(b) of Directive 92/50 provides that:

> "Contracting authorities may award public service contracts by negotiated procedure without prior publication of a contract notice in the following cases:

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...

(b) when, for technical or artistic reasons, or for reasons connected with the protection of exclusive rights, the services may be provided only by a particular service provider

" .

5. Article 16(1) of Directive 92/50 provides that:

"Contracting authorities who have awarded a public contract or have held a design contest shall send a notice of the results of the award procedure to the Office for Official Publications of the European Communities."

Facts and pre-litigation procedure

Case C-20/01

6. The Municipality of Bockhorn in Lower Saxony concluded a contract for the collection of its waste water for a term of at least 30 years from 1 January 1997 with the energy distribution undertaking Weser-Ems AG (hereinafter "EWE").

7. By letter of 30 April 1999, the Commission gave the Federal Republic of Germany formal notice to submit observations on whether the provisions of Directive 92/50 should have been applied in that instance.

8. In its reply of 1 July 1999, the German Government conceded that the contract concluded by the Municipality of Bockhorn should have been awarded in accordance with Community rules. In addition, it pointed out that the Ministry of Internal Affairs of the Land of Lower Saxony would take the opportunity to call on local authorities to give a firm reminder to bodies in their area that they must comply strictly with Community legislation on the award of public contracts.

9. On 21 March 2000, the Commission sent a reasoned opinion to the Federal Republic of Germany, in which it asserted that the provisions of Directive 92/50 should have been applied, and that it was irrelevant in law that the infringement of the provisions of Community law had been acknowledged by Germany. The Commission also called on Germany to remind the authorities concerned without delay of the relevant requirements and to urge them to comply with the abovementioned provisions in the future.

10. In a letter of 12 May 2000, the German Government once again acknowledged the breach of obligations complained of. It explained that on the basis of its intervention following the Commission's letter of formal notice, the Ministry of Internal Affairs of Lower Saxony, by decree of 21 June 1999, had instructed all local authorities in the Land to take appropriate measures to ensure that contracting authorities complied strictly with the Community provisions on the award of public contracts. In response to the reasoned opinion, the Government of Lower Saxony had insisted that those provisions must be complied with.

11. Moreover, the German Government contended that, under German law, it was virtually impossible to put an end to the infringement of Directive 92/50, since there had been a valid contract between the Municipality of Bockhorn and EWE since 1 January 1997 which could not be terminated without substantial compensation being paid to EWE. The cost of terminating the contract was disproportionate in relation to the Commission's objective.

Case C-28/01

12. The City of Braunschweig, also in Lower Saxony, and Braunschweigsche Kohlebergwerke (hereinafter "BKB") concluded a contract under which BKB was made responsible for residual waste disposal by thermal processing for a period of 30 years from June/July 1999.

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13. The competent authorities of the City of Braunschweig took the view that Directive 92/50 applied but relied on Article 11(3) thereof to release them from their obligation to publish a contract notice, and awarded the contract by a negotiated procedure.

14. The Commission challenged that interpretation by letter of formal notice of 20 July 1998.

15. By letters of 4 August, 19 October and 15 December 1998, the German Government replied to the letter of formal notice, arguing that the conditions on which Article 11(3)(b) of Directive 92/50 applied were met, since for technical reasons thermal treatment of waste could be entrusted only to BKB. It had been an essential criterion of the award of the contract that the incineration facilities were close to the City of Braunschweig in order to avoid transport over longer distances.

16. By letter of 16 December 1998, the German Government admitted that the Braunschweig authorities had infringed Directive 92/50 by applying the negotiated procedure without publishing a contract notice when there were no grounds for doing so.

17. On 6 March 2000, the Commission sent the Federal Republic of Germany a reasoned opinion in which, in particular, it called upon Germany to remind the authorities concerned without delay of the relevant rules and to urge them to comply with the applicable provisions in the future.

18. In a letter of 17 May 2000, the German Government admitted the infringement complained of. It also pointed out that the Government of Lower Saxony had instructed all local authorities to comply with the provisions on the award of public contracts. As in Case C-20/01, it stated that it would not be possible to put an end to the infringement of Directive 92/50 by terminating the contract. Moreover, such termination would oblige the City of Braunschweig to pay large sums by way of compensation to the other party to the contract. The cost of terminating the contract was therefore disproportionate.

19. By order of the President of the Court of 15 May 2001, Cases C-20/01 and C-28/01 were joined for the purposes of the written and oral procedure and judgment.

20. By order of the President of the Court of 18 May 2001, the United Kingdom was granted leave to intervene in support of the forms of order sought by the defendant.

Admissibility of the application

Pleas in law and arguments of the parties

21. The German Government argues, first, that the actions are inadmissible, since there is no ongoing breach of obligations which must be brought to an end by the defendant Member State. The Community legislation on the award of public contracts consists solely of procedural rules. The effects of breach of those rules are exhausted as soon as the breach is committed. Once the Federal Republic of Germany had admitted the breach, there was no longer any objective interest in bringing infringement proceedings.

22. As regards the need for such an objective interest, the German Government submits that proceedings for failure by a Member State to fulfil its obligations can be likened to an action for failure to act under Article 232 EC. The latter is inadmissible when the institution concerned, having been called upon to act, has defined its position. According to the Court's case-law, even the admission that there has been an unlawful failure to act removes the objective interest in obtaining a declaration that there has been such a failure.

23. Nor does the need to establish the basis of liability of the Member State concerned give rise in this instance to an objective interest in obtaining a declaration that that State has failed to fulfil its obligations. In particular, liability to individuals is not at issue, since no individual appears to have suffered loss as a result of the contracts concluded by the Municipality of Bockhorn

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and the City of Braunschweig.

24. The German Government, supported by the United Kingdom Government on this point, submits that the contracts concluded by the contracting authorities are protected by Community law by virtue of being established rights. The principle pacta sunt servanda is enshrined in 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). By allowing national law to limit the powers of the bodies responsible for review procedures concerning the award of public contracts to awarding damages to any person harmed by an infringement of Community law on public procurement, Article 2(6) of Directive 89/665 specifically refrains from imposing a requirement that contracts which have been properly formed should be terminated or not complied with.

25. The German Government explains that a feature of national law is the principle that a contract entered into by a contracting authority in breach of the provisions on public procurement may be terminated only for a serious reason, which does not include the circumstances leading up to conclusion of the contract. Furthermore, provision is made for such a contract to be void only in exceptional, restrictively defined, cases, which do not concern the contracts concluded in this instance. However, national law incorporates the provisions necessary to enable persons harmed to claim damages.

26. The Commission argues that it does not have to demonstrate that there is a specific interest in bringing an action under Article 226 EC for failure to fulfil obligations. The Court has considered whether such an interest exists only in cases in which a Member State complied with the Commission's reasoned opinion after the end of the period laid down in the opinion. In the Commission's submission, such an interest could, however, consist not only of establishing the basis of the liability of the Member State concerned but also of clarifying essential points of Community law and avoiding the risk of further infringements.

27. In this case, the Commission considers that the effects of the alleged breach of obligations were not entirely exhausted in a procedural defect and that the breach is continuing. First, general instructions to local authorities could not have resulted in cessation of the specific infringements. Second, a Member State cannot, in order to avoid legal proceedings brought by the Commission, plead a fait accompli perpetrated by itself.

28. Furthermore, although it is true that the Court has dismissed as inadmissible an action for failure to fulfil obligations in the sphere of public procurement on the ground that the infringement had ceased to exist at the end of the period laid down in the reasoned opinion, that outcome arose as a result of the particular circumstances of the case. The present cases are different in that the contracts concluded in breach of Community law will continue to have effects for decades. The German Government has thus not put an end to the infringement. The fact that it is impossible to terminate the contracts concerned does not affect the admissibility of the action, since it is incumbent on the Member States to select the appropriate way of making good an infringement.

Findings of the Court

29. It is settled case-law that in exercising its powers under Article 226 EC the Commission does not have to show that there is a specific interest in bringing an action. The provision is not intended to protect the Commission's own rights. The Commission's function, in the general interest of the Community, is to ensure that the Member States give effect to the Treaty and the provisions adopted by the institutions thereunder and to obtain a declaration of any failure to fulfil the obligations deriving therefrom with a view to bringing it to an end (Case 167/73 Commission v France [1974] ECR 359, paragraph 15; Case C-431/92 Commission v Germany [1995] ECR I-2189, paragraph 21; and Case C-476/98 Commission v Germany [2002] ECR I-9855,

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paragraph 38).

30. Given its role as guardian of the Treaty, the Commission alone is therefore competent to decide whether it is appropriate to bring proceedings against a Member State for failure to fulfil its obligations and to determine the conduct or omission attributable to the Member State concerned on the basis of which those proceedings should be brought. It may therefore ask the Court to find that, in not having achieved, in a specific case, the result intended by the directive, a Member State has failed to fulfil its obligations (Commission v Germany , cited above, paragraph 22, and Case C-471/98 Commission v Belgium [2002] ECR I-9861, paragraph 39).

31. The German Government submits, however, that in this instance, the failure to fulfil obligations consisted of breaches of procedural rules, whose effects were entirely exhausted before the end of the periods laid down in the reasoned opinions and that the Federal Republic of Germany admitted before that date that it had failed to fulfil its obligations.

32. It is true that the question whether a Member State has failed to fulfil its obligations must be determined by reference to the situation prevailing in the Member State at the end of the period laid down in the reasoned opinion (Case C-200/88 Commission v Greece [1990] ECR I-4299, paragraph 13; Case C-362/90 Commission v Italy [1992] ECR I-2353, paragraph 10; and Case C-29/01 Commission v Spain [2002] ECR I-2503, paragraph 11).

33. The Court did indeed find an action for failure to fulfil obligations in the sphere of public procurement inadmissible, but it was on the ground that all the effects of the contract notice at issue had been exhausted by the end of the period laid down in the reasoned opinion (Commission v Italy , cited above, paragraphs 11 to 13).

34. By contrast, the Court dismissed an objection of inadmissibility based on a claim that the alleged infringement had ceased in a situation in which the procedures for the award of contracts had been conducted entirely before the date on which the period laid down in the reasoned opinion expired, since the contracts had not been fully performed by that date (Case C-328/96 Commission v Austria [1999] ECR I-7479, paragraphs 43 to 45).

35. Furthermore, although Directive 92/50 contains essentially procedural rules, it was nevertheless adopted with a view to eliminating barriers to the freedom to provide services and therefore is intended to protect the interests of traders established in a Member State who wish to offer services to contracting authorities established in another Member State (see, inter alia , Case C-19/00 SIAC Construction [2001] ECR I-7725, paragraph 32).

36. Therefore the adverse effect on the freedom to provide services arising from the infringement of Directive 92/50 must be found to subsist throughout the entire performance of the contracts concluded in breach thereof.

37. In this instance, the contracts allegedly concluded in breach of Directive 92/50 will continue to produce effects for decades. It cannot therefore be maintained that the alleged breaches of obligations came to an end before the periods laid down in the reasoned opinions expired.

38. That conclusion is not affected by the fact that the Member States are able, pursuant to Article 2(6) of Directive 89/665, to limit the powers of the body responsible for review procedures, after the conclusion of a contract following its award, to awarding damages to any person harmed by an infringement of Community law on public procurement.

39. Although Article 2(6) permits the Member States to preserve the effects of contracts concluded in breach of directives relating to the award of public contracts and thus protects the legitimate interests of the parties thereto, its effect cannot be, unless the scope of the Treaty provisions establishing the internal market is to be reduced, that the contracting authority's conduct vis-à-vis

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third parties is to be regarded as in conformity with Community law following conclusion of such contracts.

40. Furthermore, the admissibility of these actions is not affected either by the fact that the German Government, during the pre-litigation procedure, admitted the breaches of obligations complained of by the Commission or by that government's contention that a claim for damages may be made under national law even where the Court of Justice has not made a declaration that there has been a failure to fulfil obligations.

41. The Court has already held that it is responsible for determining whether or not the alleged breach of obligations exists, even if the State concerned no longer denies the breach and recognises that any individuals who have suffered damage because of it have a right to compensation (Case C-243/89 Commission v Denmark [1993] ECR I-3353, paragraph 30).

42. Since the finding of failure by a Member State to fulfil its obligations is not bound up with a finding as to the damage flowing therefrom (Case C-263/96 Commission v Belgium [1997] ECR I-7453, paragraph 30), the Federal Republic of Germany may not rely on the fact that no third party has suffered damage in the case of the contracts concluded by the Municipality of Bockhorn and the City of Braunschweig.

43. Given that the alleged breaches of obligations alleged have continued beyond the date set in the reasoned opinions and notwithstanding the Federal Republic of Germany's admission of those breaches, the latter may not base any argument on either a comparison with the action for failure to act provided for in Article 232 EC or on the circumstances in which the Court considers that a failure to act has been brought to an end.

44. In the light of the foregoing, the actions brought by the Commission must be held to be admissible.

Substance

Pleas in law and arguments of the parties

45. In Case C-20/01, the Commission argues that Directive 92/50 applied to the contract concerned, which should have been the subject of an invitation to tender in accordance with the provisions of Articles 8 and 15(2) of the directive, read together. The results of the award procedure should have been published in accordance with Article 16 of the directive.

46. In Case C-28/01 the Commission submits that the contract in question also falls within the scope of Directive 92/50. In its submission, the criteria allowing a negotiated procedure to be used without publication of a prior contract notice, as provided for in Article 11(3)(b) of Directive 92/50, were not met. Neither the location of the undertaking selected, on account of its proximity to the place where the services were to be provided, nor the fact that award of the contract was urgent, provides a basis for the application of that provision in this instance.

47. The principle, provided for in Article 130r(2) of the EC Treaty (now, after amendment, Article 174 EC), that environmental damage should as a priority be rectified at source, should be read in the light of that provision as a whole, according to which environmental protection requirements must be integrated into the definition and implementation of other Community policies. Article 130r(2) does not provide that Community environmental policy is to take precedence over other Community policies in the event of a conflict between them. Nor, in the context of a procedure for the award of public contracts, can ecological criteria be used for discriminatory ends.

48. Furthermore, the contracting authority justifies its choice of the award procedure at issue by an argument based on the guarantee that waste would be disposed of. In the Commission's submission, that argument refutes the argument that the procedure had been chosen on account of environmental considerations and the proximity of the waste disposal facility.

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49. The German Government, which presents its arguments on substance only as an alternative plea, argues that the actions brought by the Commission are in any event unfounded, since the effects of the alleged breaches of Directive 92/50 had been exhausted at the time when the breaches were committed and were not continuing on the date on which the period laid down in the reasoned opinions expired.

50. In Case C-28/01, the German Government adds that only BKB was in a position to satisfy the quite lawfully selected criterion that the waste disposal facility should be close to the relevant region. The criterion was not automatically discriminatory, since it was not impossible that undertakings established in other Member States would be able to meet the requirement.

51. In general, a contracting authority is entitled to take account of environmental criteria in its considerations relating to the award of a public contract when it determines which type of service it is proposing to acquire. The German Government submits that, for that reason too, termination of the contract entered into between the City of Braunschweig and BKB cannot be required, given that, in the context of a further award, the contract would again have to be awarded to BKB.

Findings of the Court

Case C-20/01

52. As regards Case C-20/01, it is not disputed that the conditions on which Directive 92/50 applies were met. As the Advocate General observes at point 65 of his Opinion, the treatment of waste water is a service within the meaning of Article 8 and Annex IA, category 16, of the directive. The construction of certain facilities was ancillary to the main purpose of the contract which the Municipality of Bockhorn entered into with EWE. The value of the contract far exceeds the threshold laid down in Article 7 of the directive.

53. Under Article 8 and Article 15(2) of Directive 92/50, the contract should consequently have been awarded in accordance with the provisions of the directive. It is established, and the German Government does not deny, that the Municipality of Bockhorn did not award the contract in that way.

54. The Federal Republic of Germany's defence on the substance refers essentially to the arguments put forward to challenge the admissibility of the action. For the reasons set out at paragraphs 29 to 43 of this judgment, those arguments must be rejected.

55. It follows that the Commission's action in Case C-20/01 is founded.

Case C-28/01

56. In Case C-28/01 Directive 92/50 was evidently applicable and was indeed applied by the City of Braunschweig. However, the latter, relying on Article 11(3)(b) of the directive, used a negotiated procedure without prior publication of a contract notice.

57. Although it admitted during the administrative procedure that the conditions on which Article 11(3)(b) applies were not met, the German Government argues that BKB was actually the only undertaking to which the contract could be awarded and that a further award procedure would not affect that outcome.

58. In that regard, it should be stated at the outset that the provisions of Article 11(3) of Directive 92/50, which authorise derogations from the rules intended to ensure the effectiveness of the rights conferred by the Treaty in relation to public service contracts, must be interpreted strictly and that the burden of proving the existence of exceptional circumstances justifying a derogation lies on the person seeking to rely on those circumstances (Case C-318/94 Commission v Germany [1996] ECR I-1949, paragraph 13).

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59. Article 11(3)(b) of Directive 92/50 cannot apply unless it is established that for technical or artistic reasons, or for reasons connected with the protection of exclusive rights, only one undertaking is actually in a position to perform the contract concerned. Since no artistic reason, nor any reason connected with the protection of exclusive rights, has been put forward in this instance, it is appropriate solely to ascertain whether the reasons relied on by the German Government are capable of constituting technical reasons for the purposes of Article 11(3)(b).

60. A contracting authority may take account of criteria relating to environmental protection at the various stages of a procedure for the award of public contracts (see, as regards the use of such criteria as criteria for awarding a contract relating to the management of the operation of a route in the urban bus network, Case C-513/99 Concordia Bus Finland [2002] ECR I-7213, paragraph 57).

61. Therefore, it is not impossible that a technical reason relating to the protection of the environment may be taken into account in an assessment of whether the contract at issue may be awarded to a given supplier.

62. However, the procedure used where there is a technical reason of that kind must comply with the fundamental principles of Community law, in particular the principle of non-discrimination as it follows from the provisions of the Treaty on the right of establishment and the freedom to provide services (see, to that effect, Concordia Bus Finland , paragraph 63).

63. The risk of a breach of the principle of non-discrimination is particularly high where a contracting authority decides not to put a particular contract out to tender.

64. In this instance, the Court notes, first, that in the absence of any evidence to that effect the choice of thermal waste treatment cannot be regarded as a technical reason substantiating the claim that the contract could be awarded to only one particular supplier.

65. Second, the German Government's submission that the proximity of the waste disposal facility is a necessary consequence of the City of Braunschweig's decision that residual waste should be treated thermally is not borne out by any evidence and cannot therefore be regarded as a technical reason of that kind. More specifically, the German Government has not shown that the transport of waste over a greater distance would necessarily constitute a danger to the environment or to public health.

66. Third, the fact that a particular supplier is close to the local authority's area can likewise not amount, on its own, to a technical reason for the purpose of Article 11(3)(b) of Directive 92/50.

67. It follows that the Federal Republic of Germany has not established that the use of Article 11(3)(b) of Directive 92/50 was justified in this instance. Consequently, the Commission's application in Case C-28/01 must also be upheld.

68. In the light of the foregoing, the Court finds that:

since the Municipality of Bockhorn failed to invite tenders for the award of the contract for the collection of its waste water and failed to publish notice of the results of the procedure for the award of the contract in the Supplement to the Official Journal of the European Communities , the Federal Republic of Germany, at the time of the award of that public service contract, failed to fulfil its obligations under Article 8 in conjunction with Article 15(2) and Article 16(1) of Directive 92/50;

since the City of Braunschweig awarded a contract for waste disposal by negotiated procedure without prior publication of a contract notice, although the criteria laid down in Article 11(3) of Directive 92/50 for an award by privately negotiated procedure without a Community-wide invitation to tender

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had not been met, the Federal Republic of Germany, at the time of the award of that public service contract, failed to fulfil its obligations under Article 8 and Article 11(3)(b) of that directive.

DOCNUM	62001J0020
AUTHOR	Court of Justice of the European Communities
FORM	Judgment
TREATY	European Economic Community
PUBREF	European Court reports 2003 Page I-03609
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JURCIT	11997E232 : N 43 11997E226 : N 29 31992L0050 : N 22 35 - 37 52 56 31992L0050-A08 : N 1 2 52 53 68 31992L0050-A15P2 : N 1 3 53 68 31992L0050-A11P3LB : N 1 4 56 59 66 68 31992L0050-A11P3 : N 58 67 68 31992L0050-A16P1 : N 1 5 68 31992L0050-A07 : N 52 31992L0050-N1A : N 2 31989L0665-A02P6 : N 38 61973J0167 : N 29 61992J0431 : N 29 30 61998J0476 : N 29 61998J0471 : N 30 61988J0202 : N 32 61990J0362 : N 32 33 62001J0029 : N 32 61996J0328 : N 34 62000J0019 : N 35 61989J0243 : N 41 61996J0263 : N 42 61994J0318 : N 58 61999J0513 : N 60 62
CONCERNS	Failure concerning 31992L0050 -A08 Failure concerning 31992L0050 -A11P3LB Failure concerning 31992L0050 -A15P2 Failure concerning 31992L0050 -A16P1

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SUB Freedom of establishment and services ; Right of establishment ; Free movement of services

AUTLANG German

MISCINF AFFAIRE : 62001J0028

APPLICA Commission ; Institutions

DEFENDA Federal Republic of Germany ; Member States

NATIONA Federal Republic of Germany

NOTES Gjørtler, Peter: Varemærker og udbud, Lov & Ret 2003 p.32-33 ; Antonucci, Marco: I criteri ambientali negli appalti pubblici alla luce della normativa e della giurisprudenza comunitarie, Il Consiglio di Stato 2003 II p.809-814 ; Williams, Rhodri: Remedying a Breach of Community Law: the Judgment in Joined Cases C-20/01 and C-28/01, Commission v Germany, Public Procurement Law Review 2003 p.NA109-NA115 ; Kalbe, Peter: Vergaberechtliche Vertragsverletzungsklage ist auch nach Abschluss der Verträge durch öffentlichen Auftraggeber zulässig, Europäisches Wirtschafts- & Steuerrecht - EWS 2003 p.566-568 ; Belorgey, Jean-Marc ; Gervasoni, Stéphane ; Lambert, Christian: Passation du marché, L'actualité juridique ; droit administratif 2003 p.2153 ; Tserkezis, Giorgos: Armenopoulos 2004 p.614 ; Adamantidou, El.: Dimosies Symvaseis & Kratikes Enisxyseis 2004 p.184-187

PROCEDU Action for failure to fulfil obligations - successful

ADVGEN Geelhoed

JUDGRAP Jann

DATES of document: 10/04/2003
of application: 16/01/2001

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Judgment of the Court (Second Chamber)
of 3 March 2005
Fabricom SA v Belgian State. Reference for a preliminary ruling: Conseil d'Etat - Belgium. Public procurement - Works, supplies and services - Water, energy, transport and telecommunications sectors - Prohibition on participation in a procedure of submission of a tender by a person who has contributed to the development of the works, supplies or services concerned. Joined cases C-21/03 and C-34/03.

1. Approximation of laws - Procedures for the award of public service, public supply and public works contracts and procurement contracts in the water, energy, transport and telecommunications sectors - Directives 92/50, 93/36, 93/37 and 93/38 - Principle of nondiscrimination between tenderers - National rules precluding from participation in a contract any person who has contributed to the development of the works, supplies or services concerned without the possibility to prove the absence of any adverse effect on competition - Not permissible

(Council Directives 92/50, Art. 3(2), 93/36, Art. 5(7), 93/37, Art. 6(6), and 93/38, Art. 4(2))

2. Approximation of laws - Procedures for the award of public service, public supply and public works contracts and procurement contracts in the water, energy, transport and telecommunications sectors - Directives 89/665 and 92/13 - National rules allowing the contracting authority to preclude from participation in the contract, until the end of the procedure for the examination of tenders, an undertaking connected with any person who has contributed to the development of the works, supplies or services concerned without taking into consideration the undertaking's assertion that there is no adverse effect on competition - Not permissible

(Council Directives 89/665, Arts 2(1)(a) and 5, and 92/13, Arts 1 and 2)

1. Directives 92/50, 93/36 and 93/37, as amended by Directive 97/52, and Directive 93/38, as amended by Directive 98/4, relating to the coordination of procedures for the award of, respectively, public service contracts, public supply contracts and public works contracts and procurement contracts in the water, energy, transport and telecommunications sectors, and, more particularly, the provision in each of those directives that the contracting authorities are to ensure equal treatment of tenderers, preclude national rules whereby a person who has been instructed to carry out research, experiments, studies or development in connection with public works, supplies or services is not permitted to apply to participate in or to submit a tender for those works, supplies or services and where that person is not given the opportunity to prove that, in the circumstances of the case, the experience which he as acquired was not capable of distorting competition.

Taking account of the favourable situation in which a person who has carried out such preparatory work may find himself, it cannot be maintained that the principle of equal treatment requires that that person be treated in the same way as any other tenderer. However, a rule which provides that person with no possibility to demonstrate that in his particular case that situation is not apt to distort competition goes beyond what is necessary to attain the objective of equal treatment for all tenderers.

(see paras 31, 33-34, 36, operative part 1)

2. Directive 89/665 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 and, more particularly, Articles 2(1)(a) and 5 thereof, and Directive 92/13 coordinating the laws, regulations and administrative provisions relating to the application of Community rules on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors and, more particularly, Articles 1 and 2 thereof, preclude the contracting entity from refusing, until the end of the procedure for the examination of tenders, to allow an undertaking connected with any person who has been instructed to carry out research, experiments, studies or

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development in connection with works, supplies or services to participate in the procedure or to submit a tender, even though, when questioned on that point by the awarding authority, that undertaking states that it has not thereby obtained an unfair advantage capable of distorting the normal conditions of competition.

The possibility that the contracting authority might delay, until the procedure has reached a very advanced stage, taking a decision as to whether such an undertaking may participate in the procedure or submit a tender, when that authority has before it all the information which it needs in order to take that decision, deprives that undertaking of the opportunity to rely on the Community rules on the award of public contracts as against the awarding authority for a period which is solely within that authority's discretion and which, where necessary, may be extended until a time when the infringements can no longer be usefully rectified.

Such a situation is capable of depriving Directives 89/665 and 92/13 of all practical effect as they are susceptible of giving rise to an unjustified postponement of the possibility for those concerned to exercise the rights conferred on them by Community law. It is also contrary to the objectives of Directives 89/665 and 92/13, which seek to protect tenderers vis-à-vis the awarding authority.

(see paras 44-46, operative part 2)

In Joined Cases C-21/03 and C-34/03,

REFERENCES for a preliminary ruling under Article 234 EC from the Conseil d'Etat (Belgium), made by decisions of

27 December 2002

, received at the Court on 29 and

22 January 2003

, respectively, in the proceedings

Fabricom SA

v

Etat belge,

THE COURT (Second Chamber),

composed of C.W.A. Timmermans, President of the Chamber (Rapporteur), C. Gulmann, J.-P. Puissochet, N. Colneric and J.N. Cunha Rodrigues, Judges,

Advocate General: P. Léger,

Registrar: R. Grass,

having regard to the written procedure,

after considering the observations submitted on behalf of:

- Fabricom SA, by J. Vanden Eynde and J.-M. Wolter, avocats,

- the Austrian Government, by M. Fruhmann, acting as Agent,

- the Finnish Government, by T. Pynnä, acting as Agent,

- the Commission of the European Communities, by K. Wiedner and B. Stromsky, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on

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11 November 2004,

gives the following

Judgment

Costs

47. Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Second Chamber) rules as follows:

1. Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts, as amended by European Parliament and Council Directive 97/52/EC of 13 October 1997, and, more particularly, Article 3(2) thereof, Council Directive 93/36/EEC of 14 June 1993 coordinating procedures for the award of public supply contracts, as amended by Directive 97/52, and, more particularly, Article 5(7) thereof, Council Directive 93/37/EEC of 14 June 1993 concerning the coordination of procedures for the award of public works contracts, as amended by Directive 97/52, and, more particularly, Article 6(6) thereof, and also Council Directive 93/38/EEC of 14 June 1993 coordinating the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors, as amended by European Parliament and Council Directive 98/4/EC of 16 February 1998, and, more particularly, Article 4(2) thereof, preclude a rule such as that laid down in Article 25 of the Royal Decree of 25 March 1999 amending the Royal Decree of 10 January 1996 on public works, supply and service contracts in the water, energy, transport and telecommunications sectors, and Article 32 of the Royal Decree of 25 March 1999 amending the Royal Decree of 8 January 1996 on public works, supply and service contracts and on the award of public contracts, whereby a person who has been instructed to carry out research, experiments, studies or development in connection with a public works, supplies or services contract is not permitted to apply to participate in or to submit a tender for those works, supplies or services and where that person is not given the opportunity to prove that, in the circumstances of the case, the experience which he has acquired was not capable of distorting competition.

2. 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 and, more particularly, Articles 2(1)(a) and 5 thereof, and Council Directive 92/13/EEC of 25 February 1992 coordinating the laws, regulations and administrative provisions relating to the application of Community rules on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors and, more particularly, Articles 1 and 2 thereof, preclude the contracting entity from refusing, until the end of the procedure for the examination of tenders, to allow an undertaking connected with any person who has been instructed to carry out research, experiments, studies or development in connection with works, supplies or services to participate in the procedure or to submit a tender, even though, when questioned on that point by the awarding authority, that undertaking states that it has not thereby obtained an unfair advantage capable of distorting the normal conditions of competition.

1. The references for a preliminary ruling concern the interpretation of Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts (OJ 1992 L 209, p. 1), as amended by European Parliament and Council Directive 97/52/EC of 13 October 1997 (OJ 1997 L 328, p. 1) (Directive 92/50'), and, more particularly, of Article 3(2) thereof, of Council Directive 93/36/EEC of 14 June 1993 coordinating procedures for the award of public supply contracts (OJ 1993 L 199, p. 1), as amended by Directive 97/52 (Directive

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93/36'), and, more particularly, of Article 5(7) thereof, 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 Directive 97/52 (Directive 93/37'), and, more particularly, of Article 6(6) thereof, and also of Council Directive 93/38/EEC of 14 June 1993 coordinating the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors (OJ 1993 L 199, p. 84), as amended by European Parliament and Council Directive 98/4/EC of 16 February 1998 (OJ 1998 L 101, p. 1) (Directive 93/38'), and, more particularly, of Article 4(2) thereof, in conjunction with the principle of proportionality, freedom of trade and industry and the right to property. The references also concern the interpretation 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) and, more particularly, of Articles 2(1)(a) and 5 thereof, and also of Council Directive 92/13/EEC of 25 February 1992 coordinating the laws, regulations and administrative provisions relating to the application of Community rules on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors (OJ 1992 L 76, p. 14) and, more particularly, of Articles 1 and 2 thereof.

2. The references were made in proceedings between Fabricom SA (Fabricom') and the Belgian State concerning the lawfulness of national provisions which, on certain conditions, preclude a person who has been instructed to carry out preparatory work in connection with a public contract or an undertaking connected to such a person from participating in that contract.

Legal background

Community rules

3. Article VI(4) of the agreement on government procurement annexed to Council Decision 94/800/EC of 22 December 1994 concerning the conclusion on behalf of the European Community, as regards matters within its competence, of the agreements reached in the Uruguay Round multilateral negotiations (1986-1994) (OJ 1994 L 336, p. 1) (the public contracts agreement'), provides:

Entities shall not seek or accept, in a manner which would have the effect of precluding competition, advice which may be used in the preparation of specifications for a specific procurement from a firm that may have a commercial interest in the procurement.'

4. Under Article 3(2) of Directive 92/50:

Contracting authorities shall ensure that there is no discrimination between different service providers.'

5. Article 5(7) of Directive 93/36 provides:

Contracting authorities shall ensure that there is no discrimination between the various suppliers.'

6. Article 6(6) of Directive 93/37 provides:

Contracting authorities shall ensure that there is no discrimination between the various contractors.'

7. Under Article 4(2) of Directive 93/38:

Contracting authorities shall ensure that there is no discrimination between different suppliers, contractors or service providers.'

8. The 10th recital in the preamble to Directive 97/52, the terms of which are substantially reproduced in the 13th recital in the preamble to Directive 98/4, states:

... contracting authorities may seek or accept advice which may be used in the preparation of specifications for a specific procurement, provided that such advice does not have the effect of precluding competition'.

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9. Article 2 of Directive 89/665 provides:

1. 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;

...'

10. Under Article 1 of Directive 92/13:

1. The Member States shall take the measures necessary to ensure that decisions taken by contracting entities 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(8), on the grounds that such decisions have infringed Community law in the field [of] procurement or national rules implementing that law as regards:

(a) contract award procedures falling within the scope of Council Directive 90/531/EEC;

and

(b) compliance with Article 3(2)(a) of that Directive in the case of the contracting entities to which that provision applies.

2. Member States shall ensure that there is no discrimination between undertakings likely to make a claim for injury in the context of a procedure for the award of a contract as a result of the distinction made by this Directive between national rules implementing Community law and other national rules.

3. The Member States shall ensure that the review procedures are available, under detailed rules which the Member States may establish, at least to any person having or having had an interest in obtaining a particular contract and who has been or risks being harmed by an alleged infringement. In particular, the Member States may require that the person seeking the review must have previously notified the contracting entity of the alleged infringement and of his intention to seek review.'

11. Article 2 of Directive 92/13 provides:

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

either

(a) to take, at the earliest opportunity and by way of interlocutory procedure, interim measures with the aim of correcting the alleged infringement or preventing further injury to the interests concerned, including measures to suspend or to ensure the suspension of the procedure for the award of a contract or the implementation of any decision taken by the contracting entity;

and

(b) to set aside or ensure the setting aside of decisions taken unlawfully, including the removal of discriminatory technical, economic or financial specifications in the notice of contract, the periodic indicative notice, the notice on the existence of a system of qualification, the invitation to tender, the contract documents or in any other document relating to the contract award procedure in question;

or

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(c) to take, at the earliest opportunity, if possible by way of interlocutory procedures and if necessary by a final procedure on the substance, measures other than those provided for in points (a) and (b) with the aim of correcting any identified infringement and preventing injury to the interests concerned; in particular, making an order for the payment of a particular sum, in cases where the infringement has not been corrected or prevented.

Member States may take this choice either for all contracting entities or for categories or entities defined on the basis of objective criteria, in any event preserving the effectiveness of the measures laid down in order to prevent injury being caused to the interests concerned;

...'

National rules

12. Article 32 of the Royal Decree of 25 March 1999 amending the Royal Decree of 8 January 1996 on the public procurement of works, supplies and services and on public works concessions (Moniteur belge , 9 April 1999, p. 11690; Article 32 of the Royal Decree of 25 March 1999 amending the Royal Decree of 8 January 1996'), provides:

...

1. No person who has been instructed to carry out research, experiments, studies or development in connection with public works, supplies or services shall be permitted to apply to participate in or to submit a tender for a contract for those works, supplies or services.

2. An undertaking connected to any person referred to in paragraph 1 shall be permitted to apply to participate in or to submit a tender only where it establishes that it has not thereby obtained an unfair advantage capable of distorting the normal conditions of competition.

For the purposes of this article, undertaking connected means any undertaking over which a person referred to in paragraph 1 may, directly or indirectly, exercise a dominant influence or any undertaking which may exercise a dominant influence over that person or which, like that person, is subject to the dominant influence of another undertaking by virtue of its ownership, financial participation or the rules which govern it. Dominant influence shall be presumed where an undertaking, directly or indirectly, with respect to another undertaking:

(1) holds a majority of the subscribed capital of the undertaking; or

(2) is entitled to a majority of the votes attached to the shares issued by the undertaking; or

(3) may nominate more than half the members of the body responsible for the administration, management or supervision of the undertaking.

Before excluding any undertaking on the ground that it is presumed to have obtained an unfair advantage, the contracting authority shall, by registered letter, invite that undertaking to provide within 12 calendar days, unless in a particular case the invitation allows a longer period, evidence of, for example, its connections, its degree of independence or any circumstances showing that dominant influence has not been established or has not affected the relevant contract.

3. Paragraphs 1 and 2 shall not apply:

(1) to public contracts covering both the setting-up and the implementation of a project;

(2) to public contracts awarded by negotiated procedure without publication at the time of the commencement of the procedure for the purposes of Article 17(2) of the Law.'

13. Article 26 of the Royal Decree of 25 March 1999 amending the Royal Decree of 10 January 1996 on public works, supplies and services contracts in the water, energy, transport and telecommunications

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sectors (Moniteur belge , 28 April 1999, p. 14144; the Royal Decree of 15 March 1999 amending the Royal Decree of 10 January 1996'), is essentially worded in the same terms as Article 32 of the Royal Decree of 25 March 1999 amending the Royal Decree of 8 January 1996.

Main proceedings and questions referred to the Court

14. Fabricom is a contractor which is regularly required to submit tenders for public contracts, particularly in the water, energy, transport and telecommunications sectors.

Case C-21/03

15. By application lodged before the Conseil d'Etat on 25 June 1999, Fabricom seeks annulment of Article 26 of the Royal Decree of 25 March 1999 amending the Royal Decree of 10 January 1996.

16. It claims that that provision is, inter alia, contrary to the principle of equal treatment of all tenderers, to the principle of the effectiveness of judicial review as guaranteed by Directive 92/13, to the principle of proportionality, to freedom of trade and industry and also to the right to property as laid down in Article 1 of Protocol No 1 to the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950.

17. The Belgian State disputes the pleas put forward by Fabricom.

18. As regards Article 26 of the Royal Decree of 25 March 1999 amending the Royal Decree of 10 January 1996, the Conseil d'Etat states that, according to the terms of the preamble to the Roya l Decree of 25 March 1999 and to the terms of the Report to the King which precedes it, Article 26 is designed to prevent a person desiring to be awarded a public contract from deriving an advantage, contrary to free competition, from research, experiments, studies or development carried out in connection with works, supplies or services relating to such a contract.

19. The Conseil d'Etat considers that that provision, generally and without distinction, precludes a person who has been instructed to carry out such research, experiments, studies or development and, consequently, an undertaking deemed to be connected to that person, from participating in or submitting tenders for a contract. Nor, unlike the position of the connected undertaking, does that provision allow the person concerned to prove that, in the circumstances of the case, he has been unable to obtain, by means of one of those operations, an advantage capable of upsetting the equality between tenderers. It does not expressly require that the awarding authority reach a decision within a specific period on the evidence which the connected undertaking provides in order to show that the dominant influence is not established or has no effect on the market concerned.

20. Being of the view that the outcome of the dispute before it requires an interpretation of certain provisions of the public procurement directives, the Conseil d'Etat decided to stay proceedings and to refer the following questions to the Court for a preliminary ruling:

1. Do ... Directive 98/38..., and in particular Article 4(2) thereof, and Directive 98/4..., in conjunction with the principle of proportionality, freedom of trade and industry and respect for the right to property guaranteed in particular by Protocol No 1 of 20 March 1952 to the Convention for the Protection of Human Rights and Fundamental Freedoms, preclude any person who has been instructed to carry out research, experiments, studies or development in connection with a public contract for works, supplies or services from being permitted to apply to participate in or to submit a tender for that contract where that person has not been given an opportunity to prove that, in the circumstances of the case, the experience which he has acquired was not capable of distorting competition?

2. Would the answer to the preceding question be different if those directives, considered in conjunction with that principle, freedom and right, were interpreted as referring only to private undertakings or to undertakings which have provided services for valuable consideration?

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3. May ... Directive 92/13..., and in particular Articles 1 and 2 thereof, be interpreted as meaning that a contracting entity may refuse, up to the end of the procedure for the examination of tenders, to allow an undertaking connected to any person who has been instructed to carry out research, experiments, studies or development in connection with supplies or services to participate in the procedure or to submit a tender, even though, when questioned on that point by the awarding authority, the undertaking states that it has not thereby obtained an unfair advantage capable of distorting the normal conditions of competition?'

Case C-34/03

21. By application lodged before the Conseil d'Etat on 8 June 1999, Fabricom seeks annulment of Article 32 of the Royal Decree of 25 March 1999 amending the Royal Decree of 8 January 1996.

22. The pleas put forward by Fabricom are essentially the same as those put forward in Case C-21/03. The information provided by the Conseil d'Etat in respect of Article 32 is identical to that set out in Case C-21/03 in respect of Article 26 of the Royal Decree of 25 March 1999 amending the Royal Decree of 10 January 1996.

23. In those circumstances, the Conseil d'Etat decided to stay proceedings and to refer the following questions to the Court for a preliminary ruling:

(1) Do ... Directive 92/50..., and in particular Article 3(2) thereof, ... Directive 93/36..., and in particular Article 5(7) thereof, ... Directive 93/37..., and in particular Article 6(6) thereof, and Directive 97/52..., and in particular Articles 2(1)(b) and 3(1)(b) thereof, in conjunction with the principle of proportionality, freedom of trade and industry and respect for the right to property guaranteed in particular by Protocol No 1 of 20 March 1952 to the Convention for the Protection of Human Rights and Fundamental Freedoms, preclude any person who has been instructed to carry out research, experiments, studies or development in connection with a public contract for works, supplies or services from being permitted to apply to participate in or to submit a tender for that contract where that person has not been given an opportunity to prove that, in the circumstances of the case, the experience which he has acquired was not capable of distorting competition?

(2) Would the answer to the preceding question be different if those directives, considered in conjunction with that principle, freedom and right, were interpreted as referring only to private undertakings or to undertakings which have provided services for valuable consideration?

(3) May ... Directive 89/665..., and in particular Articles 2(1)(a) and 5 thereof, be interpreted as meaning that a contracting authority may refuse, up to the end of the procedure for the examination of tenders, to allow an undertaking connected to any person who has been instructed to carry out research, experiments, studies or development in connection with supplies or services to participate in the procedure or to submit a tender, even though, when questioned on that point by the awarding authority, the undertaking states that it has not thereby obtained an unfair advantage capable of distorting the normal conditions of competition?'

24. By order of the President of the Court of 4 March 2003, Cases C-21/03 and C-34/03 were joined for the purposes of the written and oral procedures and also of the judgment.

The questions referred to the Court

First question referred in Cases C-21/03 and C-34/03

25. By the first question referred in Cases C-21/03 and C-34/03, the national court is seeking essentially to ascertain whether the provisions of Community law to which it refers preclude a rule, such as that laid down in Article 26 of the Royal Decree of 25 March 1999 amending the Royal Decree of 10 January 1996 and Article 32 of the Royal Decree of 25 March 1999 amending the Royal Decree of 8 January 1996, which states that any person who has been instructed to carry out research,

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experiments, studies or development in connection with public works, supplies or services is not allowed to participate in or to submit a tender for a public contract for those works, supplies or services where that person is not permitted to prove that, in the circumstances of the case, the experience which he has acquired was not capable of distorting competition (the rule at issue in the main proceedings').

26. In that regard, it must be borne in mind that the duty to observe the principle of equal treatment lies at the very heart of the public procurement directives, which are intended in particular to promote the development of effective competition in the fields to which they apply and which lay down criteria for the award of contracts which are intended to ensure such competition (Case C-513/99 Concordia Bus Finland [2002] ECR I-7213, paragraph 81 and the case-law cited there).

27. Furthermore, it is settled case-law that the principle of equal treatment requires that comparable situations must not be treated differently and that different situations must not be treated in the same way unless such treatment is objectively justified (Case C-434/02 Arnold André [2004] ECR I-0000, paragraph 68 and the case-law cited there, and Case C-210/03 Swedish Match [2004] ECR I-0000, paragraph 70 and the case-law cited there).

28. A person who has been instructed to carry out research, experiments, studies or development in connection with works, supplies or services relating to a public contract (hereinafter a person who has carried out certain preparatory work') is not necessarily in the same situation as regards participation in the procedure for the award of that contract as a person who has not carried out such works.

29. Indeed, a person who has participated in certain preparatory works may be at an advantage when formulating his tender on account of the information concerning the public contract in question which he has received when carrying out that work. However, all tenderers must have equality of opportunity when formulating their tenders (see, to that effect, Case C-87/94 Commission v Belgium [1996] ECR I2043, paragraph 54).

30. Furthermore, that person may be in a situation which may give rise to a conflict of interests in the sense that, as the Commission correctly submits, he may, without even intending to do so, where he himself is a tenderer for the public contract in question, influence the conditions of the contract in a manner favourable to himself. Such a situation would be capable of distorting competition between tenderers.

31. Taking account of the situation in which a person who has carried out certain preparatory work may find himself, therefore, it cannot be maintained that the principle of equal treatment requires that that person be treated in the same way as any other tenderer.

32. Fabricom, and also the Austrian and Finnish Governments, submit, essentially, that the difference in treatment established by a rule such as that at issue in the main proceedings and which consists in prohibiting, in all circumstances, a person who has carried out certain preparatory works from participating in a procedure for the award of the public contract in question is not objectively justified. They claim that such a prohibition is disproportionate. Equal treatment for all tenderers is also ensured where there is a procedure whereby an assessment is made, in each specific case, of whether the fact of carrying out certain preparatory works has conferred on the person who carried out that work a competitive advantage over other tenderers. Such a measure is less restrictive for a person who has carried out certain preparatory work.

33. In that regard, it must be held that a rule such as that at issue in the main proceedings does not afford a person who has carried out certain preparatory work any possibility to demonstrate that in his particular case the problems referred to in paragraphs 29 and 30 of the present judgment do not arise.

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34. Such a rule goes beyond what is necessary to attain the objective of equal treatment for all tenderers.

35. Indeed, the application of that rule may have the consequence that persons who have carried out certain preparatory works are precluded from the award procedure even though their participation in the procedure entails no risk whatsoever for competition between tenderers.

36. In those circumstances, the answer to the first question referred in Cases C-21/03 and C-34/03 must be that Directive 92/50 and, more particularly, Article 3(2) thereof, Directive 93/36 and, more particularly, Article 5(7) thereof, Directive 93/37 and, more particularly, Article 6(6) thereof, and also Directive 93/38 and, more particularly, Article 4(2) thereof, preclude a rule, such as that laid down in Article 26 of the Royal Decree of 25 March 1999 amending the Royal Decree of 10 January 1996 and Article 32 of the Royal Decree of 25 March 1999 amending the Royal Decree of 8 January 1996, whereby a person who has been instructed to carry out research, experiments, studies or development in connection with public works, supplies or services is not permitted to apply to participate in or to submit a tender for those works, supplies or services and where that person is not given the opportunity to prove that, in the circumstances of the case, the experience which he has acquired was not capable of distorting competition.

Second question referred in Cases C-21/03 and C-34/03

37. By the second question referred in Cases C-21/03 and C-34/03, the national court asks whether the answer to the first question is different where Directives 92/50, 93/36, 93/37 and 93/38, considered in conjunction with the principle of proportionality, freedom of trade and industry and the right to property, are interpreted as referring only to private undertakings or to undertakings which have provided services for valuable consideration.

38. That question is based on a hypothesis which cannot be accepted.

39. There is nothing in those directives to indicate that they may be interpreted as referring, as regards their applicability to undertakings which are participating or intend to participate in a public contract procedure, only to private undertakings or to undertakings which have provided services for valuable consideration. Furthermore, the principle of equal treatment precludes the application of a rule such as that at issue in the main proceedings solely to private undertakings or to undertakings which have provided services for valuable consideration and which have carried out certain preparatory works where it would not apply to undertakings not having one of those qualities which have also carried out such preparatory work.

40. Accordingly, there is no need to answer the second question referred in Cases C21/03 and C-34/03.

Third question referred in Cases C-21/03 and C-34/03

41. By the third question referred in Cases C-21/03 and C-34/03, the national court is seeking essentially to ascertain whether Directive 89/665 and, more particularly, Articles 2(1)(a) and 5 thereof, and also Directive 92/13 and, more particularly, Articles 1 and 2 thereof, preclude the contracting entity from being able to refuse, until the end of the procedure for the examination of tenders, to allow an undertaking connected with any person who has carried out certain preparatory works from participating in the procedure or from submitting a tender, even though, when questioned on that point by the awarding authority, the undertaking states that it has not thereby obtained an unfair advantage capable of distorting the normal conditions of competition.

42. In that regard, it should be borne in mind that, since the issue in the case relates to detailed procedural rules governing the remedies intended to protect rights conferred by Community law on candidates and tenderers harmed by decisions of contracting authorities, those rules must not compromise the effectiveness of Directive 89/665 (Case C-470/99 Universale-Bau and Others [2002] ECR I11617, paragraph 72).

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43. Furthermore, the provisions of Directives 89/665 and 92/13, which are intended to protect tenderers against arbitrary decisions by the contracting authority, seek to reinforce existing arrangements for ensuring effective application of Community directives on the award of public contracts, in particular where infringements can still be rectified. Such protection cannot be effected if the tenderer is not able to rely on those rules against the contracting authority (Case C-212/02 Commission v Austria , not published in the European Court Reports, paragraph 20 and the case-law cited there).

44. The possibility that the contracting authority might delay, until the procedure has reached a very advanced stage, taking a decision as to whether an undertaking connected with a person who has carried out certain preparatory works may participate in the procedure or submit a tender, when that authority has before it all the information which it needs in order to take that decision, deprives that undertaking of the opportunity to rely on the Community rules on the award of public contracts as against the awarding authority for a period which is solely within that authority's discretion and which, where necessary, may be extended until a time when the infringements can no longer be usefully rectified.

45. Such a situation is capable of depriving Directives 89/665 and 92/13 of all practical effect as they are susceptible of giving rise to an unjustified postponement of the possibility for those concerned to exercise the rights conferred on them by Community law. It is also contrary to the objectives of Directives 89/665 and 92/13, which seek to protect tenderers vis-à-vis the awarding authority.

46. The answer to the third question referred in Cases C-21/03 and C-34/03 must therefore be that Directive 89/665 and, more particularly, Articles 2(1)(a) and 5 thereof, and also Directive 92/13 and, more particularly, Articles 1 and 2 thereof, preclude the contracting authority from being able to refuse, up to the end of the procedure for the examination of tenders, to allow an undertaking connected with any person who has been instructed to carry out research, experiments, studies or development in connection with works, supplies or services from participating in the procedure or submitting an offer, even though, when questioned on that point by the awarding authority, that undertaking states that it has not thereby obtained an unfair advantage capable of distorting the normal conditions of competition.

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PROCEDU Reference for a preliminary ruling

ADVGEN Léger

JUDGRAP Timmermans

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Judgment of the Court (Third Chamber)
of 27 October 2005
Contse SA, Vivisol Srl and Oxigen Salud SA v Instituto Nacional de Gestion Sanitaria (Ingesa), formerly Instituto Nacional de la Salud (Insalud). Reference for a preliminary ruling: Audiencia Nacional - Spain. Freedom of establishment - Freedom to provide services - Directive 92/50/EEC - Public service contracts - Principle of non-discrimination - Health services of home respiratory treatments - Admission condition - Evaluation criteria. Case C-234/03.

In Case C-234/03,

REFERENCE for a preliminary ruling under Article 234 EC, from the Audiencia Nacional (Spain), made by decision of 16 April 2003, received at the Court on 2 June 2003, in the proceedings

Contse SA,

Vivisol Srl,

Oxigen Salud SA

v

Instituto Nacional de Gestion Sanitaria (Ingesa), formerly Instituto Nacional de la Salud (Insalud),

interested parties:

Air Liquide Medicinal SL,

Sociedad Española de Carburos Metalicos SA,

THE COURT (Third Chamber),

composed of A. Rosas (Rapporteur), President of the Chamber, J. Malenovsku, J.P. Puissochet, S. von Bahr and U. Lohmus, Judges,

Advocate General: C. Stix-Hackl,

Registrar: M. Ferreira, Principal Administrator,

having regard to the written procedure and further to the hearing on 19 January 2005,

after considering the observations submitted on behalf of:

- Contse SA, Vivisol Srl and Oxigen Salud SA, by R. García-Palencia and C. Urda Serrano, abogados,

- the Instituto Nacional de Gestion Sanitaria (Ingesa), formerly Instituto Nacional de la Salud (Insalud), by M. Gomez Montes, procurador, and J.M. Pérez-Gomez, abogado,

- the Spanish Government, by S. Ortiz Vaamonde, acting as Agent,

- the Austrian Government, by M. Fruhmann, acting as Agent,

- the Commission of the European Communities, by G. Valero Jordana and K. Wiedner, acting as Agents,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

Judgment

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

Article 49 EC precludes a contracting authority from providing, in the tendering specifications

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for a public contract for health services of home respiratory treatments and other assisted breathing techniques, first, for an admission condition which requires an undertaking submitting a tender to have, at the time the tender is submitted, an office open to the public in the capital of the province where the service is to be supplied and, second, for evaluation criteria which reward, by awarding extra points, the existence at the time the tender is submitted of oxygen production, conditioning and bottling plants situated within 1 000 kilometres of that province or offices open to the public in other specified towns in that province, and which, in the case of a tie between a number of tenders, favours the undertaking which was previously providing the service concerned, in so far as those criteria are applied in a discriminatory manner, are not justified by imperative requirements in the general interest, are not suitable for securing the attainment of the objective which they pursue or go beyond what is necessary to attain it, which is a matter for the national court to determine.

1. This reference for a preliminary ruling concerns the interpretation of Articles 12 EC, 43 EC et seq., 49 EC et seq. and Article 3(2) of Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts (OJ 1992 L 209, p. 1).

2. The reference was made in the course of proceedings between Contse SA (Contse'), Vivisol Srl and Oxigen Salud SA (all three forming a temporary consortium owning oxygen-producing factories in Italy and Belgium), and the Instituto Nacional de la Salud (the National Health Institute, Insalud'). The applicants brought an action in respect of, first, two calls for tenders issued by Insalud for services of home respiratory treatments and other assisted breathing techniques in the provinces of Caceres and Badajoz and, second, the decision of the Presidencia Ejecutiva (Executive Board) of Insalud of 10 July 2000 dismissing the complaints made against those calls for tenders.

Legal background

3. Article 12 EC provides that, within the scope of application of the EC Treaty, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality is to be prohibited.

4. Articles 43 EC and 49 EC enshrine freedom of establishment and freedom to provide services respectively. Those provisions are a specific expression of the principle of non-discrimination.

5. Directive 92/50 also contains an expression of that principle in Article 3(2) stating that the contracting authorities are to ensure that there is no discrimination between different service providers.

The facts and the dispute in the main proceedings

6. By two decisions of 24 May 2000, Insalud issued calls for tenders for the supply of services of home respiratory treatments and other assisted breathing techniques in the provinces of Caceres and Badajoz (the contested calls for tenders').

7. The tendering specifications, the specific administrative clauses and the technical specifications of those two calls for tenders lay down the admission conditions and the evaluation criteria.

8. The admission conditions, which are not subject to any evaluation, must necessarily be fulfilled at the time the tender is submitted.

9. In that connection, it is stipulated that the tenderer must have at least one office open to the public for a minimum of eight hours a day, morning and afternoon, five days a week, in the provincial capital concerned (the admission condition').

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10. It is clear from the file that the evaluation criteria concern a number of economic and technical characteristics for which points are awarded. In this case, out of a maximum of 140 points which may be awarded, 40 relate to the financial aspect of the tender and 100 concern its technical evaluation criteria.

11. In addition to the submission of a quality certificate (for which 20 points are awarded) the technical specifications are set out in various sections: equipment (35 points), supply of services (35 points), information for the patient (5 points), and service inspection report (5 points).

12. Under the section equipment', in the part relating to the provision of oxygen by pressurised gas cylinder, it is stipulated that a maximum of 4.6 points, defined according to the total annual production, is to be awarded if at the time the tenders are submitted the tenderer owns at least two oxygen-producing factories situated within 1 000 kilometres of the province concerned. Half a point is also awarded if, at the time the tenders are submitted, the tenderer owns at least one cylinder-conditioning plant and at least one oxygen-bottling plant situated, in both cases, within 1 000 kilometres of the province concerned.

13. Under the section supply of services', the existence, at the time the tenders are submitted, of offices open to the public for a minimum of eight hours per day, morning and afternoon, five days a week, in certain towns in the province concerned may lead to the award of a maximum of 0.9 extra points (0.3 for each of the three towns mentioned in the contested calls for tenders).

14. The contract is awarded to the undertaking which submits the tender gaining the highest number of points. In the case of a tie, the tender with the best technical evaluation will be successful. If the position is still tied the undertaking which has previously provided that service will be successful.

15. The appellants in the main proceedings lodged complaints against the contested calls for tenders, which were dismissed on 10 July 2000 by decision of Insalud's Presidencia Ejecutiva.

16. Subsequently, the appellants in the main proceedings brought an action against that decision and the contested calls for tenders before the Juzgado Central de lo Contencioso-Administrativo Madrid (Central Court for Contentious Administrative Proceedings, Madrid) which dismissed that action on 20 September 2001. An appeal was brought before the referring court.

17. The appellants in the main proceedings, first, submit that a number of elements in the contested calls for tender, set out in paragraphs 8 to 14 of this judgment (the disputed elements'), infringe Articles 12 EC, 43 EC and 49 EC and Article 3(2) of Directive 92/50, and, second, requested the referring court to make a reference to the Court of Justice for a preliminary ruling on this matter.

18. Insalud contends that the disputed elements in the contested calls for tender are lawful in that the fact that the service concerned is a health service and the particularly vulnerable category of patients who rely on it compel the competent authorities not only to ensure the supply of services at all times, but also to take account of and evaluate the circumstances likely to reduce the risks inherent in all human activity, by favouring the tender which minimises those risks.

19. In those circumstances the Audiencia Nacional decided to stay proceedings and to refer the following question to the Court for a preliminary ruling:

Is it contrary to Articles 12 EC, 43 EC et seq. and 49 EC et seq., and Article 3(2) of [Directive 92/50] to include in the tendering specifications, special administrative clauses and technical specifications governing calls for tender relating to services of home respiratory treatments and other assisted breathing techniques

(1) admission conditions requiring undertakings which wish to submit a tender already to have offices

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open to the public in the province or the capital of the province in which the service is to be provided; and

(2) award criteria which [favour tenders submitted by undertakings:

(a) which have their own oxygen production, conditioning and bottling plants situated within a radius of 1 000 kilometres of the capital of the province where the service is to be provided],

(b) which already have offices open to the public in certain towns in that province or

(c) which have been providing the service previously?'

The question referred for a preliminary ruling

20. By its question the national court asks essentially whether Articles 12 EC, 43 EC and 49 EC and Article 3(2) of Directive 92/50 preclude a contracting authority from laying down, in the tendering specifications for a public contract for the provision of health services of home respiratory treatments and other assisted breathing techniques, first, an admission condition which requires the tenderer at the time the tender is submitted to have an office open to the public in the capital of the province where the service is to be provided and, second, evaluation criteria for the tenders which take account, by awarding extra points, of the existence at that time of oxygen producing, conditioning and bottling plants situated within 1 000 kilometres of that province or of offices open to the public in other specified towns in that province and which, in the event that there is a tie on points between a number of tenders, favour the undertaking which was previously providing the service in question.

21. The appellants in the main proceedings, the Commission of the European Communities and the Austrian Government suggest that the answer to that question should be in the affirmative. Insalud and the Spanish Government support the contrary argument.

22. As a preliminary point, it should be observed that the case in the main proceedings, contrary to the Spanish Government's submissions, appears to concern a public service contract and not a management contract for a service categorised as a concession. As Insalud stated at the hearing, the Spanish administration remains liable for all harm suffered on account of a failure of the service. That factor, which implies that there is no transfer of risks connected to the provision of the service concerned, and the fact that the service is paid for by the Spanish health administration, support that conclusion. It is, however, for the national court to determine whether in fact that is the case.

23. In any event, since the questions from the national court are based on the fundamental rules laid down by the Treaty, the following considerations will be helpful to it even if this contract is a public service concession not covered by Directive 92/50. It is in the light of primary law and, in particular, of the fundamental freedoms provided for by the Treaty that the consequences in Community law of the award of such concessions must be examined (see, in particular, Case C-231/03 Coname [2005] ECR I-0000, paragraph 16).

24. Those fundamental rules, referred to by the national court, are of two kinds. Article 43 EC et seq. relates to freedom of establishment and Article 49 EC et seq. concerns freedom to provide services.

25. It must be recalled, as all the parties which lodged observations before the Court have done, that, disregarding Article 46 EC, the national measures liable to hinder or make less attractive the exercise of fundamental freedoms guaranteed by the Treaty must, according to settled case-law, fulfil four conditions in order to comply with Article 43 EC and Article 49 EC: they must be applied in a non-discriminatory manner, they must be justified by imperative requirements in the general interest, they must be suitable for securing the attainment of the objective which they

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pursue, and they must not go beyond what is necessary in order to attain it (see Case C-19/92 Kraus [1993] ECR I-1663, paragraph 32; Case C-55/94 Gebhard [1995] ECR I-4165, paragraph 37; and Case C-243/01 Gambelli and Others [2003] ECR I-13031, paragraphs 64 and 65).

26. Therefore, it is appropriate to examine the disputed elements of the contested calls for tender in order to determine whether those elements are liable to hinder or make less attractive the exercise of the fundamental freedoms guaranteed by the Treaty by undertakings which are not established in Spain.

27. In so far as such elements are not obstacles to the establishment of the undertakings on Spanish territory it must be held, first of all, that no restriction on freedom of establishment exists in this case.

28. Second, it is appropriate to examine whether those elements constitute a restriction on the freedom to provide services.

29. In that regard, it is common ground that Insalud is the main recipient of the services concerned, since the public sector represents 90% of the requests for home respiratory treatments. The Commission rightly states therefore that the admission condition gives rise for undertakings to a series of costs which will be absorbed only if the contract is awarded to them, which has the effect of rendering the submission of a tender clearly less attractive. The same is true for the evaluation criterion, pursuant to which extra points are awarded if an office is already open in the towns listed in the calls for tenders.

30. As regards the evaluation criteria for the oxygen producing, conditioning and bottling plants, it is clear that unless it already owns such plants within a 1 000 kilometres radius, an undertaking could be hindered in submitting a tender.

31. Lastly, the fact that in the final analysis the method of deciding between two tenderers who have the same number of points operates in favour of the undertaking already established on the relevant Spanish market is liable to render the submission of a tender less attractive by any other undertaking on account, in particular, of the considerable homogeneity of the market.

32. It is clear from the file that the Spanish market in gas for medical use is 97% controlled by four multinational undertakings. Moreover, as Contse rightly observed without being contradicted on that point, there cannot be any major differences between the participants as regards the number of points awarded for the technical aspects because all the tenderers use similar technical equipment which is produced by only two or three undertakings.

33. Therefore, it must be held that the disputed elements in the contested calls for tender are all liable to hinder or render less attractive the exercise of the freedom to provide services as guaranteed by the Treaty. Therefore, it is appropriate to determine whether each of those disputed elements fulfils the four conditions which are clear from the case-law cited in paragraph 25 of this judgment.

34. As regards the division of jurisdiction between the Community judicature and national courts, it is for the national court to determine whether those conditions are fulfilled in the case pending before it. The Court, when giving a preliminary ruling, may, where appropriate, provide clarification designed to give the national court guidance in its interpretation (see, to that effect, Case C-79/01 Payroll and Others [2002] ECR I-8923, paragraphs 28 and 29). In that connection, and in answer to the questions referred by the national court, it is for that court to take account of the factors stated in the following paragraphs.

The admission condition

35. First of all the national measure must be applied in a non-discriminatory manner.

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36. According to the case-law of the Court, the principle of equality, of which Article 49 EC is a specific expression, prohibits not only overt discrimination based on nationality but also all covert forms of discrimination which, by applying other distinguishing elements, lead in fact to the same result (see Case 22/80 Boussac Saint-Frères [1980] ECR 3427, paragraph 9, and Case C-3/88 Commission v Italy [1989] ECR 4035, paragraph 8).

37. Although the admission condition is applicable without distinction to any undertaking intending to respond to the call for tenders in question, it is for the national court to determine whether that condition may in practice be met more easily by Spanish operators than by those established in another Member State. In such a case, that criterion infringes the principle of non-discriminatory application (see, to that effect, Gambelli and Others , paragraph 71).

38. It must, however, be stated that in the absence of restrictions on the freedom of establishment the very fact of having an office open to the public in the capital of the province where the service will be provided would not pose a serious obstacle for foreign operators.

39. Second, the national provision must be justified by imperative requirements in the general interest.

40. In this case it is common ground that the admission condition and the other disputed elements in the contested calls for tender are intended to ensure better protection of the life and health of patients.

41. Third and fourth, the national measure must be suitable for securing the attainment of the objective pursued and must not go beyond what is necessary for attaining it.

42. On that point the Commission and Contse take the view that the condition of having, at the time the tender is submitted, an office open to the public in the capital of the province concerned is irrelevant to the aim identified above of better ensuring the protection of the life and health of patients. Insalud considers, on the contrary, that the existence of such an office serves to achieve that aim.

43. Even assuming that the existence of such an office may be regarded as suitable for ensuring patients' health, it is evident that the requirement to have an office at the time the tender is submitted is clearly disproportionate.

44. The Spanish Government's argument which, by stating that the purpose of a call for tenders is to determine which undertakings already have the means necessary to provide the service in question, places an office open to the public on the same footing as any other equipment necessary for the supply of the service cannot be accepted.

45. In that regard, the Commission rightly considers that such an office is not an essential element for the supply of the service in question. The minimum conditions already require a technical support service to be set up which is open 24 hours a day, seven days a week, which will, by means which are less restrictive of freedom to provide services, lead to the attainment in an initial period of the objective pursued in this case, that is, not to endanger the life or health of patients where there is a problem with the functioning or handling of the equipment.

46. Furthermore, as Contse pointed out, a transitional period during which the undertaking already providing the service in question transfers management of the service to the new contractor is provided, if necessary, in order to ensure that treatment of patients is not interrupted. It is important to note that, in such a case, the contractor is obliged to remunerate the undertaking which continues to provide services according to a formula set out in the specific administrative clauses in the call for tenders. The remuneration increases each month until the third month from the date on which the contract was awarded. If the new contractor has still not assumed responsibility for

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all the services required, the contract may be terminated.

The evaluation criteria

47. As a preliminary point it must be recalled that, although it is true that Directive 92/50 is evidently applicable to the contested calls for tenders, it is clear that the service concerned in this case features in Annex I B to that directive. Under Article 9 only Articles 14 and 16 apply to such services, together with the general provisions of Title I including Article 3(2), referred to by the national court, and the final provisions in Title VII. Article 14 concerns common rules in the technical field and Article 16 concerns notices of the results of the award procedure.

48. Therefore, and in order to give a useful answer to the national court, it must be stated that the disputed elements in the contested calls for tenders are not, in any event, subject to Chapter 3, entitled Criteria for the award of contracts', in Title VI of Directive 92/50 or the limitations for which it provides.

49. It should also be recalled that the evaluation criteria, like any national measure, must comply with the principle of non-discrimination as derived from the provisions of the Treaty relating to the freedom to provide services, and that restrictions on that freedom must themselves fulfil four conditions which are set out in the case-law cited in paragraph 25 of this judgment.

50. As was stated in paragraph 34 of this judgment, it is for the national court to determine whether those conditions are fulfilled in the case pending before it, taking account of the factors set out in the following paragraphs.

51. As regards, first, the application in a non-discriminatory manner of the criterion by which extra points are awarded if the tenderer has offices open to the public in certain towns in the province where the service will be provided, it appears, as was stated in respect of the admission condition, that that criterion itself is applicable without distinction to any undertaking wishing to submit a tender.

52. Furthermore, as was stated in paragraph 40 of this judgment, it is common ground that the disputed elements in the contested calls for tenders have all been included in order to provide better protection for the life and health of patients. Insalud goes on to explain that those elements are designed, more particularly, to resolve problems with the supply of oxygen and the functioning of equipment and to ensure an adequate supply of the service in question, without undue delay or harm to the patient.

53. Next, it should be determined whether that criterion is suitable for securing the attainment of that objective but does not go beyond that which is necessary to attain it.

54. In that regard, the Commission repeats the argument it put forward in relation to the admission condition, that having those offices available prior to the performance of the contract is unnecessary and disproportionate. Contse accepts that such a criterion, given the purpose of assisting patients, might be consistent with the objective pursued, but takes the view that a simple contractual undertaking to set up such offices in the event that the contract is awarded would have enabled that objective to be attained. Neither Insalud nor the Spanish Government deal specifically with this evaluation criterion.

55. As regards that issue, as was stated in paragraph 43 of this judgment, even assuming that the existence of such offices might be regarded as suitable for protecting patients' health, it is clear that the requirement to have those offices already available at the time the tender is submitted is clearly disproportionate, even more so as the minimum conditions already require, as it was stated in paragraph 45 of this judgment, the setting up of a technical support service.

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56. As regards the evaluation criteria relating to the ownership of certain plants for oxygen production, conditioning and bottling, situated within a radius of 1 000 kilometres of the province where the service will be provided, it is important to determine whether, although applicable without distinction to any undertaking, those elements might in fact favour essentially those undertakings already established in Spain.

57. Unlike having an office available, a condition which could by its very nature be fulfilled on many occasions or even each time the award of a contract made it necessary, the existence of production, conditioning or bottling plants belonging to the tenderer requires a much more substantial investment which is not normally repeated. The nature of this criterion means that it would not be easy to satisfy it if such plants are not already in place. The fact that it is not just availability but ownership of the plants in question which is required only reinforces the idea that that criterion is intended, in fact, to favour permanence.

58. Therefore, only undertakings which already own such plants on Spanish territory, or outside Spanish territory but still within a distance of 1 000 kilometres of the province in question, could be awarded the points relating to those elements.

59. Furthermore, although the geographical zone situated within a radius of 1 000 kilometres of the provinces concerned, namely Caceres and Badajoz, includes in addition to Spanish territory all Portuguese territory, it includes only a part of France and excludes almost all the Member States so that plants which, as in this case, are situated in Belgium and Italy would be outside the required radius.

60. As was stated in paragraph 37 of this judgment, if the national court finds that a criterion is in practice more easily fulfilled by Spanish operators than by those established in another Member State, that criterion infringes the principle of non-discriminatory application (see Gambelli and Others , paragraph 71).

61. In any event, although reliability of supplies may be included in the elements to be considered in order to ascertain the most economically advantageous tender in the case of a service such as that in question in the main proceedings, which aims to protect the life and health of persons by providing a suitable and diversified production close to the place of consumption (see, by analogy Case C-324/93 Evans Medical and Macfarlan Smith [1995] ECR I-563, paragraph 44), it must be held that those elements do not appear, in this case, to be adapted to the objective pursued in several respects.

62. In the first place, although the Spanish Government rightly observes that any choice of distance or transport time is arbitrary, the fact remains that the criterion of 1 000 kilometres chosen in this case appears to be inappropriate for securing the attainment of the objective in question.

63. First, the Spanish Government does not provide any evidence in support of its argument that the risk of delays, which increases proportionally with the distance to be covered, is lower because of the control that the Spanish authorities could exercise in the event of a problem arising on Spanish territory. That argument cannot be accepted.

64. Second, even assuming that crossing the internal borders of the European Community creates the delays feared by the Spanish Government, the radius of 1 000 kilometres, in that it goes beyond the Spanish borders, is not suitable for attaining the objective pursued.

65. In the second place, the Commission points out that the oxygen produced in the production plants is delivered to compression centres, in order to be compressed into bottles and that in those centres there is an emergency stock of full bottles which is sufficient in the event of damage, technical interruption or emergency to ensure the supply of oxygen for at least 15 days.

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66. Therefore, as Contse also states, the proximity of the production plants does not secure the attainment of the objective of reliable supplies. It is for the national court to determine whether the situation is different for oxygen conditioning and bottling plants.

67. The stated practice of the undertakings confirms, moreover, that means exist, which are less restrictive of the freedom to provide services, for attaining the objective pursued of guaranteed availability of gas for medical use close to the place of consumption. As the Commission and Contse point out, that is to give credit, by awarding extra points, to storage depots with a stock of gas intended to cover, where necessary for a stated period, any interruptions or irregularities in transport from production or bottling plants.

68. Lastly, in so far as the Commission and Contse criticise the importance attributed to the ownership of production plants, it must be observed that the contracting authorities are free not only to choose the elements for awarding the contract but also to determine the weighting of such elements, provided that the weighting enables an overall evaluation to be made of the elements applied in order to identify the most economically advantageous tender (see, to that effect, Case C448/01 EVN and Wienstrom [2003] ECR I-14527, paragraph 39). The same would be true if the service in question came under Annex I B to Directive 92/50, which could be the case for the contracts in question, and, therefore, were covered by a less restrictive scheme for the award of contracts.

69. In the main proceedings the criterion relating to production plants does not concern the supply which is the subject of the contract, namely the supply of home respiratory treatments, or even the amount of gas which will be produced, but the maximum production capacity of the plants owned by the tenderer in so far as extra points are awarded each time one of the three thresholds for total annual production is reached.

70. Therefore the evaluation criteria relating, in this case, to the award of extra points for an ever-increasing production capacity, cannot be regarded as linked to the objective of the contract and even less as suitable for ensuring that it is attained (see, to that effect, EVN and Wienstrom , paragraph 68)

71. Finally, even assuming that those elements were a response to the need to ensure reliability of supplies and, therefore, that they were linked to the objective pursued in the contested calls for tenders and suitable for attaining it, the capacity of tenderers to provide the largest possible amount of the product cannot legitimately be given the status of an award criterion (see, to that effect, EVN and Wienstrom , paragraph 70).

72. In that regard, it must be recalled that the contested calls for tender provide, as conditions for the submission of a tender, that the tenderer should have more than one source of production and bottling and be able to produce at least 400 000 m3 per year, in connection with the call for tenders relating to the province of Caceres, and 550 000 m3 per year in connection with that relating to the province of Badajoz. It is clear from the file that those quantities represent approximately 75% and 80% respectively of the consumption planned for the first year of the contract concerned.

73. Furthermore, it must be observed that the first of the three thresholds provided for in the contested calls for tenders, that is a total annual production, for each of the contracts, of at least 800 000 m3 and 1 000 000 m3 respectively, in respect of which extra production confers in both cases 1.3 points, corresponds to a volume exceeding the total consumption anticipated for the fourth and final year of the contract concerned. Therefore, a total annual production capacity of such a level could, in some circumstances, be regarded as being necessary to the objective, recalled in paragraph 71 of this judgment, of ensuring reliability of supplies.

74. However, the evaluation criteria under consideration go beyond what is necessary. 1.3 points are still awarded where total annual production exceeds a threshold of at least 1 200 000 m3 and

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1 500 000 m3 respectively and 2 extra points if that production is at least 1 600 000 m3 and 2 000 000 m3 respectively.

75. It should be noted that those figures, which correspond to the third total annual production threshold, represent each time twice the figure for the first threshold, set out in paragraph 73 of this judgment.

76. It follows that, in so far as the maximum number of points is allocated to tenderers with a production capacity which largely exceeds the consumption expected in the context of the contested calls for tenders, while the first threshold already appears suitable for ensuring, as far as possible, a reliable supply of gas, the evaluation criteria used in the case, as regards the award of extra points where the second and third total annual production thresholds are exceeded, are not compatible with the requirements of the relevant Community law (see, by analogy, EVN and Wienstrom , paragraph 71).

77. Finally, as regards the manner of deciding between two tenderers with the same number of points, the award criterion used applies not only where there is an overall tie, but also where there is a tie in respect of technical aspects between two tenders with the same number of points, and favours the undertaking which was already supplying the service.

78. The conditions to be fulfilled, set out above, are also applicable to such a criterion. Deciding automatically and definitively in favour of the operator already present on the market concerned is discriminatory.

79. It follows from all the foregoing considerations that Article 49 EC precludes a contracting authority from providing in the tendering specifications for a public contract for health services of home respiratory treatment and other assisted breathing techniques, first, for an admission condition which requires an undertaking submitting a tender to have, at the time the tender is submitted, an office open to the public in the capital of the province where the service is to be supplied and, second, for evaluation criteria which reward, by awarding extra points, the existence at the time the tender is submitted of oxygen production, conditioning and bottling plants situated within 1 000 kilometres of that province or offices open to the public in other specified towns in that province, and which, in the case of a tie between a number of tenders, favour the undertaking which was already providing the service concerned, in so far as those elements are applied in a discriminatory manner, are not justified by imperative requirements in the general interest, are not suitable for securing the attainment of the objective which they pursue or go beyond what is necessary to attain it, which is a matter for the national court to determine.

Costs

80. Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

DOCNUM 62003J0234

AUTHOR Court of Justice of the European Communities

FORM Judgment

TREATY European Economic Community

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PUBREF	European Court reports 2005 Page I-09315
DOC	2005/10/27
LODGED	2003/06/02
JURCIT	11997E012 : N 1 3 19 20 11997E043 : N 1 4 19 20 24 25 11997E046 : N 25 11997E049 : N 1 4 19 20 24 25 36 79 31992L0050 : N 23 47 48 31992L0050-A03P2 : N 1 5 19 20 47 31992L0050-A09 : N 47 31992L0050-A14 : N 47 31992L0050-A16 : N 47 31992L0050-N1LB : N 47 68 61980J0022 : N 36 61988J0003 : N 36 61992J0019 : N 25 61993J0324 : N 61 61994J0055 : N 25 62001J0079 : N 34 62001J0243 : N 25 37 60 62001J0448 : N 68 70 71 76 62003J0231 : N 23
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AUTLANG	Spanish
OBSERV	Spain ; Austria ; Member States ; Commission ; Institutions
NATIONA	Spain
NATCOUR	*A9* Audiencia Nacional, auto de 16/04/2003
NOTES	Meisse, Eric: Procédure de passation, Europe 2005 Décembre no 412 Comm. p.19 ; Brown, Adrian: Evaluation Criteria for the Supply of Home Respiratory Treatment Services in Spain: a Note on C-234/03, Contse SA, Vivisol and Oxigen Salud SA v Insalud, Public Procurement Law Review 2006 p.NA48-NA54 ; Burgi, Martin: Juristenzeitung 2006 p.305-307
PROCEDU	Reference for a preliminary ruling
ADVGEN	Stix-Hackl
JUDGRAP	Rosas
DATES	of document: 27/10/2005 of application: 02/06/2003

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Judgment of the Court (Sixth Chamber) of 18 March 2004 Siemens AG Osterreich and ARGE Telekom & Partner v Hauptverband der österreichischen Sozialversicherungsträger. Reference for a preliminary ruling: Bundesvergabeamt - Austria. Public contracts - Directive 89/665/EEC - Review procedures concerning the award of public contracts - Effects of a decision by the body responsible for review procedures annulling the decision by the contracting authority not to revoke the procedure by which a contract was awarded - Restriction on the use of subcontracting. Case C-314/01.

1. Preliminary rulings - Jurisdiction of the Court - Limits - General or hypothetical questions - Determination by the Court as to whether it has jurisdiction

(Art. 234 EC)

2. Approximation of laws - Review procedures concerning the award of public supply and public works contracts - Directive 89/665 - Obligation on Member States to provide for review procedures - Clause in an invitation to tender incompatible with Community rules - Obligation to make it possible to rely on that incompatibility in a review procedure

(Council Directive 89/665, Arts 1(1) and 2(7))

1. The procedure provided for by Article 234 EC is an instrument of cooperation between the Court of Justice and national courts. In the context of that cooperation, the national court or tribunal seised of the dispute, which alone has direct knowledge of the facts giving rise to the dispute and must assume responsibility for the subsequent judicial decision, is best placed to determine, in the light of the particular circumstances of the case, both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions which it submits to the Court.

The fact none the less remains that it is for the Court, if need be, to examine the circumstances in which the case was referred to it by the national court or tribunal, in order to assess whether it has jurisdiction and in particular to determine whether the interpretation of Community law which is requested bears any relation to the actual nature and subject-matter of the main proceedings, in order that the Court will not be required to give opinions on general or hypothetical questions. If it should appear that the question raised is manifestly irrelevant for the purposes of deciding the case, the Court must declare that there is no need to proceed to judgment.

(see paras 33-35)

2. Directive 89/665 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 Directive 92/50 relating to the coordination of procedures for the award of public service contracts, and in particular Articles 1(1) and 2(7) thereof, must be construed as meaning that, in the case where a clause in an invitation to tender is incompatible with Community rules on public contracts, the national legal systems of the Member States must provide for the possibility of relying on that incompatibility in the review procedures referred to in Directive 89/665.

(see para. 50, operative part)

In Case C-314/01,

REFERENCE to the Court under Article 234 EC by the Bundesvergabeamt (Austria) for a preliminary ruling in the proceedings pending before that tribunal between

Siemens AG Osterreich,

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ARGE Telekom & Partner

and

Hauptverband der österreichischen Sozialversicherungsträger,

joined party:

Bietergemeinschaft EDS/ORGA,

on the interpretation 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 relating to the coordination of procedures for the award of public service contracts (OJ 1992 L 209, p. 1),

THE COURT (Sixth Chamber),

composed of: V. Skouris, acting for the President of the Sixth Chamber, C. Gulmann, J.-P. Puissochet, R. Schintgen (Rapporteur) and N. Colneric, Judges,

Advocate General: L.A. Geelhoed,

Registrar: M.-F. Contet, Principal Administrator,

after considering the written observations submitted on behalf of:

- ARGE Telekom & Partner, by M. Ohler, Rechtsanwalt,

- Hauptverband der österreichischen Sozialversicherungsträger, by G. Lansky, Rechtsanwalt,

- Bietergemeinschaft EDS/ORGA, by R. Regner, Rechtsanwalt,

- the Austrian Government, by M. Fruhmann, acting as Agent,

- the Commission of the European Communities, by M. Nolin, acting as Agent, assisted by R. Roniger, Rechtsanwalt,

having regard to the Report for the Hearing,

after hearing the oral observations of Hauptverband der österreichischen Sozialversicherungsträger, represented by T. Hamerl, Rechtsanwalt; of the Austrian Government, represented by M. Fruhmann; and the Commission, represented by M. Nolin, assisted by R. Roniger, at the hearing on 18 September 2003,

after hearing the Opinion of the Advocate General at the sitting on

20 November 2003,

gives the following

Judgment

Costs

51. The costs incurred by the Austrian Government and by the Commission, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the proceedings pending before the national tribunal, the decision on costs is a matter for that tribunal.

On those grounds,

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THE COURT (Sixth Chamber),

in answer to the questions referred to it by the Bundesvergabeamt by order of 11 July 2001, hereby rules:

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 relating to the coordination of procedures for the award of public service contracts, and in particular Articles 1(1) and 2(7) thereof, must be construed as meaning that, in the case where a clause in an invitation to tender is incompatible with Community rules on public contracts, the national legal systems of the Member States must provide for the possibility of relying on that incompatibility in the review procedures referred to in Directive 89/665.

1. By order of 11 July 2001, received at the Court on 9 August 2001, the Bundesvergabeamt (Austrian Federal Procurement Office) referred to the Court for a preliminary ruling under Article 234 EC four questions on the interpretation 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 relating to the coordination of procedures for the award of public service contracts (OJ 1992 L 209, p. 1) (Directive 89/665').

2. Those questions have arisen in a dispute between the companies Siemens AG (Siemens') and ARGE Telekom & Partner (ARGE Telekom'), on the one hand, and, on the other, the Hauptverband der österreichischen Sozialversicherungsträger (Central Association of Austrian Social Security Institutions) (the Hauptverband'), in its capacity as contracting authority, concerning an adjudication procedure for the award of a public supply and service contract.

Legal framework

Community law

3. 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 Directives 71/305/EEC, 77/62/EEC and 92/50/EEC, decisions taken by the contracting authorities may be reviewed effectively and, in particular, as rapidly as possible in accordance with the provisions 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.'

4. Article 2 of Directive 89/665 sets out in this regard the obligations devolving on Member States. Article 2(1), (6) and (7) provides:

1. 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;

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(c) award damages to persons harmed by an infringement.

...

6. The effects of the exercise of the powers referred to in paragraph 1 on a contract concluded subsequent to its award shall be determined by national law.

Furthermore, except where a decision must be set aside prior to the award of damages, a Member State may provide that, after the conclusion of a contract following its award, the powers of the body responsible for the review procedures shall be limited to awarding damages to any person harmed by an infringement.

7. The Member States shall ensure that decisions taken by bodies responsible for review procedures can be effectively enforced.'

5. Directive 92/50 sets out common rules on participation in the procedure for the award of public service contracts. These include the possibility of sub-contracting part of the contract to third parties. Thus, Article 25 of Directive 92/50 provides:

In the contract documents, the contracting authority may ask the tenderer to indicate in his tender any share of the contract he may intend to subcontract to third parties.

This indication shall be without prejudice to the question of the principal service provider's liability.'

6. Directive 92/50 also sets out qualitative selection criteria which make it possible to determine the candidates admitted to participate in the procedure for the award of a public service contract. Article 32 of Directive 92/50 is worded as follows:

1. The ability of service providers to perform services may be evaluated in particular with regard to their skills, efficiency, experience and reliability.

2. Evidence of the service provider's technical capability may be furnished by one or more of the following means according to the nature, quantity and purpose of the services to be provided:

...

(c) an indication of the technicians or technical bodies involved, whether or not belonging directly to the service provider, especially those responsible for quality control;

...

(h) an indication of the proportion of the contract which the service provider may intend to sub-contract.

3. The contracting authority shall specify, in the notice or in the invitation to tender, which references it wishes to receive.

...'

National legislation

7. Directives 89/665 and 92/50 were transposed in Austrian law by the Bundesgesetz über die Vergabe von Aufträgen (Bundesvergabegesetz) 1997 (1997 Federal Procurement Law), BGBl. I 1997/56, in the version published in BGBl. I 2000/125 (the BVergG').

8. Paragraph 31 of the BVergG, relating to services to be performed by subcontracting undertakings, provides:

1. The documents relating to the invitation to tender shall specify whether subcontracting is permitted. The subcontracting of the whole contract is not permitted except in the case of purchase agreements

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and subcontracting to undertakings associated with the contractor. In the case of building contracts the subcontracting of the majority of the services constituting the object of the undertaking is not permitted. ... The contracting authority shall ensure that the contractor's subcontractors themselves perform the greater part of contracts subcontracted to them. In exceptional cases the contracting authority may specify in the contract documents, stating its reasons, that it is permissible for the majority of the contract to be subcontracted. Subcontracting parts of the contract is, moreover, permitted only if the subcontractor is qualified to perform his share of the work.

2. The contracting authority should ask the tenderer in the documents relating to the invitation to tender to indicate in his tender the proportion of the contract which he may intend to subcontract to third parties. This information shall be without prejudice to the issue of the contractor's liability.'

9. Paragraph 40(1) of the BVergG, which concerns the withdrawal of an invitation to tender, provides as follows:

During the tendering period the invitation to tender may be withdrawn for compelling reasons, especially if before the end of the tendering period circumstances become known which, had they been known earlier, would not have led to an invitation to tender or would have led to an invitation to tender essentially different in substance.'

10. Paragraph 52 et seq. of the BVergG deals with the examination of tenders. Paragraph 52(1) provides:

Before the contracting authority proceeds to the selection of the tender qualifying for the award of the contract, it should immediately eliminate the following tenders on the basis of the results of the assessment:

...

(9) tenders received from applicants who, immorally or contrary to the principle of effective competition, have come to agreements with other applicants which are disadvantageous to the contracting authority;

...'.

11. Paragraph 113 of the BVergG sets out the powers of the Bundesvergabeamt. Paragraph 113(2) and (3) provides:

2. In order to preclude infringements of this Federal Law and of the regulations implementing it, the Bundesvergabeamt is authorised until the time of the award:

(1) to adopt interim measures and

(2) to set aside unlawful decisions of the contracting authority.

3. After the award of the contract or the close of the contract award procedure, the Bundesvergabeamt is competent to determine whether, on grounds of infringement of this Federal Law or of any regulations issued under it, the contract has not been awarded to the best tenderer....'

12. Under Paragraph 117(1) and (3) of the BVergG:

1. The Bundesvergabeamt shall set aside, by way of administrative decision, taking into account the opinion of the Conciliation Committee in the case, any decision of the contracting authority in an award procedure where the decision in question:

(1) is contrary to the provisions of this Federal Law or its implementing regulations and

(2) significantly affects the outcome of the award procedure.

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...

3. After the award of the contract, the Bundesvergabeamt shall, in accordance with the conditions of subparagraph 1, determine only whether the alleged illegality exists or not.'

13. Under Paragraph 125(2) of the BVergG a claim for damages, which must be brought before the civil courts, is admissible only if there has been a prior determination by the Bundesvergabeamt under Paragraph 113(3) of the BVergG. The civil court which is required to rule on such a claim for damages is bound by that determination, as are the parties to the proceedings before the Bundesvergabeamt.

14. Article 879(1) of the Allgemeines Bürgerliches Gesetzbuch (Austrian General Civil Code) provides:

A contract shall be null and void if it infringes a statutory prohibition or is contrary to acceptable moral values.'

The dispute in the main proceedings and the questions referred for preliminary ruling

15. On 21 September 1999 the Hauptverband announced in the supplement to the Official Journal of the European Communities that it intended to initiate a two-stage contract award procedure for the award of a contract for the design, planning and implementation of a smart-card-based electronic data processing system, including the delivery, initialisation, personalisation, distribution and disposal of cards throughout Austria, delivery, installation and maintenance of sector terminals, support for a call-centre unit, card management and other services necessary for the operation of the system.

16. On 22 February 2000 the Hauptverband decided to invite five of the six groups of candidates which had taken part in the first phase of the procedure to submit tenders. At the same time the Hauptverband decided to eliminate the sixth candidate. Point 1.8 of the invitation to tender of 15 March 2000, which replicated Point 1.9 of the contract notice of 21 September 1999, stated:

A maximum of 30% of the services may be subcontracted, provided that the characteristic parts of the contract, namely, project management, system design, development, construction, delivery and management of the central components of the overall system specific to the project development, delivery and management of the life-cycle of the cards and development and delivery of the terminals remain with the tenderer or tender consortium'.

17. According to the order for reference, this clause, which stresses the personal responsibility of the card provider, was retained in order to guarantee proper technical performance of the contract.

18. Three of the four tender consortia which submitted tenders, namely, Siemens, ARGE Telekom and Debis Systemhaus Osterreich GmbH (Debis'), included the card provider Austria Card, Plastikkard und Ausweissysteme GmbH (Austria Card'), which was to be responsible for supplying the cards. The fourth consortium, to which Austria Card did not belong, was Bietergemeinschaft EDS/ORGA (EDS/ORGA'); which consisted of the undertakings Electronic Data Systems (EDS Austria) GmbH, Electronic Data Systems (EDS Deutschland) GmbH and ORGA Kartensysteme GmbH.

19. By letter of 18 December 2000, the first three tender consortia were informed that the Hauptverband was minded to award the contract to EDS/ORGA.

20. After having unsuccessfully attempted to have arbitration proceedings instituted before the Bundesvergabekontrollkommission (Federal Procurement Review Commission), the three unsuccessful consortia lodged review applications with the Bundesvergabeamt in which they sought, principally, annulment of the decision of the Hauptverband to award the contract to EDS/ORGA and, in the alternative, cancellation of the invitation to tender.

21. By decision of 19 March 2001, the Bundesvergabeamt dismissed all of the review applications

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brought before it as being inadmissible on the ground of lack of locus standi and interest in bringing proceedings inasmuch as the applicants' tenders ought in any event to have been eliminated by the Hauptverband pursuant to Paragraph 52(1) of the BVergG on the ground that Austria Card's membership of the three tender consortia in question was liable to distort free competition by reason of the exchange of information and negotiations on the terms of the tenders which such threefold membership made possible.

22. It appears from the case-file that this decision of the Bundesvergabeamt was annulled by judgment of the Verfassungsgerichtshof (Austrian Constitutional Court) of 12 June 2001 on the ground that the constitutional rights of the three consortia in question to have their case properly adjudged before a judicial body had been infringed inasmuch as the Bundesvergabeamt had, prior to taking its decision, failed to refer the matter to the Court of Justice for a preliminary ruling.

23. On 28 and 29 March 2001, Debis and ARGE Telekom lodged a second series of review applications before the Bundesvergabeamt in which they sought, inter alia, annulment of the Hauptverband's decision refusing to cancel the invitation to tender and, by way of interim measure, a prohibition on awarding the contract during a period of two months calculated from the instigation of proceedings, in the case of the application brought by Debis, or until such time as the Bundesvergabeamt had reached its decision in the main proceedings, in regard to the application brought by ARGE Telekom.

24. By decision of 5 April 2001, the Bundesvergabeamt, ruling on the applications for interim measures, prohibited the Hauptverband from awarding the contract until 20 April 2001.

25. By decision of 20 April 2001, the Bundesvergabeamt upheld the principal applications of Debis and ARGE Telekom and, pursuant to Paragraph 113(2)(2) of the BVergG, annulled the decision of the Hauptverband not to cancel the invitation to tender. As the essential grounds for its decision, it stated that the invitation to tender included an unlawful selection criterion inasmuch as the prohibition of subcontracting set out in Point 1.8 of the invitation to tender infringed the subcontractor's right, derived from Community legislation as interpreted by the Court (see, inter alia, Case C-176/98 Holst Italia [1999] ECR I8607), also to have recourse to a subcontractor in order to justify its capacity to perform the contract in question. In the present case, if the invitation to tender had not laid down this condition, the consortia which had been eliminated could have had recourse to a subcontractor for the supply of the cards.

26. Notwithstanding that decision, the Hauptverband decided, on 23 April 2001, to award the contract to EDS/ORGA. As it took the view that the effects of the interim measure adopted on 5 April 2001 by the Bundsvergabeamt had expired on 20 April 2001 without being extended and that the Bundesvergabeamt's decision of 20 April 2001 contained no more than a statement on setting aside the failure to cancel' which was difficult to understand, the Hauptverband took the view that no legally binding decision had been taken that its own decision to award the contract to the tender consortium which had submitted the lowest tender was invalid or ought to have been annulled.

27. The Hauptverband also decided to bring proceedings before the Verfassungsgerichtshof for annulment of the decision taken by the Bundesvergabeamt on 20 April 2001. According to the case-file forwarded by the Bundesvergabeamt and the observations lodged with the Court, the Verfassungsgerichtshof initially rejected, by order of 22 May 2001, the request by the Hauptverband that its application be recognised as having the effect of suspending operation of that decision, on the ground that the disputed contract had in any event already been awarded, and, subsequently, by judgment of 2 March 2002, the Verfassungsgerichtshof annulled that decision on the ground that it was logically impossible to annul a decision requiring something not to be done and that the proceedings brought by Debis and ARGE Telekom to secure that end ought to have been declared inadmissible.

28. On 30 April 2001, Siemens brought a fresh application before the Bundesvergabeamt by which

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it sought the annulment of several decisions taken by the Hauptverband after its decision to award the contract to EDS/ORGA. Siemens essentially argued in these proceedings that the annulment by the Bundesvergabeamt of the decision by the contracting authority not to annul the contract award procedure rendered unlawful the Hauptverband's decision to award the contract because it took place within the context of a second award procedure which had not been publicised in the requisite manner.

29. On 17 May 2001 ARGE Telekom also applied for annulment of 11 decisions taken by the Hauptverband after the latter had decided not to annul the disputed award procedure notwithstanding the decision of the Bundesvergabeamt of 20 April 2001.

30. As it took the view that resolution of this third series of disputes required an interpretation of several provisions of Directive 89/665, the Bundesvergabeamt decided to stay proceedings and to refer the following questions to the Court for a preliminary ruling:

(1) Is ... Directive 89/665... , and in particular Article 2(1)(b) thereof, if necessary in conjunction with Article 2(7) thereof, to be interpreted as meaning that the legal effect of a decision taken by a national review body within the meaning of Article 2(8) of Directive 89/665 relating to the setting aside of a contracting authority's decision not to cancel a contract award procedure is that if national law does not provide any basis for the effective and compulsory enforcement of the review body's decision against the contracting authority, the contract award procedure is automatically terminated by the national review body's decision, without the need for any further act by the contracting authority?

(2) Is Directive 89/665, in particular Article 2(7) thereof, if necessary in conjunction with... Directive 92/50... , in particular Articles 25 and 32(2)(c) thereof, or any other provisions of Community law, in particular having regard to the effet utile doctrine relating to the interpretation of Community law, to be construed as meaning that a provision in an invitation to tender which prohibits subcontracting material parts of the service concerned and, contrary to the case-law of the Court of Justice, in particular Case C-176/98 Holst Italia [1999] ECR I-8607, prevents the tenderer from using his contract with his subcontractor to prove that the services of a third party are actually available to him and which thus deprives him of his right to prove his own capability by relying on the services of a third party or to prove that he actually has available a third party's services, is so clearly contrary to Community law that a contract concluded on the basis of such an invitation to tender is to be regarded as invalid, in particular where national law in any case provides that illegal contracts are invalid?

(3) Is Directive 89/665, in particular Article 2(7) thereof, or any other provision of Community law, in particular having regard to the effet utile doctrine relating to the interpretation of Community law, to be construed as meaning that a contract concluded contrary to a decision by a national review body within the meaning of Article 2(8) of Directive 89/665 relating to the setting aside of a contracting authority's decision not to cancel a contract award procedure is invalid, in particular where national law in any case provides that immoral or illegal contracts are void but does not provide any basis for the effective and compulsory enforcement of the review body's decision against the contracting authority?

(4a) Is Directive 89/665, in particular Article 2(1)(b) thereof, if necessary in conjunction with Article 2(7), to be interpreted as meaning that where national law does not otherwise provide any basis for the effective and compulsory enforcement of the review body's decision against the contracting authority, the review body has, by virtue of the direct application of Article 2(1)(b) in conjunction with Article 2(7), the power to issue a compulsory, enforceable order to the contracting authority to ensure that the unlawful decision is set aside, even though national law authorises the review body to issue only non-compulsory, non-enforceable orders to set aside contracting authorities'

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decisions in tenderers' applications for review within the meaning of Article 1(1) of Directive 89/665?

(4b) If Question 4a is answered in the affirmative: does Article 2(7) of Directive 89/665, if necessary in conjunction with other provisions of Community law, give the review body the power in such a case to threaten contracting authorities and the members of their executive organs with, and to impose on them, such fines or fines and imprisonment by way of coercive penalties as are necessary to enforce their orders and are calculated in accordance with judicial discretion, where the contracting authorities and the members of their executive organs do not comply with the orders issued by the review body?'

The admissibility of the reference for a preliminary ruling

31. It is clear from all of the questions submitted by the Bundesvergabeamt that the latter is unsure as to the compatibility with Directive 89/665 of the procedural rules contained in the Austrian legislation governing public contracts inasmuch as those rules are not adequate effectively to guarantee implementation of the decisions taken by the body responsible for review proceedings as, in the case in the main proceedings, notwithstanding the decision of the Bundesvergabeamt of 20 April 2001 setting aside the Hauptverband's decision not to annul the call for tenders, the contract in dispute was none the less awarded to EDS/ORGA.

32. It is common ground that the Verfassungsgerichtshof, by judgment of 2 March 2002, annulled the decision of 20 April 2001 taken by the Bundesvergabeamt.

33. According to settled case-law in this regard, the procedure provided for by Article 234 EC is an instrument of cooperation between the Court of Justice and national courts (see, inter alia, Case C-343/90 Lourenço Dias [1992] ECR I-4673, paragraph 14, and Case C-112/00 Schmidberger [2003] ECR I5659, paragraph 30, and the case-law cited therein).

34. In the context of that cooperation, it is for the national court or tribunal seised of the dispute, which alone has direct knowledge of the facts giving rise to the dispute and must assume responsibility for the subsequent judicial decision, to determine in the light of the particular circumstances of the case both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions which it submits to the Court (see, inter alia, Lourenço Dias , cited above, paragraph 15, Case C390/99 Canal Satélite Digital [2002] ECR I607, paragraph 18, and Schmidberger , cited above, paragraph 31).

35. The fact none the less remains that it is for the Court, if need be, to examine the circumstances in which the case was referred to it by the national court or tribunal, in order to assess whether it has jurisdiction and in particular to determine whether the interpretation of Community law which is requested bears any relation to the actual nature and subject-matter of the main proceedings, in order that the Court will not be required to give opinions on general or hypothetical questions. If it should appear that the question raised is manifestly irrelevant for the purposes of deciding the case, the Court must declare that there is no need to proceed to judgment (Case 244/80 Foglia [1981] ECR 3045, paragraph 21; Lourenço Dias , paragraph 20; Canal Satélite Digital , cited above, paragraph 19; and judgment of 30 September 2003 in Case C167/01 Inspire Art [2003] ECR I0000, paragraphs 44 and 45).

36. In the light of the foregoing, it is appropriate to examine whether the questions referred by the Bundesvergabeamt have remained relevant for the resolution of the disputes in the main proceedings, even though the Verfassungsgerichtshof annulled the Bundesvergabeamt's decision of 20 April 2001.

37. In this regard, it is clear from the order for reference that it is the fact that this decision of 20 April 2001 was not mandatorily enforceable in Austrian law that provided the essential grounds for the present request for a preliminary ruling, with the result that, since the annulment of that

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decision, those questions have become purely hypothetical, as is, moreover, emphasised by the Verfassungsgerichtshof in its judgment of 2 March 2002.

38. It must, however, be acknowledged that the possibility cannot be discounted that a reply to the second question, which incidentally concerns the scope of the Holst Italia judgment, will have a bearing on the resolution of the disputes in the main proceedings, particularly in the event that those disputes, following a finding that the award procedure followed by the Bundesvergabeamt pursuant to Paragraph 113(3) of the BVergG, was unlawful, were to be continued before the civil courts, which, under Austrian legislation, are the courts having jurisdiction to rule on a claim for compensation following the award of a contract.

39. In the light of the foregoing, the first, third and fourth questions need not be answered and the Court's reply should be confined to the second question.

The second question

40. By this question, the Bundesvergabeamt is seeking essentially to ascertain whether Article 2(7) of Directive 89/665, read in conjunction with Articles 25 and 32(2)(c) of Directive 92/50, must be construed as meaning that a contract concluded at the end of the procedure for the award of a public supply and service contract, the proper conduct of which is affected by the incompatibility with Community law of a provision in the invitation to tender, must be treated as void if the applicable national law declares contracts that are illegal to be void.

41. This question is based on the premiss that a provision in an invitation to tender which prohibits recourse to subcontracting for material parts of the contract is contrary to Directive 92/50, as interpreted by the Court in Holst Italia.

42. It must be borne in mind in this regard that Directive 92/50, which is designed to eliminate obstacles to the freedom to provide services in the award of public service contracts, expressly envisages, in Article 25, the possibility for a tenderer to subcontract a part of the contract to third parties, as that provision states that the contracting authority may ask that tenderer to indicate in its tender any share of the contract which it may intend to subcontract. Furthermore, with regard to the qualitative selection criteria, Article 32(2)(c) and (h) of Directive 92/50 makes express provision for the possibility of providing evidence of the technical capacity of the service provider by means of an indication of the technicians or technical bodies involved, whether or not belonging directly to the undertaking of that service provider, and which the latter will have available to it, or by indicating the proportion of the contract which the service provider may intend to subcontract.

43. As the Court ruled in paragraphs 26 and 27 of Holst Italia , it follows from the object and wording of those provisions that a party cannot be eliminated from a procedure for the award of a public service contract solely on the ground that that party proposes, in order to carry out the contract, to use resources which are not its own but belong to one or more other entities. This means that it is permissible for a service provider which does not itself fulfil the minimum conditions required for participation in the procedure for the award of a public service contract to rely, vis-à-vis the contracting authority, on the standing of third parties upon whose resources it proposes to draw if it is awarded the contract.

44. However, according to the Court, the onus rests on a service provider which relies on the resources of entities or undertakings with which it is directly or indirectly linked, with a view to being admitted to participate in a tendering procedure, to establish that it actually has available to it the resources of those entities or undertakings which it does not itself own and which are necessary for the performance of the contract (Holst Italia , paragraph 29).

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45. As the Commission of the European Communities has correctly pointed out, Directive 92/50 does not preclude a prohibition or a restriction on the use of subcontracting for the performance of essential parts of the contract precisely in the case where the contracting authority has not been in a position to verify the technical and economic capacities of the subcontractors when examining the tenders and selecting the lowest tenderer.

46. It follows that the premiss on which the second question is based would prove to be accurate only if it were to be established that Point 1.8 of the invitation to tender prohibits, during the phase of the examination of the tenders and the selection of the successful tenderer, any recourse by the latter to subcontracting for the provision of essential services under the contract. A tenderer claiming to have at its disposal the technical and economic capacities of third parties on which it intends to rely if the contract is awarded to it may be excluded only if it fails to demonstrate that those capacities are in fact available to it.

47. Point 1.8 of the invitation to tender does not appear to relate to the examination and selection phase of the procedure for award of the contract, but rather to the phase of performance of that contract and is designed precisely to avoid a situation in which the performance of essential parts of the contract is entrusted to bodies whose technical and economic capacities the contracting authority was unable to verify at the time when it selected the successful tenderer. It is for the Bundesvergabeamt to establish whether that is indeed the case.

48. If it were to transpire that a clause in the invitation to tender is in fact contrary to Directive 92/50, in particular inasmuch as it unlawfully prohibits recourse to subcontracting, it would then be sufficient to point out that, under Articles 1(1) and 2(7) of Directive 89/665, Member States are required to take the measures necessary to ensure that decisions taken by the contracting authorities may be reviewed effectively and as rapidly as possible in the case where those decisions may have infringed Community law in the area of public procurement.

49. It follows that, in the case where a clause in the invitation to tender is incompatible with Community rules on public contracts, the national legal system of the Member State must provide for the possibility of relying on that incompatibility in the review procedures referred to in Directive 89/665.

50. The answer to the second question must therefore be that Directive 89/665, and in particular Articles 1(1) and 2(7) thereof, must be construed as meaning that, in the case where a clause in an invitation to tender is incompatible with Community rules on public contracts, the national legal systems of the Member States must provide for the possibility of relying on that incompatibility in the review procedures referred to in Directive 89/665.

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31989L0665-A02P8 : N 30
31992L0050 : N 1 45 48
31992L0050-A25 : N 5 40 42
31992L0050-A32 : N 5 30
31992L0050-A32P2LC : N 30 40 42
31992L0050-A32P2LH : N 42
61998J0176 : N 41 44
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PROCEDU Reference for a preliminary ruling

ADVGEN Geelhoed

JUDGRAP Schintgen

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Judgment of the Court (Second Chamber)
of 7 October 2004
Sintesi SpA v Autorità per la Vigilanza sui Lavori Pubblici. Reference for a preliminary ruling: Tribunale amministrativo regionale per la Lombardia - Italy. Directive 93/37/EEC - Public works contracts - Award of contracts - Right of the contracting authority to choose between the criterion of the lower price and that of the more economically advantageous tender. Case C-247/02.

Approximation of laws - Procedures for the award of public works contracts - Directive 93/37 - Award of contracts - Criteria for award - National rules which impose a requirement that the contracting authorities use only the criterion of the lowest price - Not permissible

(Council Directive 93/37, Art. 30(1))

Article 30(1) of Directive 93/37 concerning the coordination of procedures for the award of public works contracts is to be interpreted as meaning that it precludes national rules which, for the purpose of awarding public works contracts following open or restricted tendering procedures, impose a general and abstract requirement that the contracting authorities use only the criterion of the lowest price.

Such rules deprive the contracting authorities of the possibility of taking into consideration the nature and specific characteristics of the contracts in question, taken in isolation, by choosing for each of them the criterion most likely to ensure free competition and thus to ensure that the best tender will be accepted.

(see paras 40, 42, operative part)

In Case C-247/02,

REFERENCE to the Court under Article 234 EC

from the Tribunale amministrativo regionale per la Lombardia (Italy), made by decision of

26 June 2002

, received at the Court on

8 June 2002

, in the proceedings

Sintesi SpA

v

Autorità per la Vigilanza sui Lavori Pubblici,

THE COURT (Second Chamber),

composed of: C.W.A. Timmermans, President of the Chamber, J.-P. Puissochet, R. Schintgen (Rapporteur), F. Macken and N. Colneric, Judges,

Advocate General: C. Stix-Hackl,

Registrar: M. Mugica Azarmendi, Principal Administrator,

having regard to the written procedure and further to the hearing on 19 May 2004,

after considering the observations submitted on behalf of:

- Sintesi SpA, by G. Caia, V. Salvadori and N. Aicardi, avvocati,

- Ingg. Provera e Carrassi SpA, by M. Wongher, avvocatessa,

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- the Italian Government, by I.M. Braguglia, acting as Agent, assisted by M. Fiorilli, avvocato dello Stato,

- the Greek Government, by S. Spyropoulos, D. Kalogiros and D. Tsagkaraki, acting as Agents,

- the Austrian Government, by M. Fruhmann, acting as Agent,

- the Commission of the European Communities, by K. Wiedner, R. Amorosi and A. Aresu, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on

1 July 2004,

gives the following

Judgment

Costs

43. Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Second Chamber) rules as follows:

Article 30(1) of Council Directive 93/37/EEC of 14 June 1993 concerning the coordination of procedures for the award of public works contracts is to be interpreted as meaning that it precludes national rules which, for the purpose of awarding public works contracts following open or restricted tendering procedures, impose a general and abstract requirement that the contracting authorities use only the criterion of the lowest price.

1. The reference for a preliminary ruling concerns the interpretation of Article 30(1) 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; the Directive').

2. The reference was made in proceedings between Sintesi SpA (Sintesi') and the Autorità per la Vigilanza sui Lavori Pubblici (Public Works Supervisory Authority; the supervisory authority') concerning the award of a public works contract under the restricted tendering procedure.

Legal framework

Community rules

3. According to the second recital in the preamble to the Directive, ... the simultaneous attainment of freedom of establishment and freedom to provide services in respect of public works contracts awarded in Member States on behalf of the State, or regional or local authorities or other bodies governed by public law entails not only the abolition of restrictions but also the coordination of national procedures for the award of public works contracts'.

4. Article 30(1) of the Directive provides:

1. The criteria on which the contracting authorities shall base the award of contracts shall be:

(a) either the lowest price only;

(b) or, when the award is made to the most economically advantageous tender, various criteria according to the contract: e.g. price, period for completion, running costs, profitability, technical merit.'

National legislation

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5. Article 30(1) of the Directive was transposed into Italian law by Article 21 of Law No 109 of 11 February 1994 (GURI No 41 of 19 February 1994, p. 5; Law No 109/1994'), which is the framework law on public works in Italy.

6. Article 21(1) and (2) of Law No 109/1994, in the version in force at the material time, is worded as follows:

Criteria for the award of contracts - Contracting authorities

1. The award of contracts by open or restricted tender shall be based on the criterion of lowest price, below the base price in the tender notice, and shall be determined as follows:

...

2. The award of contracts by call for competitive tenders and also the allocation of concessions by restricted calls for tender shall be made on the basis of the criterion of the most economically advantageous tender, taking into account the following factors which vary according to the work to be carried out:

...'

Main proceedings and questions referred to the Court

7. In February 1991, the City of Brescia (Italy) awarded Sintesi a concession contract for the construction and management of an underground car park.

8. Under the contract concluded between the City of Brescia and Sintesi in December 1999, Sintesi was required to submit the completion of the works to a restricted call for tenders, at European level, in accordance with the Community rules on public works.

9. By a notice published in the Official Journal of the European Communities on 22 April 1999, Sintesi made a restricted call for tenders based on the criterion of the most economically advantageous tender. This tender was to be assessed on the basis of price, technical merit and time necessary for completion of the works.

10. Following the preselection stage, Sintesi sent the selected undertakings a letter of invitation to tender and the file of tender documents. Ingg. Provera e Carrassi SpA (Provera'), one of the companies invited to submit a tender, sought and was granted an extension of the period for submitting its tender. However, it subsequently informed Sintesi that it would not take part in the tendering procedure, on the ground that it was unlawful.

11. On 29 May 2000, Sintesi awarded the contract, accepting the most economically advantageous tender.

12. Following a fresh complaint by Provera, the contracting authority, by letter of 26 July 2000, informed Sintesi that it regarded the tendering procedure in question as contrary to Law No 109/1994, and on 7 December 2000 it adopted Decision No 53/2000, which is worded as follows:

1. in the system governed by Framework Law No 109/1994 on public works, a contract can be awarded only on the basis of the criterion of the lowest price; the criterion of the most economically advantageous tender can be employed only in the hypotheses of competition for and the concession of the construction and management of public works;

2. the above rules are applicable to all works contracts, whatever the amount involved, including where that amount is above the Community threshold, and the system in question cannot be regarded as contrary to Article 30(1) of Directive 93/37/EEC...;

3. where, in cases where the law so allows, and therefore not in the case referred to us, assessment

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of the technical merit is provided for in the framework of the actual application of the criterion of the most economically advantageous tender, it is necessary, in order to allow such an assessment, that the project be capable of being altered by the candidates.'

13. Sintesi challenged that decision before the national court, claiming, in particular, that there had been a breach of Article 30(1) of the Directive.

14. It claimed that it follows from that provision that the two criteria for the award of public works contracts, namely the lowest price' criterion and the most economically advantageous' criterion, are placed on an equal footing. By excluding, on the basis of Law No 109/1994, the criterion of the most economically advantageous tender in the case of a public works contract concluded according to the restricted tendering procedure, the supervisory authority was, in Sintesi's submission, in breach of Article 30(1) of the Directive.

15. The national court observes that Article 21(1) of Law No 109/1994 seeks to ensure transparency in the procedures for awarding public contracts, but is uncertain as to whether that provision is capable of ensuring free competition, since price does not on its own appear to constitute a factor capable of ensuring that the best tender will be accepted.

16. The national court also makes the point that the car park in question will be situated in the historical centre of the City of Brescia. Consequently, the works to be carried out would be very complex and would require an assessment of technical elements, which should be provided by the tenderers, so that the contract can be awarded to the undertaking most capable of carrying out the work.

17. In those circumstances, the Tribunale amministrativo regionale per la Lombardia decided to stay proceedings and refer the following two questions to the Court for a preliminary ruling:

1. Does Article 30(1) of [the Directive], in so far as it allows individual contracting authorities to choose either the lowest price or the most economically advantageous tender as the criterion for the award of a contract, constitute a logically consistent application of the principle of free competition which is already enshrined in Article 85 of the EC Treaty (now Article 81 EC) and requires that all tenders submitted as part of a procedure for the award of a contract announced within the single market be assessed in such a way as not to prevent, restrict or distort comparison between them?

2. Does Article 30 of [the Directive], as a strictly logical consequence, preclude Article 21 of Law No 109 of 11 February 1994 from excluding, for the award of public works contracts under open and restricted procedures, the choice by the contracting authority of the criterion of the most economical tender, and prescribing, as a general rule, that of the lowest price only?'

Admissibility of the reference for a preliminary ruling

18. The Italian Government has doubts as to the admissibility of the reference, on the ground that the questions are purely theoretical.

19. The Commission of the European Communities questions the very applicability of Article 30 of the Directive to the main proceedings, in so far as the award procedure was undertaken by a works concessionaire.

20. It states that under Article 3(3) and (4) of the Directive, only a public works concessionaire which is itself one of the contracting authorities referred to in Article 1(b) of the Directive is required, in respect of the work to be carried out by third parties, to comply with all the provisions of the Directive. Public works concessionaires other than contracting authorities, on the other hand, are only required to observe the rules on advertising set out in Article 11(4), (6), (7) and (9) to (13) and Article 16 of the Directive.

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21. In that regard, it is settled case-law that the procedure provided for by Article 234 EC is an instrument of cooperation between the Court of Justice and national courts (see, inter alia, Case C-343/90 Lourenço Dias [1992] ECR I-4673, paragraph 14, and Case C-314/01 Siemens and ARGE Telekom [2004] ECR I0000, paragraph 33, and the case-law cited there).

22. In the context of that cooperation, it is for the national court or tribunal seised of the dispute, which alone has direct knowledge of the facts giving rise to the dispute and must assume responsibility for the subsequent judicial decision, to determine in the light of the particular circumstances of the case both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions which it submits to the Court (see, inter alia, Lourenço Dias , cited above, paragraph 15; Case C-390/99 Canal Satélite Digital [2002] ECR I-607, paragraph 18; and Siemens and ARGE Telekom , cited above, paragraph 34).

23. In the present case, it is by no means clear that the interpretation of Article 30 will be of no assistance in the resolution of the main dispute since, as stated in the decision for reference, under the contract concluded between the City of Brescia and Sintesi, the latter, in its capacity as concessionaire, was required, for the purpose of the works at issue in the main proceedings, to launch a restricted tender procedure, at European level, in accordance with the Community rules on public works.

24. The reference for a preliminary ruling must therefore be held to be admissible.

The questions for the Court

25. By its questions, which should be examined together, the national court is asking essentially whether Article 30(1) of the Directive is to be interpreted as meaning that it precludes national rules under which, when awarding public works contracts, following open or restricted tendering procedures, the contracting authorities are required to employ only the lowest-price criterion. In particular, it asks whether the objective pursued by that provision, which seeks to ensure effective competition in the field of public contracts, necessarily implies that the question must be answered in the affirmative.

Observations submitted to the Court

26. According to Sintesi, Article 30(1) of the Directive, in so far as it leaves to the contracting authority the free choice between lowest price and most advantageous tender as the criterion for awarding public works contracts, implements the principle of free competition. Reducing that authority's discretion to a mere analysis of the prices submitted by the tenderers, as required by Article 21(1) of Law No 109/1994, constitutes an obstacle to the selection of the best possible tender and is therefore contrary to Article 81 EC.

27. Provera and the Italian Government claim that in adopting Law No 109/1994 the national legislature was seeking, in particular, to combat corruption in the public works contracts sector by eliminating the administration's discretion in awarding contracts and by adopting transparent procedures apt to ensure free competition.

28. In their submission, it follows from the very wording of Article 30(1) that the Directive does not ensure that the contracting authority is free to choose one criterion rather than another, nor does it require that one or other criterion be used in certain specific circumstances. Article 30(1) merely sets out the two criteria applicable to the award of contracts and does not specify the cases in which they are to be used.

29. Nor does the national legislature's choice of the lowest price' criterion in restricted or open tendering procedures adversely affect tenderers' rights, since the same, pre-determined criterion is applied to each of them.

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30. The Greek and Austrian Governments agree with that interpretation.

31. In particular, according to the Austrian Government, there is no indication in Article 30 of the Directive as to which of the two criteria, which are placed on an equal footing, the contracting authority must choose. The Directive thus leaves it to that authority to determine precisely what criterion it will use to obtain the best quality/price ratio in the light of its needs. However, Article 30 does not preclude the national legislature from itself directly making that choice, depending on the nature of the contracts in question, by authorising either both criteria, or only one of them, as the Directive does not confer on the contracting authority any subjective right to exercise such a choice.

32. The Commission also submits that the Directive does not express any preference for one or other of the two criteria set out in Article 30(1) of the Directive. That provision seeks only to ensure that contracting authorities do not adopt criteria for the award of public works contracts other than the two criteria which it sets out; it does not impose any choice between them. In order to preclude arbitrary conduct on the part of those authorities and to ensure healthy competition between undertakings, it is in principle immaterial whether the contract is concluded on the basis of the lowest price or the most economically advantageous tender. It is also essential that the award criteria be clearly stated in the contract notice and applied objectively and without discrimination.

33. The choice of the appropriate criterion is for the contracting authority, which examines each particular case when awarding a specific contract, or for the national legislature, which is entitled to adopt legislation applicable either to all public works contracts or only to certain types of contracts.

34. The Commission observes that, in the present case, Article 21(1) of Law No 109/1994 requires that the lowest-price criterion be used in order to ensure the greatest transparency of procedures relating to public works contracts, which is consistent with the objective pursued by the Directive, namely to ensure the development of effective competition. Such a provision is therefore not contrary to Article 30(1) of the Directive.

The Court's answer

35. According to the 10th recital thereto, the purpose of the Directive is to develop effective competition in the field of public contracts (see Case C-27/98 Fracasso and Leitschutz [1999] ECR I-5697, paragraph 26; Joined Cases C-285/99 and C286/99 Lombardini and Mantovani [2001] ECR I-9233, paragraph 34; and Case C-470/99 Universale-Bau and Others [2002] ECR I-11617, paragraph 89).

36. That objective, moreover, is expressly stated in the second subparagraph of Article 22(2) of the Directive, which provides that where the contracting authorities award a contract by restricted procedure, the number of candidates invited to tender is in any event to be sufficient to ensure genuine competition.

37. In order to meet the objective of developing effective competition, the Directive seeks to organise the award of contracts in such a way that the contracting authority is able to compare the different tenders and to accept the most advantageous on the basis of objective criteria (Fracasso and Leitschutz , cited above, paragraph 31).

38. Thus Article 30(1) of the Directive sets out the criteria on which the contracting authority relies when awarding contracts, namely either the lowest price only or, when the award is made to the most economically advantageous tender, various criteria according to the contract, such as price, period for completion, running costs, profitability, technical merit.

39. A national provision, such as that at issue in the main proceedings, which restricts the contracting

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authorities' freedom of choice, in the context of open or restricted tendering procedures, by requiring that the lowest price be used as the sole criterion for the award of the contract, does not prevent those authorities from comparing the different tenders and from accepting the best one on the basis of an objective criterion fixed in advance and specifically included among those set out in Article 30(1) of the Directive.

40. However, the abstract and general fixing by the national legislature of a single criterion for the award of public works contracts deprives the contracting authorities of the possibility of taking into consideration the nature and specific characteristics of such contracts, taken in isolation, by choosing for each of them the criterion most likely to ensure free competition and thus to ensure that the best tender will be accepted.

41. In the main proceedings, the national court has specifically highlighted the technical complexity of the work to be carried out and, accordingly, the contracting authority could profitably have taken that complexity into account when choosing objective criteria for the award of the contract, such as those set out, by way of example, in Article 30(1)(b) of the Directive.

42. It follows from the foregoing considerations that the answer to the questions referred to the Court must be that Article 30(1) of the Directive is to be interpreted as meaning that it precludes national rules which, for the purpose of the award of public works contracts following open or restricted tendering procedures, impose a general and abstract requirement that the contracting authorities use only the criterion of the lowest price.

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AUTHOR	Court of Justice of the European Communities
FORM	Judgment
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JURCIT	11997E234 : N 21 11992E085 : N 17 31993L0037-A22P2L2 : N 36 31993L0037-A30P1 : N 1 4 17 38 39 42 31993L0037-A30P1PTB : N 41 31993L0037-C2 : N 3 31993L0037-C10 : N 35 61990J0343 : N 21 22 62001J0314 : N 21 22 61999J0390 : N 22 61998J0027 : N 35 37 61999J0470 : N 35

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CONCERNS	Interprets 31993L0037 -A30P1
SUB	Freedom of establishment and services ; Right of establishment ; Free movement of services
AUTLANG	Italian
OBSERV	Italy ; Greece ; Austria ; Member States ; Commission ; Institutions
NATIONA	Italy
NATCOUR	*A9* Tribunale Amministrativo Regionale della Lombardia, ordinanza del 22/01/2002 (RG 997/02) ; - I tribunali amministrativi regionali 2002 I p.1694-1697 ; - Il Foro amministrativo 2005 p.17-20 ; - Sciaudone, Francesco: Criteri di aggiudicazione degli appalti di lavori pubblici: la tutela della concorrenza e la "nuova" discrezionalità delle amministrazioni aggiudicatrici, Il Foro amministrativo 2005 p.20-32
NOTES	Antonucci, Marco: I criteri di aggiudicazione negli appalti di lavori pubblici e l'anello di Moebius, Il Consiglio di Stato 2004 II p.2020-2027 ; Di Lieto, Giovanni Maria: Criteri di aggiudicazione dei lavori pubblici: riflessioni dalla sentenza della Corte di giustizia 7 ottobre 2004, Il Foro amministrativo 2004 p.2430-2434 ; R., B.: Giustizia civile 2004 I p.2898-2899 ; Bercelli, Jacopo: Le procedure di aggiudicazione degli appalti pubblici e il principio comunitario di concorrenza effettiva, Il Foro amministrativo 2004 p.3239-3246 ; Taccogna, Gerolamo: Criteri di aggiudicazione degli appalti pubblici e concorrenza, secondo l'interpretazione della Corte di giustizia, Il Foro amministrativo 2004 p.2801-2810 ; Belorgey, Jean-Marc ; Gervasoni, Stéphane ; Lambert, Christian: Concurrence et secteur public, L'actualité juridique ; droit administratif 2005 p.315-316 ; Lacava, Chiara: La libertà di scelta dei criteri di aggiudicazione per le amministrazioni, Giornale di diritto amministrativo 2005 p.135-140 ; Sciaudone, Francesco: Criteri di aggiudicazione degli appalti di lavori pubblici: la tutela della concorrenza e la "nuova" discrezionalità delle amministrazioni aggiudicatrici, Il Foro amministrativo 2005 p.20-32 ; Magri, Marco: Sul regime del contratto "atipico" per la realizzazione di lavori pubblici, Le nuove leggi civili commentate 2005 p.731-750 ; Santi, Giacomo: I criteri di aggiudicazione degli appalti pubblici tra direttive comunitarie e legislazione nazionale, Rassegna dell'avvocatura dello Stato 2005 p.15-54 ; Brown, Adrian: The Right to Choose Between the Criteria of Lowest Price and Most Economically Advantageous Tender: Case C-247/02, Sintesi SpA v. Autorita per la Vigilanza sui Lavori Pubblici, Public Procurement Law Review 2005 p.NA17-NA18 ; Nicolella, Mario: L'imposition abstraite et générale aux pouvoirs adjudicateurs d'appliquer le critère du prix le plus bas n'est pas conforme au droit communautaire des marchés publics, Gazette du Palais 2005 I Jur. p.36-37 ; Paolantonio, Nino: European Review of Contract Law 2006 Vol. 2 p.77-85
PROCEDU	Reference for a preliminary ruling
ADVGEN	Stix-Hackl

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JUDGRAP Schintgen

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of application: 08/07/2002

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Judgment of the Court (Sixth Chamber)
of 19 June 2003
Gesellschaft für Abfallentsorgungs-Technik GmbH (GAT) v Osterreichische Autobahnen und Schnellstraßen AG (OSAG). Reference for a preliminary ruling: Bundesvergabeamt - Austria. Public contracts - Directive 89/665/EEC - Review procedures concerning the award of public contracts - Power of the body responsible for review procedures to consider infringements of its own motion - Directive 93/36/EEC- Procedures for the award of public supply contracts - Selection criteria - Award criteria. Case C-315/01.

1. Approximation of laws - Review procedures in respect of the award of public supply and public works contracts - Directive 89/665 - Power of the body responsible for review procedures to consider of its own motion any unlawfulness of a decision awarding a contract - Whether permissible - Power to dismiss an application by reason of the unlawfulness raised of its own motion - Excluded - (Council Directive 89/665)

2. Approximation of laws - Procedures for the award of public supply contracts - Directive 93/36 - Award of contracts - Award criteria - Account taken of a list of principal deliveries effected previously - Not permissible - (Council Directive 93/36, Arts 23(1) and 26(1))

3. Approximation of laws - Procedures for the award of public supply contracts - Directive 93/36 - Award of contracts - Award criteria - Requirement that the product which is the subject of the tenders should be available for inspection by the contracting authority within a radius of a specific number of kilometres - Not permissible - (Council Directive 93/36, Arts 23(1) and 26(1))

1. Directive 89/665 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 Directive 92/50 relating to the coordination of procedures for the award of public service contracts, does not preclude the court responsible for hearing review procedures, in an action brought by a tenderer, with the ultimate aim of obtaining damages, for a declaration that the decision to award a public contract is unlawful, from raising of its own motion the unlawfulness of a decision of the contracting authority other than the one contested by the tenderer. On the other hand, the directive does preclude the court from dismissing an application by a tenderer on the ground that, owing to the unlawfulness raised of its own motion, the award procedure was in any event unlawful and that the harm which the tenderer may have suffered would therefore have been caused even in the absence of the unlawfulness alleged by the tenderer.

see para. 56, operative part 1

2. Directive 93/36 coordinating procedures for the award of public supply contracts precludes the contracting authority, in a procedure to award a public supply contract, from taking account of the number of references relating to the products offered by the tenderers to other customers not as a criterion for establishing their suitability for carrying out the contract but as a criterion for awarding the contract.

The submission of a list of the principal deliveries effected in the past three years, stating the sums, dates and recipients, public or private, involved is expressly included among the references or evidence which, under Article 23(1)(a) of that directive, may be required to establish the suppliers' technical capacity. Furthermore, a simple list of references, which contains only the names and number of the suppliers' previous customers without other details relating to the deliveries effected to those customers, cannot provide any information to identify the offer which is the most economically advantageous within the meaning of Article 26(1)(b) of Directive 93/36, and therefore cannot in any event constitute an award criterion within the meaning of that provision.

see paras 65-67, operative part 2

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3. Directive 93/36 coordinating procedures for the award of public supply contracts precludes, in a procedure to award a public supply contract, the requirement that the products which are the subject of the tenders be available for inspection by the contracting authority within a radius of a specific number of kilometres of the authority as a criterion for the award of the contract.

Firstly, it is apparent from Article 23(1)(d) of that directive that for public supply contracts the contracting authorities may require the submission of samples, descriptions and/or photographs of the products to be supplied as references or evidence of the suppliers' technical capacity to carry out the contract concerned. Secondly, such a criterion cannot serve to identify the most economically advantageous offer within the meaning of Article 26(1)(b) of that directive and therefore cannot, in any event, constitute an award criterion within the meaning of that provision.

see paras 71-72, 74, operative part 3

In Case C-315/01,

REFERENCE to the Court under Article 234 EC by the Bundesvergabeamt (Austria) for a preliminary ruling in the proceedings pending before that court between

Gesellschaft für Abfallentsorgungs-Technik GmbH (GAT)

and

Osterreichische Autobahnen und Schnellstraßen AG (OSAG),

on the interpretation 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 relating to the coordination of procedures for the award of public service contracts (OJ 1992 L 209, p. 1), and of Council Directive 93/36/EEC of 14 June 1993 coordinating procedures for the award of public supply contracts (OJ 1993 L 199, p. 1),

THE COURT (Sixth Chamber),

composed of:

J.-P. Puissochet, President of the Chamber,

R. Schintgen (Rapporteur),

V. Skouris,

F. Macken and

J.N. Cunha Rodrigues, Judges,

Advocate General: L.A. Geelhoed,

Registrar: R. Grass,

after considering the written observations submitted on behalf of:

Gesellschaft für Abfallentsorgungs-Technik GmbH (GAT), by S. Korn, Universitätsassistent,

the Austrian Government, by M. Fruhmann, acting as Agent,

the Commission of the European Communities, by M. Nolin, acting as Agent, assisted by R. Roniger, Rechtsanwalt,

having regard to the report of the Judge-Rapporteur,

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after hearing the Opinion of the Advocate General at the sitting on 10 October 2002,

gives the following

Judgment

Costs

75. The costs incurred by the Austrian Government and by the Commission, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT (Sixth Chamber),

in answer to the questions referred to it by the Bundesvergabeamt by order of 11 July 2001, hereby rules:

1. 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 relating to the coordination of procedures for the award of public service contracts, does not preclude the court responsible for hearing review procedures, in an action brought by a tenderer, with the ultimate aim of obtaining damages, for a declaration that the decision to award a public contract is unlawful, from raising of its own motion the unlawfulness of a decision of the contracting authority other than the one contested by the tenderer. On the other hand, the directive does preclude the court from dismissing an application by a tenderer on the ground that, owing to the unlawfulness raised of its own motion, the award procedure was in any event unlawful and that the harm which the tenderer may have suffered would therefore have been caused even in the absence of the unlawfulness alleged by the tenderer.

2. Council Directive 93/36/EEC of 14 June 1993 coordinating procedures for the award of public supply contracts precludes the contracting authority, in a procedure to award a public supply contract, from taking account of the number of references relating to the products offered by the tenderers to other customers not as a criterion for establishing their suitability for carrying out the contract but as a criterion for awarding the contract.

3. Directive 93/36/EEC precludes, in a procedure to award a public supply contract, the requirement that the products which are the subject of the tenders be available for inspection by the contracting authority within a radius of 300 km of the authority as a criterion for the award of the contract.

1. By order of 11 July 2001, received at the Court on 13 August 2001, the Bundesvergabeamt (Federal Procurement Office) referred to the Court for a preliminary ruling under Article 234 EC five questions on the interpretation 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 relating to the coordination of procedures for the award of public service contracts (OJ 1992 L 209, p. 1) ("Directive 89/665"), and of Council Directive 93/36/EEC of 14 June 1993 coordinating procedures for the award of public supply contracts (OJ 1993 L 199, p. 1).

2. Those questions were raised in proceedings between Gesellschaft für Abfallentsorgungs-Technik GmbH ("GAT") and Osterreichische Autobahnen und Schnellstraßen AG ("OSAG") concerning

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the award of a public supply contract for which GAT had tendered.

Legal context

Community provisions

Directive 89/665

3. Article 1 of Directive 89/665 provides:

"1. The Member States shall take the measures necessary to ensure that, as regards contract award procedures falling within the scope of Directives 71/305/EEC, 77/62/EEC and 92/50/EEC decisions taken by the contracting authorities may be reviewed effectively and, in particular, as rapidly as possible in accordance with the provisions 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. The Member States shall ensure that the review procedures are available, under detailed rules which the Member States may establish, at least to any person having or having had an interest in obtaining a particular public supply or public works contract and who has been or risks being harmed by an alleged infringement. In particular, the Member States may require that the person seeking the review must have previously notified the contracting authority of the alleged infringement and of his intention to seek review.

"

4. Article 2 provides:

"1. 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.

2. The powers specified in paragraph 1 may be conferred on separate bodies responsible for different aspects of the review procedure.

...

6. The effects of the exercise of the powers referred to in paragraph 1 on a contract concluded subsequent to its award shall be determined by national law.

Furthermore, except where a decision must be set aside prior to the award of damages, a Member State may provide that, after the conclusion of a contract following its award, the powers of the body responsible for the review procedures shall be limited to awarding damages to any person harmed by an infringement.

...

8. Where bodies responsible for review procedures are not judicial in character, written reasons

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for their decisions shall always be given. Furthermore, in such a case, provision must be made to guarantee procedures whereby any allegedly illegal measure taken by the review body or any alleged defect in the exercise of the powers conferred on it can be the subject of judicial review or review by another body which is a court or tribunal within the meaning of Article [234] of [the Treaty] and independent of both the contracting authority and the review body.

The members of such an independent body shall be appointed and leave office under the same conditions as members of the judiciary as regards the authority responsible for their appointment, their period of office and their removal. At least the President of this independent body shall have the same legal and professional qualifications as members of the judiciary. The independent body shall take its decisions following a procedure in which both sides are heard, and these decisions shall, by means determined by each Member State, be legally binding.

"

Directive 93/36

5. Article 15(1) of Directive 93/36, which forms part of Chapter 1 (Common rules on participation) of Title IV, provides:

"Contracts shall be awarded on the basis of the criteria laid down in Chapter 3 of this Title, taking into account Article 16, after the suitability of the suppliers not excluded under Article 20 has been checked by the contracting authorities in accordance with the criteria of economic and financial standing and of technical capacity referred to in Articles 22, 23 and 24."

6. Article 23, which forms part of Chapter 2 (Criteria for qualitative selection) of Title IV, provides:

"1. Evidence of the supplier's technical capacity may be furnished by one or more of the following means according to the nature, quantity and purpose of the products to be supplied:

(a) a list of the principal deliveries effected in the past three years, with the sums, dates and recipients, public or private, involved:

where effected to public authorities, evidence to be in the form of certificates issued or countersigned by the competent authority;

where effected to private purchasers, delivery to be certified by the purchaser or, failing this, simply declared by the supplier to have been effected;

...

(d) samples, descriptions and/or photographs of the products to be supplied, the authenticity of which must be certified if the contracting authority so requests;

...

" .

7. Article 26, which forms part of Chapter 3 (Criteria for the award of contracts) of Title IV, states:

"1. The criteria on which the contracting authority shall base the award of contracts shall be:

(a) either the lowest price only;

(b) or, when award is made to the most economically advantageous tender, various criteria according to the contract in question: e.g. price, delivery date, running costs, cost-effectiveness, quality, aesthetic and functional characteristics, technical merit, after-sales service and technical assistance.

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...

" .

National legislation

8. Directives 89/665 and 93/36 were transposed into Austrian law by the Bundesgesetz über die Vergabe von Aufträgen (Bundesvergabegesetz) 1997 (1997 Federal Public Procurement Law, BGBl. I, 1997/56, "the BVergG").

9. Paragraph 113 of the BVergG sets out the powers of the Bundesvergabeamt. It provides:

"1. The Bundesvergabeamt is responsible on application for carrying out a review procedure in accordance with the following provisions.

2. To preclude infringements of this Federal Law and of the regulations implementing it, the Bundesvergabeamt is authorised until the time of the award:

(1) to adopt interim measures and

(2) to set aside unlawful decisions of the contracting authority.

3. After the award of the contract or the close of the contract award procedure, the Bundesvergabeamt is competent to determine whether, on grounds of infringement of this Federal Law or of any regulations issued under it, the contract has not been awarded to the best tenderer....

"

10. Paragraph 115(1) and (5) of the BVergG provides:

"1. Where an undertaking claims to have an interest in the conclusion of a contract within the scope of this Federal Law, it may apply for the contracting authority's decision in the contract award procedure to be reviewed on the ground of unlawfulness, provided that it has been or risks being harmed by the alleged infringement.

...

5. The application shall contain:

(1) an exact designation of the contract award procedure concerned and of the contested decision,

...

" .

11. Under Paragraph 117(1) and (3) of the BVergG:

"1. The Bundesvergabeamt shall set aside, by way of administrative decision, taking into account the opinion of the Conciliation Committee in the case, any decision of the contracting authority in an award procedure where the decision in question:

(1) is contrary to the provisions of this Federal Law or its implementing regulations and

(2) significantly affects the outcome of the award procedure.

...

3. After the award of the contract, the Bundesvergabeamt shall, in accordance with the conditions of subparagraph 1, determine only whether the alleged illegality exists or not.

"

12. Paragraph 122(1) of the BVergG provides that "in the event of a culpable breach of the

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Federal Law or its implementing rules by the organs of an awarding body, an unsuccessful candidate or tenderer may bring a claim against the contracting authority to which the conduct of the organs of the awarding body is attributable for reimbursement of the costs incurred in drawing up its bid and other costs borne as a result of its participation in the tendering procedure."

13. Under Paragraph 125(2) of the BVergG a claim for damages, which must be brought before the civil courts, is admissible only if the Bundevergabeamt has made a declaration under Paragraph 113(3). The civil court called upon to hear the claim for damages, and the parties to the proceedings before the Bundesvergabeamt, are bound by that declaration.

14. Pursuant to Paragraph 2(2)(c), point 40a, of the Einführungsgesetz zu den Verwaltungsverfahrensgesetzen 1991 (Introductory Law to the Laws on Administrative Procedure, BGBl. 1991/50), the Allgemeines Verwaltungsverfahrensgesetz 1991 (General Law on Administrative Procedure, BGBl, 1991/51, hereinafter "the AVG") applies to the administrative procedure adopted by the Bundesvergabeamt.

15. Paragraph 39(1) and (2) of the AVG, in the version applicable to the main proceedings, provides:

"1. The evaluation procedure shall be governed by the provisions of administrative law.

2. In so far as those provisions do not cover a matter, the authority shall proceed ex proprio motu and shall determine the procedure for the evaluation, subject to the provisions contained in this Part ...

" .

The main proceedings and the questions referred for a preliminary ruling

16. On 2 March 2000 OSAG, represented by the Autobahnmeisterei (the Motorway Authority) for Sankt Michael/Lungau, issued an invitation to tender for the supply of a "special motor vehicle: new, ready-to-use and officially approved road sweeper for the A9 Phyrn motorway, delivery to the motorway authority for Kalwang" , in an open European procedure.

17. The five tenders submitted were opened on 25 April 2000. GAT had submitted a tender at a price of ATS 3 547 020 excluding VAT. The tender submitted by the firm OAF & Steyr Nutzfahrzeuge OHG was ATS 4 174 290 net; that of another tenderer was ATS 4 168 690, excluding VAT.

18. As regards the evaluation of the tenders, Point B.1.13 of the invitation to tender provided:

"B.1.13 Tender evaluation

The determination of which tender is technically and economically the most advantageous shall be made in accordance with the best tenderer principle. It is a fundamental condition that the vehicles tendered satisfy the conditions in the invitation to tender.

The evaluation shall be carried out as follows:

Tenders shall be evaluated in each case by reference to the best tenderer and points shall be calculated relative to the best tenderer.

...

(2) Other criteria:

A maximum of 100 points shall be awarded for other criteria, and shall count for 20% of the overall evaluation.

2.1. Reference list of road sweeper vehicle customers in the geographical area comprising the part of the Alps within the European Union (references to be provided in German): weighting 20

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points.

Evaluation formula

The highest number of customers divided by the next highest number and multiplied by 20 points.

"

19. On 16 May 2000, OSAG eliminated GAT's tender on the ground that that tender did not comply with the conditions in the invitation to tender inasmuch as the pavement cleaning machine tendered could be operated only down to temperatures of 0 °C, whereas the invitation to tender had required a minimum operating temperature of -5 °C. In addition, despite a request by the contracting authority, the applicant had not arranged for the machine to be available for inspection within a 300 kilometre radius of the authority issuing the invitation to tender, as required therein. Furthermore, OSAG doubted that the price in GAT's tender was plausible. Finally, despite requests by the OSAG, GAT had not provided a sufficient explanation of the technical specifications concerning cleaning of the reflectors on the machine it had tendered.

20. In accordance with the award proposal of 31 July 2000, OAF & Steyr Nutzfahrzeuge OHG was awarded the contract by letter of 23 August 2000. By letter of 12 July 2000, the other tenderers were notified that a decision had been taken regarding the recipient of the award. GAT had been informed by letter of 17 July 2000 that its tender had been eliminated, and by letter of 5 October 2000 it was notified of the identity of the recipient of the award and the contract price.

21. On 17 November 2000 GAT sought a review by the Bundesvergabeamt and a declaration that the award in the contract award procedure had not been made to the best tenderer, claiming that its tender had been eliminated unlawfully. The technical description included in its tender of the reflector cleaning had been sufficient for an expert. In addition, it had invited OSAG to visit its supplier's factory. GAT also contended that the award condition consisting of "the opportunity to inspect the subject of the invitation to tender within a 300 kilometre radius of the authority issuing the invitation to tender" contravened Community law because it constituted indirect discrimination. OSAG should have accepted any corresponding product in Europe. In addition, GAT argued, that criterion could be used only as an award criterion and not as the contracting authority had subsequently wrongly used it as a selection criterion. It was true that the basic version of the road sweeper GAT had tendered could be used only at temperatures down to 0 °C. However, OSAG had reserved the right to purchase an additional option. The additional option tendered by GAT could operate at -5 °C, as required in the invitation to tender. Finally, the price of GAT's tender was certainly not implausible. On the contrary, GAT was able to give OSAG an adequate explanation as to why its price was so favourable.

22. As the Bundesvergabeamt considered that an interpretation of several provisions of Community law was required in order to enable it to give a decision in the case before it, it decided to stay proceedings and refer the following questions to the Court for a preliminary ruling:

"1.

(a) Is Article 2(8) of Directive 89/665, or any other provision of that directive or any other provision of Community law, to be interpreted as meaning that an authority responsible for carrying out review procedures within the meaning of Article 1(1) of that directive, including the exercise of the powers referred to in Article 2(1)(c) thereof, is precluded from taking into account, of its own motion and independently of the submissions of the parties to the review procedure, those circumstances relevant under the law governing contract award procedures which the authority responsible for carrying out review procedures considers material to its decision in a review procedure?

(b) Is Article 2(1)(c) of Directive 89/665, if necessary considered in conjunction with other

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principles of Community law, to be interpreted as meaning that an authority responsible for carrying out review procedures within the meaning of Article 1(1) of that directive, including the exercise of the powers referred to in Article 2(1)(c) thereof, is precluded from dismissing an application by a tenderer that is indirectly aimed at obtaining damages, where the contract award procedure is already vitiated by a substantive legal defect attributable to a decision taken by the contracting authority, other than the decision being contested by that tenderer, on the ground that if the contested decision had not been taken the tenderer would none the less have been harmed for other reasons?

2. If Question 1(a) is answered in the negative: Is Directive 93/36, in particular Articles 15 to 26 thereof, to be interpreted as prohibiting a public contracting authority conducting contract award procedures from taking account of references relating to the products offered by tenderers not as proof of the tenderers' suitability but to satisfy an award criterion, such that the fact that those references are given a negative evaluation would not exclude the tenderer from the contract award procedure but would merely result in the tender receiving a lower evaluation, for example under a points system in which poor evaluation of references might be offset by a lower price?

3. If Questions 1(a) and 2 are answered in the negative: Is it compatible with the relevant provisions of Community law, including Article 26 of Directive 93/36, the principle of equal treatment and the obligations of the Communities under public international law for an award criterion to provide that product references are to be evaluated on the basis of the number of references alone, there being no substantive examination as to whether contracting authorities' experiences of the product have been good or bad, and, moreover, that only references from the geographical area comprising the part of the Alps within the European Union are to be taken into account?

4. Is it compatible with Community law, in particular the principle of equal treatment, for an award criterion to permit opportunities to inspect examples of the subject of the invitation to tender to receive a positive evaluation only if available within a 300 kilometre radius of the authority issuing the invitation to tender?

5. If Question 2 is answered in the affirmative, or Question 3 or 4 in the negative: Is Article 2(1)(c) of Directive 89/665, if necessary considered in conjunction with other principles of Community law, to be interpreted as meaning that if the breach committed by the contracting authority consists in imposing an unlawful award criterion, the tenderer will be entitled to damages only if he can actually prove that, but for the unlawful award criterion, he would have submitted the best tender?

"

23. The national court has also asked the Court to apply an accelerated preliminary ruling procedure under Article 104a of the Rules of Procedure, claiming that the first question arises in almost half of the review procedures brought before it and that the Verfassungsgerichtshof (Constitutional Court) has already set aside several of the Bundesvergabeamt's decisions specifically on the ground that it had raised ex proprio motu the unlawfulness of certain aspects of the award procedures at issue.

24. However, by decision of 13 September 2001, that request was denied by the President of the Court, on a proposal from the Judge-Rapporteur and after hearing the Advocate General, on the ground that the circumstances referred to by the national court did not establish that a ruling on the questions referred to the Court was a matter of exceptional urgency.

The jurisdiction of the Court

25. On the basis of the order for reference made by the Bundesvergabeamt on 11 July 2001 in another case concerning public procurement, registered at the Court Registry under number C-314/01 and currently pending before the Court, the Commission expresses doubts as to the judicial nature of

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the body making the reference on the ground that it acknowledged in the order that its decisions "do not contain binding, enforceable directions addressed to the contracting authority" . In those circumstances, the Commission has doubts as to the admissibility of the questions referred for a preliminary ruling by the Bundesvergabeamt in the present proceedings in the light of the case-law of the Court, in particular Case C-134/97 Victoria Film [1998] ECR I-7023, paragraph 14, and Case C-178/99 Salzmann [2001] ECR I-4421, paragraph 14, according to which a national court or tribunal may refer a question to the Court only if there is a case pending before it and if it is called upon to give judgment in proceedings intended to lead to a decision of a judicial nature.

26. It should be noted in that regard, first, that after the award of the contract the Bundesvergabeamt is competent, under Paragraph 113(3) of the BVergG, to determine whether as a result of an infringement of the relevant national legislation the contract has not been awarded to the best tenderer.

27. Secondly, it is apparent from the express wording of Paragraph 125(2) of the BVergG that a declaration made by the Bundesvergabeamt under Paragraph 113(3) of that Law not only constitutes a condition for admissibility of any claim for damages brought before the civil courts by reason of a culpable breach of that legislation but also binds the parties to the proceedings before the Bundesvergabeamt and the civil court hearing the case.

28. In those circumstances, neither the binding nature of a decision taken by the Bundevergabeamt under Paragraph 113(3) of the BVergG nor, accordingly, the judicial nature of the latter can reasonably be called into question.

29. It follows that the Court has jurisdiction to reply to the questions raised by the Bundesvergabeamt.

The admissibility of the questions referred

30. The Austrian Government claims that Question 1(a) and Question 5 are not admissible because they were raised in proceedings brought under Paragraph 113(3) of the BVergG, which is not a review procedure within the meaning of Directive 89/665 but merely an application for a declaration.

31. It states that the Austrian legislature exercised the option offered by the second subparagraph of Article 2(6) of Directive 89/665 to provide that, after the conclusion of a contract following its award, the powers of the body responsible for the review procedures are to be limited to awarding damages to any person harmed by an infringement. However, in Austrian law the power to award such damages, for which Article 2(1)(c) of Directive 89/665 requires the Member States to make provision, was not conferred on the Bundesvergabeamt but, as is clear from Paragraphs 122 and 125 of the BVergG, on the civil courts.

32. The Austrian Government considers that in those circumstances a reply to Question 1(a) and to Question 5 is not necessary to a solution of the main proceedings.

33. The Court observes, first, that a division of the power provided for in Article 2(1)(c) of Directive 89/665 between several courts is not contrary to the directive, since Article 2(2) expressly allows the Member States to confer the powers specified in paragraph 1 of that provision on separate bodies responsible for different aspects of the review procedure.

34. Secondly, although after the award of the contract the Bundesvergabeamt is not competent to award damages to the person harmed by the infringement of Community law on public procurement or the national rules implementing that law, but only to find that as a result of that infringement the contract has not been awarded to the best tenderer, that finding, as is clear from paragraph 27 of this judgment, not only constitutes a condition for admissibility of any claim for damages brought before the civil courts by reason of a culpable infringement of that legislation but also binds the parties to the proceedings before the Bundesvergabeamt and the civil court hearing the

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case.

35. In those circumstances, it must be concluded that the Bundesvergabeamt, even if it is hearing a case brought under Paragraph 113(3) of the BVergG, conducts a review procedure as required by Directive 89/665 and, as has already been seen in paragraph 28 of this judgment, is called upon to adopt a binding decision.

36. Furthermore, as is confirmed by Paragraph 117(3) of the BVergG, in proceedings brought under Paragraph 113(3) of that Law the Bundesvergabeamt is competent to determine the existence of the alleged infringement. It is possible that, in the exercise of that competence, it may consider it necessary to refer questions to the Court for a preliminary ruling.

37. Where such questions, which the Bundesvergabeamt considers necessary to enable it to determine the existence of illegality, concern the interpretation of Community law they cannot be declared inadmissible (see to this effect, inter alia, Case C-379/98 PreussenElektra [2001] ECR I-2099, paragraph 38, and Case C-153/00 Der Weduwe [2002] ECR I-11319, paragraph 31).

38. On the other hand, the Bundesvergabeamt, which is not directly competent to award damages to persons harmed by unlawfulness, is not entitled to refer to the Court for a preliminary ruling questions relating to the award of damages or the conditions for awarding them.

39. It is thus clear that all the questions referred for a preliminary ruling in this case by the Bundesvergabeamt are admissible except Question 5, which specifically seeks to know under what conditions a tenderer who claims to have been harmed by the adoption of an unlawful award criterion is entitled to damages.

Questions 1(a) and 1(b)

40. In its order for reference, the Bundesvergabeamt states that it is clear from Paragraphs 113(3) and 115(1) of the BVergG that in a review procedure following the award of a contract it must examine the contested award decision as to its lawfulness, but can grant the application only if it is the contested unlawful decision that has caused the contract not to be awarded to the best tenderer within the meaning of that Law. Therefore, if the award procedure is already fundamentally unlawful because of another (possibly earlier) decision by the contracting authority, as a result of which the applicant is not in any event the best tenderer within the meaning of the Law, and the applicant has not contested that other decision of the contracting authority in the review procedure, an application for review cannot be granted. In such a case, the applicant has not been "harmed" by the contested infringement within the meaning of Article 2(1)(c) of Directive 89/665 because the harm, which may take the form of wasted tender costs, was caused by another infringement by the contracting authority.

41. The Bundesvergabeamt also points out that under Paragraph 39(2) of the AVG it must determine the relevant facts ex proprio motu and therefore consider ex proprio motu whether in the main proceedings award criteria other than that of the "inspection opportunity" contested by the applicant are lawful. It also points out that according to a judgment of the Austrian Verfassungsgerichtshof of 8 March 2001 (B 707/00) the question as to the applicability of rules of procedure characterised by the ex proprio motu principle which enable the review body to take account of facts that are material under the law relating to contract award procedures, irrespective of the submissions of the parties is likely to raise, in the light of the principle laid down in the second subparagraph of Article 2(8) of Directive 89/665 that both parties must be heard in the review procedure, certain problems of Community law, making a reference to the Court under the third paragraph of Article 234 EC mandatory.

42. The Bundesvergabeamt states that it is that precedent of the Verfassungsgerichtshof which

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has induced it to refer Question 1(a) and (b), even though it is itself fully aware that the requirement that both sides be heard in the procedure which stems not from the second subparagraph of Article 2(8) of Directive 89/665, which applies only to "independent review bodies" , but from the requirements imposed on a court within the meaning of Article 234 EC is not inconsistent with the ex proprio motu rule applicable in administrative procedures, and that the Court has already implicitly found that the Bundesvergabeamt conducts a procedure in which both sides are heard, since it has recognised its right to refer questions for preliminary rulings.

43. It follows from the foregoing considerations, and from the legislation of which they form part, that by Questions 1(a) and (b) the national court is asking in essence whether Directive 89/665 precludes the court responsible for hearing review procedures, in an action brought by a tenderer, with the ultimate aim of obtaining damages, for a declaration that the decision to award a public contract is unlawful, from raising of its own motion the unlawfulness of a decision of the contracting authority other than the one contested by the tenderer. On the other hand, the directive does preclude the court from dismissing an application by a tenderer on the ground that, owing to the unlawfulness raised of its own motion, the award procedure was, in any event, unlawful and that the harm the tenderer may have suffered would therefore have been caused even in the absence of the unlawfulness alleged by the tenderer.

44. In that regard, it is appropriate to recall that, as is apparent from the first and second recitals in the preamble, Directive 89/665 is intended to strengthen the existing mechanisms, both at national and Community levels, to ensure the effective application of Community directives relating to public procurement, in particular at a stage when infringements can still be remedied. To that effect, Article 1(1) of that directive requires Member States to guarantee that unlawful decisions of contracting authorities can be subjected to effective review which is as swift as possible (see, in particular, Case C-81/98 Alcatel Austria and Others [1999] ECR I-7671, paragraphs 33 and 34, and Case C-470/99 Universale-Bau and Others [2002] ECR I-11617, paragraph 74).

45. However, Directive 89/665 lays down only the minimum conditions to be satisfied by the review procedures established in domestic law to ensure compliance with the requirements of Community law concerning public contracts (see, in particular, Case C-327/00 Santex [2003] ECR I-1877, paragraph 47).

46. If there is no specific provision governing the matter, it is therefore for the domestic law of each Member State to determine whether, and in what circumstances, a court responsible for review procedures may raise ex proprio motu unlawfulness which has not been raised by the parties to the case brought before it.

47. Neither the aims of Directive 89/665 nor the requirement it lays down that both parties be heard in review procedures precludes the introduction of that possibility in the domestic law of a Member State.

48. Firstly, it cannot be inconsistent with the objective of that directive, which is to ensure compliance with the requirements of Community law on public procurement by means of effective and swift review procedures, for the court responsible for the review procedures to raise ex proprio motu unlawfulness affecting an award procedure, without waiting for one of the parties to do so.

49. Secondly, the requirement that both parties be heard in review procedures does not preclude the court responsible for those procedures from being able to raise ex proprio motu unlawfulness which it is the first to find, but simply means that before giving its ruling the court must observe the right of the parties to be heard on the unlawfulness raised ex proprio motu.

50. It follows that Directive 89/665 does not preclude the court responsible for hearing review procedures, in an action brought by a tenderer, with the ultimate aim of obtaining damages, for

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a declaration that the decision to award a public contract is unlawful, from raising of its own motion the unlawfulness of a decision of the contracting authority other than the one contested by the tenderer.

51. However, it does not necessarily follow that the court may dismiss an application by a tenderer on the ground that, by reason of the unlawfulness raised of its own motion, the award procedure was in any event unlawful and that the harm the tenderer may have suffered would therefore have been caused even in the absence of the unlawfulness alleged by the tenderer.

52. Firstly, as is apparent from the case-law of the Court, Article 1(1) of Directive 89/665 applies to all decisions taken by contracting authorities which are subject to the rules of Community law on public procurement (see inter alia Case C-92/00 HI [2002] ECR I-5553, paragraph 37, and Case C-57/01 Makedoniko Metro and Michaniki [2003] ECR I-1091, paragraph 68) and makes no provision for any limitation as regards the nature and content of those decisions (see inter alia the judgments cited above in Alcatel Austria , paragraph 35, and HI , paragraph 49).

53. Secondly, among the review procedures which Directive 89/665 requires the Member States to introduce for the purposes of ensuring that the unlawful decisions of contracting authorities may be the subject of review procedures which are effective and as swift as possible is the procedure enabling damages to be granted to the person harmed by an infringement, which is expressly stated in Article 2(1)(c).

54. Therefore, a tenderer harmed by a decision to award a public contract, the lawfulness of which he is contesting, cannot be denied the right to claim damages for the harm caused by that decision on the ground that the award procedure was in any event defective owing to the unlawfulness, raised ex proprio motu , of another (possibly previous) decision of the contracting authority.

55. That conclusion is all the more obvious if a Member State has exercised the power conferred on Member States by the second subparagraph of Article 2(6) of Directive 89/665 to limit, after the conclusion of the contract following the award, the powers of the court responsible for the review procedures to award damages. In such cases, the unlawfulness alleged by the tenderer cannot be subject to any of the penalties provided for under Directive 89/665.

56. In the light of all the foregoing considerations, the reply to be given to Question 1 is that Directive 89/665 does not preclude the court responsible for hearing review procedures, in an action brought by a tenderer, with the ultimate aim of obtaining damages, for a declaration that the decision to award a public contract is unlawful, from raising of its own motion the unlawfulness of a decision of the contracting authority other than the one contested by the tenderer. However, the directive does preclude the court from dismissing an application by a tenderer on the ground that, owing to the unlawfulness raised of its own motion, the award procedure was in any event unlawful and that the harm which the tenderer may have suffered would therefore have been caused even in the absence of the unlawfulness alleged by the tenderer.

Question 2

57. It is clear from paragraph 18 of this judgment, and from the wording of Question 3, that the call for tenders at issue in the main proceedings specified that in order to evaluate the tenders so as to determine which offer was the most economically advantageous the contracting authority had to take account of the number of references relating to the product offered by the tenderers to other customers, without considering whether the customers' experiences of the products purchased had been good or bad.

58. In those circumstances, Question 2 should be understood as seeking to ascertain whether Directive 93/36 precludes the contracting authority, in a procedure to award a public supply contract, from

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taking account of the number of references relating to the products offered by the tenderers to other customers not as a criterion for establishing their suitability for carrying out the contract but as a criterion for awarding the contract.

59. According to the scheme of Directive 93/36, in particular Title IV, the examination of the suitability of contractors to deliver the products which are the subject of the contract to be awarded and the awarding of the contract are two different operations in the procedure for the award of a public works contract. Article 15(1) of Directive 93/36 provides that the contract is to be awarded after the supplier's suitability has been checked (see to this effect, regarding public works contracts, Case 31/87 Beentjes [1988] ECR 4635, paragraph 15).

60. Even though Directive 93/36, which, according to the fifth and sixth recitals, is intended to achieve the coordination of national procedures for the award of public supply contracts while taking into account, as far as possible, the procedures and administrative practices in force in each Member State, does not rule out the possibility that examination of the tenderer's suitability and the award of the contract may take place simultaneously, the two procedures are governed by different rules (see to this effect Beentjes , cited above, paragraph 16).

61. Article 15(1) of the directive provides that the suitability of tenderers is to be checked by the contracting authority in accordance with the criteria of economic and financial standing and of technical knowledge or ability referred to in Articles 22, 23 and 24 of the directive. The purpose of these articles is not to delimit the power of the Member States to fix the level of financial and economic standing and technical knowledge required in order to take part in procedures for the award of public works contracts, but to determine the references or evidence which may be furnished in order to establish the suppliers' financial or economic standing and technical knowledge or ability (see to this effect Beentjes , cited above, paragraph 17).

62. As far as the criteria which may be used for the award of a public contract are concerned, Article 26(1) of Directive 93/36 provides that the authorities awarding contracts must base their decision either on the lowest price only or, when the award is made to the most economically advantageous tender, on various criteria according to the contract involved, such as price, delivery date, running costs, cost-effectiveness, quality, aesthetic and functional characteristics, technical merit, after-sales service and technical assistance.

63. As is apparent from the wording of that provision, in particular the use of the expression "e.g." , the criteria which may be accepted as criteria for the award of a public contract to what is the most economically advantageous tender are not listed exhaustively (see to this effect, regarding public works contracts, Case C-19/00 SIAC Construction [2001] ECR I-7725, paragraph 35, and, regarding public service contracts, Case C-513/99 Concordia Bus Finland [2002] ECR I-7213, paragraph 54).

64. However, although Article 26(1) of Directive 93/36 leaves it to the contracting authority to choose the criteria on which it intends to base its award of the contract, that choice may relate only to criteria aimed at identifying the offer which is the most economically advantageous (see to this effect Beentjes , paragraph 19, SIAC Construction , paragraph 36, and Concordia Bus Finland , paragraph 59).

65. However, the fact remains that the submission of a list of the principal deliveries effected in the past three years, stating the sums, dates and recipients, public or private, involved is expressly included among the references or evidence which, under Article 23(1)(a) of Directive 93/36, may be required to establish the suppliers' technical capacity.

66. Furthermore, a simple list of references, such as that called for in the invitation to tender at issue in the main proceedings, which contains only the names and number of the suppliers' previous

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customers without other details relating to the deliveries effected to those customers cannot provide any information to identify the offer which is the most economically advantageous within the meaning of Article 26(1)(b) of Directive 93/36, and therefore cannot in any event constitute an award criterion within the meaning of that provision.

67. In the light of the foregoing considerations, the reply to be given to the second question is that Directive 93/36 precludes the contracting authority, in a procedure to award a public supply contract, from taking account of the number of references relating to the products offered by the tenderers to other customers not as a criterion for establishing their suitability for carrying out the contract but as a criterion for awarding the contract.

Question 3

68. Since this question was predicated upon a negative reply to the second question, it need not be answered.

Question 4

69. By its fourth question, the national court is asking, in essence, whether Community law, in particular the principle of equal treatment, precludes a criterion for the award of a public supply contract according to which a tenderer's offer may be favourably assessed only if the product which is the subject of the offer is available for inspection by the contracting authority within a radius of 300 km of theauthority.

70. The reply must be that such a criterion cannot constitute a criterion for the award of the contract.

71. Firstly, it is apparent from Article 23(1)(d) of Directive 93/36 that for public supply contracts the contracting authorities may require the submission of samples, descriptions and/or photographs of the products to be supplied as references or evidence of the suppliers' technical capacity to carry out the contract concerned.

72. Secondly, a criterion such as that which is the subject of Question 4 cannot serve to identify the most economically advantageous offer within the meaning of Article 26(1)(b) of Directive 93/36 and therefore cannot, in any event, constitute an award criterion within the meaning of that provision.

73. In those circumstances, it is not necessary to consider whether that criterion is also contrary to the principle of equal treatment, which, as the Court has repeatedly held, underlies the directives on procedures for the award of public contracts (see, inter alia, the judgments in HI , paragraph 45, and Universale-Bau , paragraph 91).

74. In the light of the foregoing considerations, the reply to be given to Question 4 is that Directive 93/36 precludes, in a procedure to award a public supply contract, the requirement that the products which are the subject of the tenders be available for inspection by the contracting authority within a radius of 300 km of the authority as a criterion for the award of the contract.

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CONCERNS	Interprets 31989L0665 - Interprets 31993L0036 -
SUB	Approximation of laws
AUTLANG	German
OBSERV	Austria ; Member States ; Commission ; Institutions
NATIONA	Austria
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NOTES Ritleng, D.: Attribution du marché, Europe 2003 Octobre Comm. no 321 p.20 ; Ritleng, D.: Directive recours, Europe 2003 Octobre Comm. no 322 p.21 ; Diman, Paolo: Motivi di illegittimità sollevati d'ufficio e diritto al risarcimento del ricorrente nelle procedure di ricorso in materia di aggiudicazione di appalti pubblici, Diritto pubblico comparato ed europeo 2003 p.2013-2018 ; Belorgey, Jean-Marc ; Gervasoni, Stéphane ; Lambert, Christian: Effectivité des recours, L'actualité juridique ; droit administratif 2003 p.2153-2154 ; Dischendorfer, Martin: The Classification of Selection Criteria and the Legality of Ex Officio Interventions of Review Bodies in Review Procedures under the EC Directives on Public Procurement: The GAT Case, Public Procurement Law Review 2004 p.NA39-NA46 ; Muzina, Aleksij: Sodbe Sodisca ES kot argument pri odlocanju Drzavne revizijske komisije, Evropsko pravo in praksa 2004 no 4 p.37-38 ; Adamantidou, El.: Dimosies Symvaseis & Kratikes Enisxyseis 2004 p.193-195

PROCEDU Reference for a preliminary ruling

ADVGEN Geelhoed

JUDGRAP Schintgen

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Judgment of the Court (Sixth Chamber)
of 4 December 2003
EVN AG and Wienstrom GmbH v Republik Osterreich. Reference for a preliminary ruling: Bundesvergabeamt - Austria. Directive 93/36/EEC - Public supply contracts - Concept of the most economically advantageous tender - Award criterion giving preference to electricity produced from renewable energy sources - Directive 89/665/EEC - Public procurement review proceedings - Unlawful decisions - Possibility of annulment only in the case of material influence on the outcome of the tender procedure - Illegality of an award criterion - Obligation to cancel the invitation to tender. Case C-448/01.

1. Approximation of laws - Procedures for the award of public supply contracts - Directive 93/36 - Award of contracts - Most economically advantageous tender - Criteria - Supply of electricity from renewable energy sources - Whether permissible - Conditions - (Council Directive 93/36, Art. 26)

2. Approximation of laws - Review procedures relating to the award of public supply and public works contracts - Directive 89/665 - Finding of illegality of an award criterion by the review body - Obligation to cancel the invitation to tender - (Council Directive 89/665)

1. The Community legislation on public procurement does not preclude a contracting authority from applying, in the context of the assessment of the most economically advantageous tender for a contract for the supply of electricity, an award criterion with a weighting of 45% which requires that the electricity supplied be produced from renewable energy sources. The fact that that criterion does not necessarily serve to achieve the objective pursued is irrelevant in that regard.

On the other hand, that legislation does preclude such a criterion where

it is not accompanied by requirements which permit the accuracy of the information contained in the tenders to be effectively verified,

it requires tenderers to state how much electricity they can supply from renewable energy sources to a non-defined group of consumers, and allocates the maximum number of points to whichever tenderer states the highest amount, where the supply volume is taken into account only to the extent that it exceeds the volume of consumption expected in the context of the procurement.

It is for the national court to determine whether, despite the contracting authority's failure to stipulate a specific supply period, the award criterion was sufficiently clearly formulated to satisfy the requirements of equal treatment and transparency of procedures for awarding public contracts.

see para. 72, operative part 1

2. The community legislation on public procurement requires the contracting authority to cancel an invitation to tender if it transpires in review proceedings under Article 1 of Directive 89/665 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 work contracts, as amended by Directive 92/50 relating to the coordination of procedures for the award of public service contracts, that a decision relating to one of the award criteria laid down by that authority is unlawful and it is therefore annulled by the review body.

In such a case the contracting authority cannot validly continue the tender procedure leaving aside that criterion since that would be tantamount to amending the criteria applicable to the procedure in question.

see paras 94-95, operative part 2

In Case C-448/01,

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REFERENCE to the Court under Article 234 EC by the Bundesvergabeamt (Austria) for a preliminary ruling in the proceedings pending before that body between

EVN AG,

Wienstrom GmbH

and

Republik Osterreich,

third parties:

Stadtwerke Klagenfurt AG

and

Kärntner Elektrizitäts-AG,

on the interpretation of Article 26 of Council Directive 93/36/EEC of 14 June 1993 coordinating procedures for the award of public supply contracts (OJ 1993 L 199, p. 1) and of Articles 1 and 2(1)(b) 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 Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts (OJ 1992 L 209, p. 1),

THE COURT (Sixth Chamber),

composed of:

V. Skouris (Rapporteur), acting for the President of the Sixth Chamber,

C. Gulmann,

J.-P. Puissochet,

R. Schintgen and

N. Colneric, Judges,

Advocate General: J. Mischo,

Registrar: H.A. Rühl (Principal Administrator),

after considering the written observations submitted on behalf of:

EVN AG and Wienstrom GmbH, by M. Ohler, Rechtsanwalt,

the Republik Osterreich, by A. Gerscha, Rechtsanwalt,

the Austrian Government, by M. Fruhmann, acting as Agent,

the Netherlands Government, by S. Terstal, acting as Agent,

the Swedish Government, by K. Renman, acting as Agent,

the Commission of the European Communities, by M. Nolin, acting as Agent, and T. Eilmansberger, Rechtsanwalt,

having regard to the Report for the Hearing,

after hearing the oral observations of EVN AG and Wienstrom GmbH, the Republik Osterreich, the Austrian Government and the Commission at the hearing on 23 January 2003,

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after hearing the Opinion of the Advocate General at the sitting on 27 February 2003,

gives the following

Judgment

Costs

96. The costs incurred by the Austrian, Netherlands and Swedish Governments and by the Commission, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT (Sixth Chamber),

in answer to the questions referred to it by the Bundesvergabeamt by order of 13 November 2001, hereby rules:

1. The Community legislation on public procurement does not preclude a contracting authority from applying, in the context of the assessment of the most economically advantageous tender for a contract for the supply of electricity, an award criterion with a weighting of 45% which requires that the electricity supplied be produced from renewable energy sources. The fact that that criterion does not necessarily serve to achieve the objective pursued is irrelevant in that regard.

On the other hand, that legislation does preclude such a criterion where

it is not accompanied by requirements which permit the accuracy of the information contained in the tenders to be effectively verified,

it requires tenderers to state how much electricity they can supply from renewable energy sources to a non-defined group of consumers, and allocates the maximum number of points to whichever tenderer states the highest amount, where the supply volume is taken into account only to the extent that it exceeds the volume of consumption expected in the context of the procurement.

It is for the national court to determine whether, despite the contracting authority's failure to stipulate a specific supply period, the award criterion was sufficiently clearly formulated to satisfy the requirements of equal treatment and transparency of procedures for awarding public contracts.

2. The Community legislation on public procurement requires the contracting authority to cancel an invitation to tender if it transpires in review proceedings under Article 1 of Directive 89/665 that a decision relating to one of the award criteria laid down by that authority is unlawful and it is therefore annulled by the review body.

1. By order of 13 November 2001, received at the Court Registry on 20 November 2001, the Bundesvergabeamt (Federal Procurement Office) referred to the Court of Justice for a preliminary ruling under Article 234 EC four questions on the interpretation of Article 26 of Council Directive 93/36/EEC of 14 June 1993 coordinating procedures for the award of public supply contracts (OJ 1993 L 199, p. 1) and of Articles 1 and 2(1)(b) 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 relating to the coordination of procedures for the award of public service contracts (OJ 1992 L 209, p. 1) ("Directive 89/665").

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2. Those questions were raised in proceedings between a group of undertakings consisting of EVN AG and Wienstrom GmbH on the one hand, and the Republik Osterreich in its capacity as the contracting authority on the other concerning the award of a public supply contract in respect of which the applicants in the main proceedings had submitted a tender.

The legal background

Community legislation

3. Article 26 of Directive 93/36, which appears in Chapter 3 of Title IV of the directive, entitled "Criteria for the award of contracts" , provides:

"1. The criteria on which the contracting authority shall base the award of contracts shall be:

...

(b) or, when award is made to the most economically advantageous tender, various criteria according to the contract in question: e.g. price, delivery date, running costs, cost-effectiveness, quality, aesthetic and functional characteristics, technical merit, after-sales service and technical assistance.

2. In the case referred to in point (b) of paragraph 1, the contracting authority shall state in the contract documents or in the contract notice all the criteria [it] intend[s] to apply to the award, where possible in descending order of importance.

"

4. The sixth recital in the preamble to Directive 89/665 states that it is necessary to ensure that adequate procedures exist in all the Member States to permit the setting aside of decisions taken unlawfully and compensation of persons harmed by an infringement.

5. Article 1 of Directive 89/665 states:

"1. The Member States shall take the measures necessary to ensure that, as regards contract award procedures falling within the scope of Directives 71/305/EEC, 77/62/EEC, and 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. The Member States shall ensure that the review procedures are available, under detailed rules which the Member States may establish, at least to any person having or having had an interest in obtaining a particular public supply or public works contract and who has been or risks being harmed by an alleged infringement. In particular, the Member States may require that the person seeking the review must have previously notified the contracting authority of the alleged infringement and of his intention to seek review.

"

6. Article 2 of Directive 89/665 provides:

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

...

(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

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contract documents or in any other document relating to the contract award procedure;

...

5. The Member States may provide that where damages are claimed on the grounds that a decision was taken unlawfully, the contested decision must first be set aside by a body having the necessary powers.

6. The effects of the exercise of the powers referred to in paragraph 1 on a contract concluded subsequent to its award shall be determined by national law. Furthermore, except where a decision must be set aside prior to the award of damages, a Member State may provide that, after the conclusion of a contract following its award, the powers of the body responsible for the review procedures shall be limited to awarding damages to any person harmed by an infringement.

"

7. Recital 2 in the preamble to Directive 2001/77/EC of the European Parliament and of the Council of 27 September 2001 on the promotion of electricity produced from renewable energy sources in the internal electricity market (OJ 2001 L 283, p. 33) states:

"The promotion of electricity produced from renewable energy sources is a high Community priority as outlined in the White Paper on Renewable Energy Sources... for reasons of security and diversification of energy supply, of environmental protection and of social and economic cohesion..." .

8. Recital 18 of Directive 2001/77 states:

"It is important to utilise the strength of the market forces and the internal market and make electricity produced from renewable energy sources competitive and attractive to European citizens."

9. It is clear from Article 1 of Directive 2001/77 that the purpose of that directive is to promote an increase in the contribution of renewable energy sources to electricity production in the internal market for electricity and to create a basis for a future Community framework thereof. To that end, Article 3(1) of the directive requires the Member States to take appropriate steps to encourage greater consumption of electricity produced from renewable energy sources in conformity with the national indicative targets referred to in paragraph 2 of that article.

National legislation

10. Directives 89/665 and 93/36 were transposed into Austrian law by the Bundesgesetz über die Vergabe von Aufträgen (Bundesvergabegesetz) 1997 (1997 Federal Public Procurement Law, BGBl. I, 1997/56; "the BVergG").

11. Paragraph 16 of the BVergG provides:

"1. Public contracts for services must be awarded, at reasonable prices, by way of a procedure provided for in this statute, in accordance with the principles of free and fair competition and of equal treatment of all applicants and tenderers, to undertakings which at the latest at the time when the tenders are opened are qualified, competent and reliable.

...

7. In the award procedure, due account is to be taken of the environmental impact of the services and the employment of persons on training contracts.

"

12. Paragraph 53 of the BVergG provides:

"From the tenders remaining after the elimination process, the most advantageous in technical

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and economic terms, in accordance with the criteria laid down in the invitation to tender, is to be selected (principle of the best tender)."

13. Paragraph 115(1) of the BVergG states:

"Where an undertaking claims to have an interest in the conclusion of a contract within the scope of this Federal Law, it may apply for the contracting authority's decision in the contract award procedure to be reviewed on the ground of unlawfulness, provided that it has been or risks being harmed by the alleged infringement."

14. Paragraph 117 of the BVergG states:

"1. The Bundesvergabeamt shall set aside, by way of administrative decision, taking into account the opinion of the Conciliation Committee ..., any decision of the contracting authority in an award procedure where the decision in question:

(1) is contrary to the provisions of this Federal Law or its implementing regulations and

(2) is material to the outcome of the award procedure.

...

3. After the award of the contract, the Bundesvergabeamt shall, in accordance with the conditions of subparagraph 1, determine only whether the alleged illegality exists or not.

"

The dispute in the main proceedings and the questions referred

15. The defendant in the main proceedings invited tenders by way of an open procedure for the award of a public contract for the supply of electricity. The contract to be awarded consisted of a framework contract followed by individual contracts for the supply of electricity to all the Federal Republic's administrative offices in the *Land* of Kärnten (Carinthia). The contract term ran from 1 January 2002 to 31 December 2003. The invitation to tender, which was published in the *Official Journal of the European Communities* of 27 March 2001, included the following provision under the heading "Award criteria" :

"The economically most advantageous tender according to the following criteria: impact of the services on the environment in accordance with the contract documents."

16. The tender had to state the price in ATS per kilowatt hour (kWh). This was to apply for the whole contract term, and was not to be subject to any revision or adjustment. The electricity supplier had to undertake to supply the Federal offices with electricity produced from renewable energy sources, subject to any technical limitations, and in any case not knowingly to supply those offices with electricity generated by nuclear fission. The supplier was not, however, required to submit proof of his electricity sources. The contracting authority was to have a right to terminate the contract and a right to punitive damages in the event of a breach of either of those obligations.

17. It was stated in the contract documents that the contracting authority was aware that for technical reasons no supplier could guarantee that the electricity supplied to a particular consumer was actually produced from renewable energy sources but that the authority had nevertheless decided to contract with tenderers who could supply at least 22.5 gigawatt hours (GWh) per annum of electricity produced from renewable energy sources, since the annual consumption of the Federal offices was estimated to be around 22.5 GWh.

18. In addition, it was specified that tenders would be eliminated if they did not contain any proof that "in the past two years and/or in the next two years the tenderer has produced or purchased, and/or will produce or purchase, and has supplied and/or will supply to final consumers, at least

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22.5 GWh electricity per annum from renewable energy sources" . The award criteria laid down were net price per kWh, with a weighting of 55%, and "energy produced from renewable energy sources" , with a weighting of 45%. It was stated in relation to the latter award criterion that "only the amount of energy that can be supplied from renewable energy sources in excess of 22.5 GWh per annum will be taken into account" .

19. The four tenders submitted were opened on 10 May 2001. The tender submitted by the Kärntner Elektrizitäts-AG and Stadtwerke Klagenfurt AG group of tenderers ("KELAG") stated a price of 0.44 ATS/kWh and, under reference to a table showing the amounts and origin of electricity produced or supplied by those companies, affirmed that they were able to supply a total amount of renewable electricity of 3 406.2 GWh. Energie Oberösterreich AG also submitted a tender, in which it proposed a price of 0.4191 ATS/kWh for annual consumption in excess of 1 million GWh and, in a table relating to 1999 to 2002, showed the various amounts of the electricity from renewable energy sources that it was able to supply for each of the years in that period. The highest amount stated in that connection was 5 280 GWh per annum. BEWAG also submitted a tender, which stated a price of 0.465 ATS/kWh. The table included with its offer showed the proportion of the electricity produced or supplied by BEWAG that came from renewable energy sources, on the basis of which the contracting authority deduced that the amount stated in that connection was 449.2 GWh.

20. The tender submitted by the applicants in the main proceedings stated a price of 0.52 ATS/kWh. Those applicants did not provide any concrete figures for the amount of electricity that they could supply from such sources, but instead merely stated that they had their own electricity generating plants in which they produced electricity from such sources. In addition, they had purchase options on electricity produced by hydroelectric power stations belonging to the Osterreichische Elektrizitätswirtschafts-Aktiengesellschaft and other Austrian hydroelectric power stations, and other electricity purchased by them derived predominantly from long-term coordination contracts with the largest supplier of electricity certified as coming from renewable energy sources. In 1999 and 2000, they had purchased exclusively hydroelectric power from Switzerland, and this would continue to be the case. The total amount of electricity from renewable energy sources was several times the amount of electricity referred to in the invitation to tender.

21. The defendant in the main proceedings considered that, of the four tenders submitted, the best was KELAG's, and that group received the most points for each of the two award criteria. The applicants in the main proceedings received the fewest points in respect of both criteria.

22. After having informed the contracting authority as early as 9 and 30 May 2001 that they considered that various provisions in the invitation to tender, including the award criterion relating to "electricity produced from renewable energy sources" , were unlawful, the applicants in the main proceedings applied on 12 June 2001 to institute conciliation proceedings before the Bundes-Vergabekontrollkommission (Federal Procurement Review Commission), which refused their application on the ground that such proceedings had no prospect of success.

23. The applicants in the main proceedings then instituted review proceedings before the Bundesvergabeamt, seeking, inter alia, annulment of the invitation to tender in its entirety, of a series of individual provisions in the contract documents and of a number of decisions of the contracting authority. Those decisions included, in particular, the decision to make the absence of proof of the production and purchase of electricity from renewable energy sources in a defined period or the absence of proof of future purchase of such electricity grounds for elimination, the decision to make proof of the production or purchase of a defined amount of electricity from such sources over a defined period a selection criterion, the decision to make the availability of electricity from renewable energy sources in excess of 22.5 GWh per annum an award criterion, and the decision refusing to cancel the invitation to tender. In addition, the applicants applied for an interim order prohibiting

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the contracting authority from awarding the contract.

24. By decision of 16 July 2001, the Bundesvergabeamt granted the applicants' application and, initially, prohibited the contract from being awarded until 10 September 2001. On a further application by the applicants, the Bundesvergabeamt made an interim order, by decision of 17 September 2001, permitting the contracting authority to award the contract on condition that the award would be cancelled and the contract rescinded in the event that even only one of the applications made to that body by the applicants in the main proceedings were granted or the decision to award the contract in question to one of the applicants' co-tenderers proved to be unlawful on the basis of any other finding of the Bundesvergabeamt.

25. On 24 October 2001, the framework contract was awarded to KELAG, subject to the conditions subsequent laid down in the decision referred to above.

26. Taking the view that the interpretation of a number of provisions of Community law was necessary in order to resolve the dispute before it, the Bundesvergabeamt decided to stay proceedings and to refer the following questions to the Court for a preliminary ruling:

"1. Do the provisions of Community law relating to the award of public contracts, in particular Article 26 of Directive 93/36/EEC, prohibit a contracting authority from laying down an award criterion in relation to the supply of electricity which is given a 45% weighting and which requires a tenderer to state, without being bound to a defined supply period, how much electricity he can supply from renewable energy sources to a group of consumers not more closely defined, where the maximum number of points is given to whichever tenderer states the highest amount and a supply volume is taken into account only to the extent that it exceeds the volume of consumption to be expected in the context of the contract to which the invitation to tender relates?

2. Do the provisions of Community law relating to the award of public contracts, in particular Article 2(1)(b) of Directive 89/665/EEC, prohibit making the setting aside of an unlawful decision in review proceedings under Article 1 of Directive 89/665/EEC dependent on proof that the unlawful decision was material to the outcome of the procurement procedure?

3. Do the provisions of Community law relating to the award of public contracts, in particular Article 26 of Directive 93/36/EEC, prohibit making the setting aside of an unlawful decision in review proceedings under Article 1 of Directive 89/665/EEC dependent on proof that the unlawful decision was material to the outcome of the procurement procedure, where that proof has to be achieved by the review body examining whether the ranking of the tenders actually submitted would have been different had they been re-evaluated disregarding the unlawful award criterion?

4. Do the provisions of Community law relating to the award of public contracts, in particular Article 26 of Directive 93/36/EEC, require the contracting authority to cancel the invitation to tender if it transpires in review proceedings under Article 1 of Directive 89/665/EEC that one of the award criteria it laid down is unlawful?

"

The first question

27. It is clear from the explanations provided by the Bundesvergabeamt that the first question must be understood as having two parts. First of all, it seeks to determine whether the Community legislation on public procurement, in particular Article 26 of Directive 93/36, precludes a contracting authority from applying, in its assessment of the most economically advantageous tender for a contract for the supply of electricity, a criterion requiring that the electricity supplied be produced from renewable energy sources.

28. In second place, if the first part of its question is answered in the affirmative, the Bundesvergabeamt

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asks for clarification of the Community law requirements as regards the concrete application of such a criterion, given the specific wording of the criterion at issue in the dispute before it, and, consequently, the second part of its question can be broken down into several sub-questions.

29. More specifically, that body is unclear as to the compatibility of such a criterion with Community law given the circumstances set out in points (a) to (d) below, in other words, given that the criterion

(a) has a weighting of 45%;

(b) is not accompanied by requirements which permit the accuracy of the information contained in the tenders to be effectively verified, and does not necessarily serve to achieve the objective pursued;

(c) does not impose a defined supply period, and

(d) requires tenderers to state how much electricity they can supply from renewable energy sources to a non-defined group of consumers, and allocates the maximum number of points to whichever tenderer states the highest amount, where the supply volume is taken into account only to the extent that it exceeds the volume of consumption to be expected in the context of the contract to which the invitation to tender relates.

The first part of the first question

30. Referring to the lack of clarity of the expression "the most economically advantageous tender" used in Article 26 of Directive 93/36, the Bundesvergabeamt first asks as a question of principle whether Community law allows the contracting authority to lay down criteria that pursue advantages which cannot be objectively assigned a direct economic value, such as advantages related to the protection of the environment.

31. In that regard, it should be noted that, in a judgment delivered after the lodging of the order for reference in this case, which concerned the interpretation of Article 36(1)(a) of Directive 92/50, whose wording is more or less identical to that of Article 26(1)(b) of Directive 93/36, the Court had occasion to rule on the question whether and in what circumstances a contracting authority may take ecological criteria into consideration in the assessment of the most economically advantageous tender.

32. More specifically, at paragraph 55 of the judgment in Case C-513/99 Concordia Bus Finland [2002] ECR I-7123, the Court held that Article 36(1)(a) of Directive 92/50 cannot be interpreted as meaning that each of the award criteria used by the contracting authority to identify the most economically advantageous tender must necessarily be of a purely economic nature.

33. The Court therefore accepted that where the contracting authority decides to award a contract to the tenderer who submits the most economically advantageous tender it may take into consideration ecological criteria, provided that they are linked to the subject-matter of the contract, do not confer an unrestricted freedom of choice on the authority, are expressly mentioned in the contract documents or the tender notice, and comply with all the fundamental principles of Community law, in particular the principle of non-discrimination (Concordia Bus Finland , cited above, paragraph 69).

34. It follows that the Community legislation on public procurement does not preclude a contracting authority from applying, in the context of the assessment of the most economically advantageous tender for a contract for the supply of electricity, a criterion requiring that the electricity supplied be produced from renewable energy sources, provided that that criterion is linked to the subject-matter of the contract, does not confer an unrestricted freedom of choice on the authority, is expressly mentioned in the contract documents or the contract notice, and complies with all the fundamental principles of Community law, in particular the principle of non-discrimination.

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The second part of the first question

Second part, point (a)

35. In its order for reference, the Bundesvergabeamt states that even if an award criterion which relates to environmental issues, such as the one applied in the case at issue in the main proceedings, had to be regarded as compatible in principle with the Community rules on the award of public contracts, the fact that it was given a weighting of 45% would create another problem since it could be objected that the contracting authority is prohibited from allowing a consideration which is not capable of being assigned a direct economic value from having such a significant influence on the award decision.

36. The defendant in the main proceedings submits in that regard that given the discretion enjoyed by the contracting authority in its identification of the most economically advantageous tender, only a weighting which resulted in an unjustified distortion would be unlawful. In the case at issue in the main proceedings there is not only an objective relationship between the criteria of "price" and "electricity produced from renewable energy sources" but, in addition, precedence is accorded to purely arithmetical economic considerations, since the price has a weighting 10 points higher than that given to the capacity to supply such electricity.

37. It must be recalled that according to settled case-law it is open to the contracting authority when choosing the most economically advantageous tender to choose the criteria on which it proposes to base the award of contract, provided that the purpose of those criteria is to identify the most economically advantageous tender and that they do not confer on the contracting authority an unrestricted freedom of choice as regards the award of the contract to a tenderer (see, to that effect, Case 31/87 Beentjes [1988] ECR 4635, paragraphs 19 and 26; Case C-19/00 SIAC Construction [2001] ECR I-7725, paragraphs 36 and 37; and C oncordia Bus Finland , paragraphs 59 and 61).

38. Furthermore, such criteria must be applied in conformity with both the procedural rules and the fundamental principles laid down in Community law (see, to that effect, Beentjes , paragraphs 29 and 31, and Concordia Bus Finland , paragraphs 62 and 63).

39. It follows that, provided that they comply with the requirements of Community law, contracting authorities are free not only to choose the criteria for awarding the contract but also to determine the weighting of such criteria, provided that the weighting enables an overall evaluation to be made of the criteria applied in order to identify the most economically advantageous tender.

40. As regards the award criterion at issue in the main proceedings, the Court has already held that the use of renewable energy sources for producing electricity is useful for protecting the environment in so far as it contributes to the reduction in emissions of greenhouse gases which are amongst the main causes of climate change which the European Community and its Member States have pledged to combat (Case C-379/98 PreussenElektra [2001] ECR I-2099, paragraph 73).

41. Moreover, as is clear, in particular from Recital 18 and Articles 1 and 3 of Directive 2001/77, it is for precisely that reason that that directive aims, by utilising the strength of market forces, to promote an increase in the contribution of renewable energy sources to electricity production in the internal market for electricity, an objective which, according to Recital 2 of the directive, is a high Community priority.

42. Having regard, therefore, to the importance of the objective pursued by the criterion at issue in the main proceedings, its weighting of 45% does not appear to present an obstacle to an overall evaluation of the criteria applied in order to identify the most economically advantageous tender.

43. In those circumstances, and since there is no evidence to support a finding that the requirements

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of Community law have been infringed, it must be held that the application of a weighting of 45% to the award criterion at issue in the main proceedings is not incompatible with the Community legislation on public procurement.

Second part, point (b)

44. The Bundesvergabeamt is also uncertain as to whether the award criterion at issue in the main proceedings is lawful under Community law, since the contracting authority itself has admitted that it does not have the technical ability to verify whether electricity supplied to it has actually been generated from renewable energy sources and it did not require the tenderers to supply proof of their actual supply obligations or existing electricity supply contracts.

45. The referring body is therefore essentially asking whether the Community law provisions governing the award of public contracts preclude a contracting authority from applying an award criterion which is not accompanied by requirements which permit the accuracy of the information contained in the tenders to be effectively verified.

46. In that context, the Bundesvergabeamt is also uncertain as to the extent to which such an award criterion is capable of achieving the objective which it pursues. Since there are no plans to verify how far the recipient of the award in fact helps by its production structure to increase the amount of electricity produced from renewable energy sources, it is possible that the application of that criteria may have no effect on the total amount of electricity produced in that way.

47. It should be recalled that the principle of equal treatment of tenderers which, as the Court has repeatedly held, underlies the directives on procedures for the award of public contracts (see, in particular, Case C-470/99 Universale-Bau and Others [2002] ECR I-11617, paragraph 91, and Case C-315/01 GAT [2003] ECR I-6351, paragraph 73) implies, first of all, that tenderers must be in a position of equality both when they formulate their tenders and when those tenders are being assessed by the contracting authority (SIAC Construction , paragraph 34).

48. More specifically, that means that when tenders are being assessed, the award criteria must be applied objectively and uniformly to all tenderers (SIAC Construction , cited above, paragraph 44).

49. Second, the principle of equal treatment implies an obligation of transparency in order to enable verification that it has been complied with, which consists in ensuring, inter alia, review of the impartiality of procurement procedures (see, to that effect, Universale-Bau and Others , paragraphs 91 and 92).

50. Objective and transparent evaluation of the various tenders depends on the contracting authority, relying on the information and proof provided by the tenderers, being able to verify effectively whether the tenders submitted by those tenderers meet the award criteria.

51. It is thus apparent that where a contracting authority lays down an award criterion indicating that it neither intends, nor is able, to verify the accuracy of the information supplied by the tenderers, it infringes the principle of equal treatment, because such a criterion does not ensure the transparency and objectivity of the tender procedure.

52. Therefore, an award criterion which is not accompanied by requirements which permit the information provided by the tenderers to be effectively verified is contrary to the principles of Community law in the field of public procurement.

53. As regards the Bundesvergabeamt's question as to whether the award criterion at issue in the main proceedings infringes Community law in so far as it is not necessarily capable of helping to increase the amount of electricity produced from renewable energy sources, it need only be noted that even if that is in fact the case, such a criterion cannot be regarded as incompatible with

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the Community provisions in the field of public procurement simply because it does not necessarily serve to achieve the objective pursued.

Second part, point (c)

54. The Bundesvergabeamt considers that since the contracting authority omitted to determine the specific supply period in respect of which the amount that could be supplied was to be stated, the criterion applied is incompatible with the principle of comparability of tenders, which derives from the requirement of transparency. As regards the proof required for the examination of the suitability of the tenderers, it was the period covering the two years preceding the invitation to tender and the period covering the following two years which were stated to be relevant as regards the amount of electricity which would in fact be required. According to the Bundesvergabeamt, even if that provision were also applied in the context of the award criterion, there would be no definite supply period allowing for an exact calculation of the amount which in fact had to be taken into account. On the contrary, in a period of four years, it might be that different amounts of electricity could be supplied. It would even be conceivable that tenderers would state amounts which relied on assumptions as to the construction of power stations or other merely potential means of production of electricity from renewable energy sources.

55. The defendant in the main proceedings explains that in Austria the electricity market was fully liberalised on 1 October 2001, and that since that date it has been possible to set up trading companies whose object is to buy and sell on electricity. As the invitation to tender was published approximately six months before that date, it was obliged to formulate the award criterion in terms which made it possible for both companies already on the market with their own means of electricity production and electricity trading companies which were only authorised to operate from 1 October 2001 to submit tenders. It therefore sought to give undertakings the possibility of stating the amount of electricity from renewable energy sources that they had produced or bought over the two years preceding the invitation to tender or to provide such information for the two coming years. Finally, all the undertakings provided in fact only information relating to the two years preceding the invitation to tender, and where the annual amounts were different the best tender was determined on the basis of the average.

56. It is clear from the Court's case-law that the procedure for awarding a public contract must comply, at every stage, with both the principle of the equal treatment of potential tenderers and the principle of transparency so as to afford all parties equality of opportunity in formulating the terms of their tenders (see, to that effect, Universale-Bau , paragraph 93).

57. More specifically, this means that the award criteria must be formulated, in the contract documents or the contract notice, in such a way as to allow all reasonably well-informed tenderers of normal diligence to interpret them in the same way (SIAC Construction , paragraph 41).

58. Consequently, in the case at issue in the main proceedings, the fact that in the invitation to tender the contracting authority omitted to determine the period in respect of which tenderers had to state in their tenders the amount of electricity from renewable energy sources which they could supply could be an infringement of the principles of equal treatment and transparency were it to transpire that that omission made it difficult or even impossible for tenderers to know the exact scope of the criterion in question and thus to be able to interpret it in the same way.

59. Inasmuch as that requires a factual assessment, it is for the national court to determine, taking account of all the circumstances of the case, whether, despite that omission, the award criterion at issue in the main proceedings was sufficiently clearly formulated to satisfy the requirements of equal treatment and transparency of procedures for awarding public contracts.

Second part, point (d)

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60. The Bundesvergabeamt explains that the award criterion at issue in the main proceedings consists in the allocation of points for the amount of electricity from renewable energy sources that the tenderers will be able to supply to a non-defined group of consumers, where the supply volume is taken into account only to the extent that it exceeds the volume of consumption expected in the context of the invitation to tender. In so far as that criterion thus concerns exclusively the total amount which the tenderer will be able to supply in general and not the amount which the tenderer will be able to supply specifically to the contracting authority, the Bundesvergabeamt is uncertain whether it is linked to any direct economic advantages for the contracting authority.

Observations submitted to the Court

61. The applicants in the main proceedings, the Netherlands Government and the Commission submit that in so far as the criterion in question relates to an amount of electricity exceeding the consumption expected in the context of the invitation to tender, the requirement of a direct link with the contract to be awarded is not met in the present case. In their opinion, the only relevant factor is the amount of electricity from renewable energy sources which can be supplied to the contracting authority.

62. According to the Commission, it would have been enough for the contracting authority to have required the tenderer to have access to a certain amount of electricity produced from renewable energy sources or to be able simply to prove that it was capable of delivering a certain amount of electricity in excess of the annual consumption, for example by calculating for a reserve of 10%.

63. The applicants in the main proceedings additionally submit that the award criterion in question is in fact a disguised selection criterion inasmuch as it in fact concerns the tenderers' capacity to supply as much electricity as possible from renewable energy sources and, in that way, ultimately relates to the tenderers themselves.

64. On the other hand, the defendant in the main proceedings and the Austrian Government consider that, by taking into account the amount of electricity produced from renewable energy sources that each tenderer was able to supply over and above 22.5 GWh, which had to be supplied in any case, the contracting authority gave the reliability of supply of electricity, which is a function of the total amount of electricity to which an undertaking has access, the status of an award criterion. They explain that since electricity cannot be stored, that criterion is in no way irrelevant to the service provided since the more productive a tenderer is, the smaller the risk that the contracting authority's demand for electricity will not be met and that it will have to find a costly alternative in the short term.

65. More specifically, the Austrian Government submits that although the production of electricity from renewable energy sources, such as wind and solar energy, is seasonal, the demand is greatest in the winter. The purpose of the award criterion in question is thus to ensure that the tenderer can provide a continuous supply of electricity notwithstanding the fact that supply and demand are not linear throughout the year, a consideration which also justifies the heavy weighting of 45% given to that criterion.

Findings of the Court

66. As recalled in paragraph 33 of this judgment, ecological criteria used by a contracting authority as award criteria for determining the most economically advantageous tender must, inter alia, be linked to the subject-matter of the contract.

67. In the case at issue in the main proceedings, the award criterion applied does not relate to the service which is the subject-matter of the contract, namely the supply of an amount of electricity to the contracting authority corresponding to its expected annual consumption as laid down in the

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invitation to tender, but to the amount of electricity that the tenderers have supplied, or will supply, to other customers.

68. An award criterion that relates solely to the amount of electricity produced from renewable energy sources in excess of the expected annual consumption, as laid down in the invitation to tender, cannot be regarded as linked to the subject-matter of the contract.

69. Moreover, the fact that, in accordance with the award criterion applied, it is the amount of electricity in excess of the expected annual consumption as laid down in the invitation to tender which is decisive is liable to confer an advantage on tenderers who, owing to their larger production or supply capacities, are able to supply greater volumes of electricity than other tenderers. That criterion is thus liable to result in unjustified discrimination against tenderers whose tender is fully able to meet the requirements linked to the subject-matter of the contract. Such a limitation on the circle of economic operators in a position to submit a tender would have the effect of thwarting the objective of opening up the market to competition pursued by the directives coordinating procedures for the award of public supply contracts.

70. Finally, even assuming that that criterion was a response to the need to ensure reliability of supplies an assumption which it is for the national court to verify it should be noted that while the reliability of supplies can, in principle, number amongst the award criteria used to determine the most economically advantageous tender, the capacity of tenderers to provide the largest amount of electricity possible in excess of the amount laid down in the invitation to tender cannot legitimately be given the status of an award criterion.

71. It follows that in so far as it requires tenderers to state how much electricity they can supply from renewable energy sources to a non-defined group of consumers, and allocates the maximum number of points to whichever tenderer states the highest amount, where the supply volume is taken into account only to the extent that it exceeds the volume of consumption expected in the context of the procurement, the award criterion applied in the case at issue is not compatible with the Community legislation on public procurement.

72. In the light of all the foregoing, the answer to the first question submitted to the Court must be that the Community legislation on public procurement does not preclude a contracting authority from applying, in the context of the assessment of the most economically advantageous tender for a contract for the supply of electricity, an award criterion with a weighting of 45% which requires that the electricity supplied be produced from renewable energy sources. The fact that that criterion does not necessarily serve to achieve the objective pursued is irrelevant in that regard.

On the other hand, that legislation does preclude such a criterion where

it is not accompanied by requirements which permit the accuracy of the information contained in the tenders to be effectively verified,

it requires tenderers to state how much electricity they can supply from renewable energy sources to a non-defined group of consumers, and allocates the maximum number of points to whichever tenderer states the highest amount, where the supply volume is taken into account only to the extent that it exceeds the volume of consumption expected in the context of the procurement.

It is for the national court to determine whether, despite the contracting authority's failure to stipulate a specific supply period, the award criterion was sufficiently clearly formulated to satisfy the requirements of equal treatment and transparency of procedures for awarding public contracts.

The second and third questions

73. By these two questions, which can be examined together, the Bundesvergabeamt is essentially asking whether Article 2(1)(b) of Directive 89/665 precludes a provision of national law such as

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point 2 of Paragraph 117(1) of the BVergG, which makes the annulment in review proceedings of an unlawful decision by a contracting authority dependent on proof that the unlawful decision materially influenced the outcome of the procurement procedure and whether, having regard to Article 26 of Directive 93/36 in particular, the answer to that question must differ if the proof of that influence derives from the examination by the review body of whether the ranking of the tenders actually submitted would have been different had they been re-evaluated disregarding the unlawful award criterion.

74. It should be noted at the outset that, according to settled case-law, in the context of the cooperation between the Court of Justice and national courts provided for by Article 234 EC, it is solely for the national court before which the dispute has been brought, and which must assume responsibility for the subsequent judicial decision, to determine in the light of the particular circumstances of the case both the need for a preliminary ruling and the relevance of the questions which it submits to the Court. Consequently, where the questions submitted concern the interpretation of Community law, the Court of Justice is, in principle, bound to give a ruling (see, inter alia, Case C-415/93 Bosman [1995] ECR I-4921, paragraph 59; PreussenElektra , paragraph 38; Case C-390/99 Canal Satélite Digital [2002] ECR I-607, paragraph 18; Case C-153/00 Der Weduwe [2002] ECR I-11319, paragraph 31, and Case C-318/00 Bacardi-Martini and Cellier des Dauphins [2003] ECR I-905, paragraph 40).

75. However, the Court has also stated that, in exceptional circumstances, it can examine the conditions in which the case was referred to it by the national court, in order to assess whether it has jurisdiction (see PreussenElektra , paragraph 39, and Canal Satélite Digital , paragraph 19). The spirit of cooperation which must prevail in preliminary ruling proceedings requires the national court for its part to have regard to the function entrusted to the Court of Justice, which is to contribute to the administration of justice in the Member States and not to give opinions on general or hypothetical questions (Der Weduwe , paragraph 32, and Bacardi-Martini and Cellier des Dauphins , paragraph 41).

76. Thus the Court must decline to give a preliminary ruling on a question submitted by a national court where it is quite obvious that the interpretation or the assessment of the validity of a provision of Community law sought by that court bears no relation to the actual facts of the main action or its purpose, or where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it (see, in particular, Bosman , paragraph 61; Case C-437/97 EKW and Wein & Co. [2000] ECR I-1157, paragraph 52; Case C-36/99 Idéal Tourisme [2000] ECR I-6049, paragraph 20, and Bacardi-Martini and Cellier des Dauphins , paragraph 42).

77. More specifically, it must be borne in mind that Article 234 EC is an instrument of judicial cooperation, by means of which the Court provides the national courts with the points of interpretation of Community law which may be helpful to them in assessing the effects of a provision of national law at issue in the disputes before them (see, in particular, Case C-300/01 Salzmann [2003] ECR I-4899, paragraph 28).

78. It follows that in order that the Court may perform its task in accordance with the Treaty, it is essential for national courts to explain, when the reasons are not clear beyond doubt from the file, why they consider that a reply to their questions is necessary to enable them to give judgment (see, in particular, Bacardi-Martini and Cellier des Dauphins , paragraph 43).

79. In the present case, there is no information to that effect before the Court.

80. On the one hand, as observed in paragraph 23 of this judgment, the object of the review proceedings brought in the case at issue is, inter alia, the annulment of the invitation to tender in its entirety and the annulment of a series of individual conditions in the contract documents and of a number

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of decisions of the contracting authority relating to the requirements established by the award and selection criteria used in that tender procedure.

81. Therefore, in the light of the information in the order for reference, it is apparent that all the decisions whose annulment is sought in the main proceedings have a decisive effect on the outcome of the tender procedure.

82. On the other hand, the Bundesvergabeamt has not provided any explanation as to the precise reasons for which it considers that it needs an answer to the question of the compatibility with the Community legislation on public procurement of the condition laid down in subparagraph 2 of Paragraph 117(1) of the BVergG in order to give judgment in the case pending before it.

83. Therefore, since there is no information before the Court to show that an answer to the second and third questions is needed in order to resolve the dispute in the main proceedings, those questions must be regarded as hypothetical and, accordingly, inadmissible.

The fourth question

84. By its fourth question the Bundesvergabeamt is essentially asking whether the provisions of Community law governing the award of public contracts, in particular Article 26 of Directive 93/36, require the contracting authority to cancel the invitation to tender if it transpires in review proceedings under Article 1 of Directive 89/665 that a decision relating to one of the award criteria laid down by that authority is unlawful.

85. According to the Bundesvergabeamt, if it is assumed that the review of the effects of unlawful decisions relating to award criteria is contrary to Community law, the only alternative where such a decision is unlawful seems to be cancellation of the invitation to tender, since otherwise the tender procedure would be carried out on the basis of a weighting of criteria which was neither laid down by the authority nor known by the tenderers.

Observations submitted to the Court

86. The Austrian Government submits that Community law does not recognise an express obligation to cancel invitations to tender, just as the directives on public procurement do not lay down a tendering obligation, and concludes that it is for the Member States, acting in accordance with the principles of Community law, to lay down rules determining whether, where a decision relating to an award criterion is recognised to be unlawful, the contracting authority is obliged to cancel the invitation to tender.

87. The defendant in the main proceedings states that, pursuant to Article 2(6) of Directive 89/665, the consequences of an infringement of the rules relating to the award of public contracts which is established after the contract has been awarded must be determined in accordance with national law. In its view, where the contract has been awarded the review body is confined pursuant to Paragraph 117(3) of the BVergG to making a finding as to the existence of the alleged illegality. It thus concludes that this question must be answered in the negative.

88. On the other hand, the applicants in the main proceedings and the Commission consider that if, after the tenders have been submitted or opened, the review body declares a decision relating to an award criterion unlawful, the contract cannot be awarded on the basis of the invitation to tender and the only option is to cancel the invitation to tender. Any amendment to the criteria would have an effect on the evaluation of the tenders, whereas the tenderers would no longer have the possibility of adapting their tenders, prepared at a completely different time and in different circumstances and on the basis of different criteria. The only option would therefore be to start the entire tender procedure afresh.

Findings of the Court

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89. It should be noted that a finding that a decision relating to an award criterion is unlawful does not always lead to the annulment of that decision.

90. As a result of the option granted to Member States under Article 2(6) of Directive 89/665 of providing that, after the conclusion of a contract following its award, the powers of the body responsible for the review procedures are to be limited to awarding damages to any person harmed by an infringement, where the review proceedings are instituted after the conclusion of the contract and the Member State concerned has made use of the option, if the review body finds that a decision relating to an award criterion is unlawful, it may not annul that decision, but only award damages.

91. It is clear from the explanations provided by the Bundesvergabeamt that the fourth question concerns the situation where the consequence of a finding that a decision relating to an award criterion is unlawful is the annulment of that decision. It must thus be understood as asking whether the Community legislation on public procurement requires the contracting authority to cancel an invitation to tender where it transpires in review proceedings under Article 1 of Directive 89/665 that a decision relating to one of the award criteria laid down by that authority is unlawful and it is therefore annulled by the review body.

92. For the purpose of answering the question as reformulated, it should be pointed out that the Court has already held that the principles of equal treatment and transparency of tender procedures imply an obligation on the part of contracting authorities to interpret the award criteria in the same way throughout the procedure (see, to that effect, in particular SIAC Construction, paragraph 43).

93. As far as the award criteria themselves are concerned, it is a fortiori clear that they must not be amended in any way during the tender procedure.

94. It follows that where the review body annuls a decision relating to an award criterion, the contracting authority cannot validly continue the tender procedure leaving aside that criterion, since that would be tantamount to amending the criteria applicable to the procedure in question.

95. Therefore, the answer to the fourth question must be that the Community legislation on public procurement requires the contracting authority to cancel an invitation to tender if it transpires in review proceedings under Article 1 of Directive 89/665 that a decision relating to one of the award criteria laid down by that authority is unlawful and it is therefore annulled by the review body.

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31992L0050-A36P1LA : N 31 32
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CONCERNS

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SUB

Approximation of laws

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A9 Bundesvergabeamt, Beschluß vom 13/11/2001 ; - Zeitschrift für Vergaberecht und Beschaffungspraxis 2002 p.36-38

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PROCEDU Reference for a preliminary ruling

ADVGEN Mischo

JUDGRAP Skouris

DATES of document: 04/12/2003
of application: 20/11/2001

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**Judgment of the Court (Sixth Chamber)
of 12 February 2004
Grossmann Air Service, Bedarfsluftfahrtunternehmen GmbH & Co. KG v Republik Osterreich. Reference for a preliminary ruling: Bundesvergabeamt - Austria. Public procurement - Directive 89/665/EEC - Review procedures for the award of public contracts - Articles 1(3) and 2(1)(b) - Persons to whom review procedures must be available - Definition of interest in obtaining a public contract. Case C-230/02.**

1. Approximation of laws - Review procedures concerning the award of public supply and public works contracts - Directive 89/665 - Member States under an obligation to provide for review procedures - Access to review procedures - Failure by an undertaking to participate in the contracts award procedure because of allegedly discriminatory specifications - Failure to seek a review of those specifications - Excluded from access to review procedures - Whether permissible - (Council Directive 89/665, Arts 1(3) and 2(1)(b))

2. Approximation of laws - Review procedures concerning the award of public supply and public works contracts - Directive 89/665 - Member States under an obligation to provide for review procedures - Access to review procedures - Interest in obtaining the contract lost because no application to a conciliation commission was made first - Not permissible - (Council Directive 89/665, Art. 1(3))

1. Articles 1(3) and 2(1)(b) of Directive 89/665 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 Directive 92/50 relating to the coordination of procedures for the award of public service contracts, must be interpreted as not precluding a person from being regarded, once a public contract has been awarded, as having lost his right of access to the review procedures provided for by the directive if he did not participate in the award procedure for that contract on the ground that he was not in a position to supply all the services for which bids were invited, because there were allegedly discriminatory specifications in the documents relating to the invitation to tender, but he did not seek review of those specifications before the contract was awarded.

As regards the failure to participate in the contracts award procedure, it would indeed be too much to require an undertaking allegedly harmed by discriminatory clauses in the documents relating to the invitation to tender to submit a tender, before being able to avail itself of the review procedures provided for by Directive 89/665 against such specifications, in the award procedure for the contract at issue, even though its chances of being awarded the contract are non-existent by reason of the existence of those specifications. It would, therefore, in those circumstances, be entitled to seek review of those specifications directly, even before the procedure for awarding the contract concerned is terminated.

However, the fact that a person does not seek such a review but awaits notification of the decision awarding the contract and then challenges it before the body responsible, on the ground specifically that those specifications are discriminatory, is not in keeping with the objectives of speed and effectiveness of Directive 89/665. The refusal, in those circumstances, to acknowledge the interest in obtaining the contract in question and, therefore, the right of access to the review procedures provided for by Directive 89/665 does not impair the effectiveness of that directive.

see paras 28-29, 37, 39-40, operative part 1

2. Even though Article 1(3) of Directive 89/665 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 Directive 92/50 relating to the coordination of procedures for the award of public contracts, expressly allows Member States to determine the detailed

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rules according to which they must make the review procedures provided for in that directive available to any person having or having had an interest in obtaining a particular public contract and who has been or risks being harmed by an alleged infringement, it none the less does not authorise them to give the term " interest in obtaining a public contract" an interpretation which may limit the effectiveness of that directive. The fact that access to the review procedures provided for by the directive is made subject to prior referral to a conciliation committee would be contrary to the objectives of speed and effectiveness of that directive.

Accordingly, that provision must be interpreted as precluding a person who has participated in a contract award procedure from being regarded as having lost his interest in obtaining the contract on the ground that, before seeking the review provided for by the directive, he failed to refer the case to a conciliation committee.

see paras 42-43, operative part 2

In Case C-230/02,

REFERENCE to the Court under Article 234 EC by the Bundesvergabeamt (Austria) for a preliminary ruling in the proceedings pending before that court between

Grossmann Air Service, Bedarfsluftfahrtunternehmen GmbH & Co. KG

and

Republik Osterreich,

on the interpretation of Articles 1(3) and 2(1)(b) 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 relating to the coordination of procedures for the award of public service contracts (OJ 1992 L 209, p. 1),

THE COURT (Sixth Chamber),

composed of:

V. Skouris,

acting as President of the Sixth Chamber,

C. Gulmann,

J.N. Cunha Rodrigues,

J.-P. Puissochet and

R. Schintgen (Rapporteur), Judges,

Advocate General: L.A. Geelhoed,

Registrar: M.-F. Contet, Principal Administrator,

after considering the written observations submitted on behalf of:

Grossmann Air Service, Bedarfsluftfahrtunternehmen GmbH & Co. KG, by P. Schmautzer, Rechtsanwalt,

the Austrian Government, by M. Fruhmann, acting as Agent,

the Commission of the European Communities, by K. Wiedner, acting as Agent,

having regard to the Report for the Hearing,

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after hearing the oral observations of Grossmann Air Service, Bedarfsluftfahrtunternehmen GmbH & Co. KG, represented by P. Schmautzer, of the Austrian Government, represented by M. Winkler, acting as Agent, and of the Commission, represented by J.C. Schieferer, acting as Agent, at the hearing on 10 September 2003,

after hearing the Opinion of the Advocate General at the sitting on 16 October 2003,

gives the following

Judgment

Costs

44. The costs incurred by the Austrian Government and by the Commission, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the proceedings pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT (Sixth Chamber),

in answer to the questions referred to it by the Bundesvergabeamt by order of 14 May 2002, hereby rules:

1. Articles 1(3) and 2(1)(b) 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 relating to the coordination of procedures for the award of public service contracts, must be interpreted as not precluding a person from being regarded, once a public contract has been awarded, as having lost his right of access to the review procedures provided for by the Directive if he did not participate in the award procedure for that contract on the ground that he was not in a position to supply all the services for which bids were invited, because there were allegedly discriminatory specifications in the documents relating to the invitation to tender, but he did not seek review of those specifications before the contract was awarded.

2. Article 1(3) of Directive 89/665, as amended by Directive 92/50, must be interpreted as precluding a person who has participated in a contract award procedure from being regarded as having lost his interest in obtaining the contract on the ground that, before seeking the review provided for by the Directive, he failed to refer the case to a conciliation committee such as Bundes-Vergabekontrollkommission (Federal Public Procurement Review Commission, established by the Bundesgesetz über die Vergabe von Aufträgen (Bundesvergabegesetz) 1997 (1997 Federal Law on Public Procurement).

1. By order of 14 May 2002, received at the Registry of the Court on 20 June 2002, the Bundesvergabeamt (Federal Public Procurement Office) referred to the Court for a preliminary ruling under Article 234 EC three questions on the interpretation of Articles 1(3) and 2(1)(b) 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 relating to the coordination of procedures for the award of public service contracts (OJ 1992 L 209, p. 1) (" Directive 89/665").

2. Those questions were raised in a dispute between Grossmann Air Service, Bedarfsluftfahrtunternehmen GmbH & Co. KG (" Grossmann") and Republik Osterreich (Republic of Austria), represented by the Federal Ministry of Finance (" the Ministry"), concerning an award procedure for a public

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contract.

Legal background

Community legislation

3. Articles 1(1) and (3) of Directive 89/665 provide:

" 1. The Member States shall take the measures necessary to ensure that, as regards contract award procedures falling within the scope of Directives 71/305/EEC, 77/62/EEC and 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. The Member States shall ensure that the review procedures are available, under detailed rules which the Member States may establish, at least to any person having or having had an interest in obtaining a particular public supply or public works contract and who has been or risks being harmed by an alleged infringement. In particular, the Member States may require that the person seeking the review must have previously notified the contracting authority of the alleged infringement and of his intention to seek review.

"

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

" 1. 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.

"

National legislation

5. Directive 89/665 was transposed into Austrian law by the Bundesgesetz über die Vergabe von Aufträgen (Bundesvergabegesetz) 1997 (1997 Federal Law on Public Procurement, BGBl. I, 1997/56, " the BVergG"). The BVergG provides for the creation of the Bundes-Vergabekontrollkommission (Federal Public Procurement Review Commission, " the B-VKK") and of the Bundesvergabeamt (Federal Public Procurement Office).

6. Paragraph 109 of the BVergG sets out the powers of the B-VKK. It contains the following provisions:

" 1. The B-VKK shall be competent:

(1) until such time as the contract is awarded, to reconcile any differences of opinion between the awarding body and one or more candidates or tenderers concerning the application of the present

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federal law or its implementing regulations.

...

6. A request for the B-VKK to take action made under paragraph 1(1) must be submitted to the directors of the Commission as soon as possible after the difference of opinion comes to light.

7. If the B-VKK does not take action following a request from the awarding body, it must inform that body immediately it does take action.

8. The awarding body may not award the contract until four weeks after ... it has been informed in accordance with paragraph 7, failing which the tendering procedure shall be declared void....

"

7. Paragraph 113 of the BVergG sets out the powers of the Bundesvergabeamt. It provides:

" 1. The Bundesvergabeamt is responsible on application for carrying out a review procedure in accordance with the following provisions.

2. To preclude infringements of this Federal Law and of the regulations implementing it, the Bundesvergabeamt is authorised until the time of the award:

(1) to adopt interim measures and

(2) to set aside unlawful decisions of the contracting authority.

3. After the award of the contract or the close of the contract award procedure, the Bundesvergabeamt is competent to determine whether, on grounds of infringement of this Federal Law or of any regulations issued under it, the contract has not been awarded to the best tenderer....

"

8. Paragraph 115(1) of the BVergG provides that:

" Where an undertaking claims to have an interest in the conclusion of a contract within the scope of this Federal Law, it may apply for the contracting authority ' s decision in the contract award procedure to be reviewed on the ground of unlawfulness, provided that it has been or risks being harmed by the alleged infringement."

9. According to Paragraph 122(1) of the BVergG, " in the event of a culpable breach of the Federal Law or its implementing rules by the organs of an awarding body, an unsuccessful candidate or tenderer may bring a claim against the contracting authority to which the conduct of the organs of the awarding body is attributable for reimbursement of the costs incurred in drawing up its bid and other costs borne as a result of its participation in the tendering procedure."

10. Under Paragraph 125(2) of the BVergG, a claim for damages, which must be brought before the civil courts, is admissible only if the Bundesvergabeamt has made a declaration under Paragraph 113(3) prior to that claim being made. The civil court called upon to hear the claim for damages, and the parties to the proceedings before the Bundesvergabeamt, are bound by that declaration.

The dispute in the main proceedings and the questions referred to the Court for a preliminary ruling

11. On 27 January 1998, the Ministry invited tenders for " the provision for the Austrian Federal Government and its delegations of non-scheduled passenger transport services by air in executive jets and aircraft". Grossmann participated in the award procedure for that contract by submitting a tender.

12. On 3 April 1998, the Ministry decided to annul the first invitation to tender, in accordance with Paragraph 55(2) of the BVergG, which provides that " the invitation to tender may be revoked

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when, after offers have been rejected pursuant to Paragraph 52, only one offer remains".

13. On 28 July 1998, the Ministry issued another invitation to tender for non-scheduled passenger transport services by air for the Austrian Federal Government and its delegations. Grossmann obtained the documents for that invitation to tender, but it did not submit an offer.

14. By letter of 8 October 1998, the Austrian Government notified Grossmann of its intention to award the contract to Lauda Air Luftfahrt AG (" Lauda Air"). Grossmann received that letter on the following day. The contract with Lauda Air was concluded on 29 October 1998.

15. By application dated 19 October 1998, posted on 23 October and received at the Bundesvergabeamt on 27 October 1998, Grossmann applied to have the contracting authority ' s decision to award the contract to Lauda Air set aside. In support of its application Grossmann claimed essentially that the invitation to tender had been tailored from the beginning to one tenderer, namely Lauda Air.

16. By decision of 4 January 1999, the Bundesvergabeamt dismissed Grossmann ' s application pursuant to Paragraphs 115(1) and 113(2) and (3) of the BVergG, on the ground that Grossmann had failed to assert its legal interest in obtaining the entire contract and, that in any event, after the award of the contract, the Bundesvergabeamt no longer has competence to set it aside.

17. As regards the absence of interest, the Bundesvergabeamt found that since it did not have large aircraft available to it, Grossmann was not in a position to provide all the services requested, and that it had not submitted a tender in the second award procedure for the contract at issue.

18. Grossmann appealed to the Verfassungsgerichtshof (Constitutional Court) (Austria) seeking to have the Bundesvergabeamt ' s decision set aside. By judgment of 10 December 2001, the Verfassungsgerichtshof set aside that decision for breach of the constitutionally guaranteed right to proceedings before the ordinary courts, on the ground that the Bundesvergabeamt had wrongly failed to refer a question to the Court of Justice for a preliminary ruling relating to whether its interpretation of Paragraph 115(1) of the BVergG was in accordance with Community law.

19. In its order for reference, the Bundesvergabeamt explains that the provisions of Paragraph 109(1), (6) and (8) of the BVergG are intended to guarantee that no contract will be concluded during the conciliation procedure. It adds that if an amicable agreement is not reached during that procedure an undertaking may still request, before the conclusion of the contract, the annulment of any decision of the contracting authority, including the decision awarding the contract, but subsequently the Bundesvergabeamt is competent only to rule that the contract has not been awarded to the tenderer who made the best offer by reason of an infringement of the BVergG or its implementing rules.

20. The national court points out that, in this case, Grossmann ' s application to have the decision awarding the contract to Lauda Air set aside, was indeed received before the contract between Lauda Air and the contracting authority was concluded, but that it could be dealt with by the Bundesvergabeamt, within the time-limit prescribed, only after the conclusion of the contract. The Bundesvergabeamt also states that the application was only posted on 23 October 1998, although the contracting authority had notified Grossmann by letter of 8 October 1998, received the following day, of its intention to award the contract to Lauda Air.

21. The Bundesvergabeamt thus finds that Grossmann allowed 14 days to elapse between notification to it of the decision awarding the contract (9 October 1998) and the institution by Grossmann of proceedings before the Bundesvergabeamt (23 October 1998), without any request for conciliation being lodged with the B-VKK (a request which would have caused the four-week time-limit laid down in Paragraph 109(8) of the BVergG, during which the contracting authority may not award the contract, to begin to run) or, in the case of a failure of the conciliation process, without the B-VKK being

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requested to grant interim measures and to set aside the decision awarding the contract. Therefore, according to the national court, the question arises whether Grosmann can establish an interest in bringing proceedings, in accordance with Article 1(3) of Directive 89/665, since as it was not in a position to provide the services in question, owing, it claims, to provisions in the documents relating to the invitation to tender that are discriminatory within the meaning of Article 2(1)(b) of the Directive, it did not submit an offer in the contract award procedure at issue.

22. It was in those circumstances that the Bundesvergabeamt decided to stay proceedings and to refer the following questions to the Court for a preliminary ruling:

" (1) Is Article 1(3) of... Directive 89/665... to be interpreted as meaning that the review procedure must be available to any undertaking which has submitted a bid, or applied to participate, in a public procurement procedure?

In the event that the answer to Question 1 is no:

(2) Is the abovementioned provision to be understood as meaning that an undertaking only has or had an interest in a particular public contract if in addition to its participating in the public procurement procedure it takes all steps available to it under national law to prevent the contract from being awarded to another bidder?

(3) Is Article 1(3) of Directive 89/665, in conjunction with Article 2(1) thereof, to be interpreted as meaning that an undertaking must be afforded the opportunity in law to seek review of an award procedure regarded by it as unlawful or discriminatory even where it is not capable of performing the totality of the services for which bids were invited and, for that reason, did not submit a bid in that award procedure.

"

The first and third questions

23. In the light of the facts in the main proceedings, as described by the national court, the first and third questions, which it is appropriate to examine together, must be regarded as asking, essentially, whether Articles 1(3) and 2(1)(b) of Directive 89/665 must be interpreted as precluding a person from being regarded, once a public contract has been awarded, as having lost his right of access to the review procedures provided for by the Directive if he did not participate in the award procedure for that contract on the ground that he was not in a position to supply all the services for which bids were invited, because there were allegedly discriminatory specifications in the documents relating to the invitation to tender, but he did not seek review of those specifications before the contract was awarded.

24. In order to assess whether a person in a situation such as that referred to in the questions thus reformulated can establish an interest in bringing proceedings within the meaning of Article 1(3) of Directive 89/665, it is appropriate to consider the fact that he neither participated in the contract award procedure at issue nor did he appeal against the invitation to tender before the contract was awarded.

Failure to participate in the contract award procedure

25. In that regard, it must be recalled that, in accordance with Article 1(3) of Directive 89/665, the Member States are required to ensure that the review procedures provided for are available " at least" to any person having or having had an interest in obtaining a particular public contract and who has been or risks being harmed by an alleged infringement of the Community law on public procurement or national rules transposing that law.

26. It follows that the Member States are not obliged to make those review procedures available

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to any person wishing to obtain a public contract, but may also require that the person concerned has been or risks being harmed by the infringement he alleges (Case C-249/01 Hackermüller [2003] ECR I-6319, paragraph 18).

27. In that sense, as the Commission pointed out in its written observations, participation in a contract award procedure may, in principle, with regard to Article 1(3) of Directive 89/665, validly constitute a condition which must be fulfilled before the person concerned can show an interest in obtaining the contract at issue or that he risks suffering harm as a result of the allegedly unlawful nature of the decision to award that contract. If he has not submitted a tender it will be difficult for such a person to show that he has an interest in challenging that decision or that he has been harmed or risks being harmed as a result of that award decision.

28. However, where an undertaking has not submitted a tender because there were allegedly discriminatory specifications in the documents relating to the invitation to tender, or in the contract documents, which have specifically prevented it from being in a position to provide all the services requested, it would be entitled to seek review of those specifications directly, even before the procedure for awarding the contract concerned is terminated.

29. On the one hand, it would be too much to require an undertaking allegedly harmed by discriminatory clauses in the documents relating to the invitation to tender to submit a tender, before being able to avail itself of the review procedures provided for by Directive 89/665 against such specifications, in the award procedure for the contract at issue, even though its chances of being awarded the contract are non-existent by reason of the existence of those specifications.

30. On the other hand, it is clear from the wording of Article 2(1)(b) of Directive 89/665 that the review procedures to be organised by the Member States in accordance with the Directive must, in particular, " set aside decisions taken unlawfully, including the removal of discriminatory technical, economic or financial specifications... ". It must, therefore, be possible for an undertaking to seek review of such discriminatory specifications directly, without waiting for the contract award procedure to be terminated.

Absence of proceedings against the invitation to tender

31. In this case, Grossmann complains that the contracting authority imposed requirements in respect of a contract for non-scheduled air transport services that only an air company offering scheduled flights would be in a position to fulfil, which had the effect of reducing the number of candidates capable of providing all the services required.

32. It is apparent, however, from the file that Grossmann did not seek review of the contracting authority ' s decision determining the specifications of the invitation to tender directly, but waited until the decision to award the contract to Lauda Air was notified before asking the Bundesvergabeamt to set that decision aside.

33. In that regard, in its order for reference the Bundesvergabeamt points out that, under Paragraph 115(1) of the BVergG, an undertaking may institute review proceedings against a decision of the contracting authority where it claims to have an interest in the conclusion of a contract in an award procedure and the unlawfulness on which it relies has caused or risks causing it harm.

34. The national court therefore asks, essentially, whether Article 1(3) of Directive 89/665 must be interpreted as meaning that it precludes a person who not only has not participated in the award procedure for a public contract but has not sought any review of the decision of the contracting authority determining the specifications of the invitation to tender either, from being regarded as having lost his interest in obtaining the contract and, therefore, the right of access to the review procedures provided for by th e Directive.

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35. This question must be examined in the light of the purpose of Directive 89/665.

36. In that regard, it is appropriate to recall that, as is apparent from the first and second recitals in the preamble, Directive 89/665 is intended to strengthen the existing mechanisms, both at national and Community level, to ensure the effective application of Community directives relating to public procurement, in particular at a stage when infringements can still be remedied. To that effect, Article 1(1) of that directive requires Member States to guarantee that unlawful decisions of contracting authorities can be subjected to effective review which is as swift as possible (see, in particular, Case C-81/98 Alcatel Austria and Others [1999] ECR I-7671, paragraphs 33 and 34, Case C-470/99 Universale-Bau and Others [2002] ECR I-11617, paragraph 74, and Case C-410/01 Fritsch, Chiari & Partner and Others [2003] ECR I-6413, paragraph 30).

37. It must be pointed out that the fact that a person does not seek review of a decision of the contracting authority determining the specifications of an invitation to tender which in his view discriminate against him, in so far as they effectively disqualify him from participating in the award procedure for the contract at issue, but awaits notification of the decision awarding the contract and then challenges it before the body responsible, on the ground specifically that those specifications are discriminatory, is not in keeping with the objectives of speed and effectiveness of Directive 89/665.

38. Such conduct, in so far as it may delay, without any objective reason, the commencement of the review procedures which Member States were required to institute by Directive 89/665 impairs the effective implementation of the Community directives on the award of public contracts.

39. In those circumstances, a refusal to acknowledge the interest in obtaining the contract in question and, therefore, the right of access to the review procedures provided for by Directive 89/665 of a person who has not participated in the contract award procedure, or sought review of the decision of the contracting authority laying down the specifications of the invitation to tender, does not impair the effectiveness of that directive.

40. Having regard to the foregoing, the answer to the first and third questions must be that Articles 1(3) and 2(1)(b) of Directive 89/665 must be interpreted as not precluding a person from being regarded, once a public contract has been awarded, as having lost his right of access to the review procedures provided for by the Directive if he did not participate in the award procedure for that contract on the ground that he was not in a position to supply all the services for which bids were invited, because there were allegedly discriminatory specifications in the documents relating to the invitation to tender, but he did not seek review of those specifications before the contract was awarded.

Second question

41. In the light of the facts in the main proceedings, as set out by the national court, the second question must be understood as asking, essentially, whether Article 1(3) of Directive 89/665 must be interpreted as precluding a person who has participated in a contract award procedure from being regarded as having lost his interest in obtaining the contract on the ground that, before seeking the review provided for by the Directive, he failed to refer the case to a conciliation committee such as the B-VKK.

42. In that regard, it is sufficient to recall that, in paragraphs 31 and 34 of Fritsch , Chiari & Partner and Others , the Court held that, even though Article 1(3) of Directive 89/665 expressly allows Member States to determine the detailed rules according to which they must make the review procedures provided for in that directive available to any person having or having had an interest in obtaining a particular public contract and who has been or risks being harmed by an alleged infringement it none the less does not authorise them to give the term " interest in

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obtaining a public contract" an interpretation which may limit the effectiveness of that directive. The fact that access to the review procedures provided for by the Directive is made subject to prior referral to a conciliation committee such as the B-VKK would be contrary to the objectives of speed and effectiveness of that directive.

43. Accordingly, the answer to the second question must be that Article 1(3) of Directive 89/665 must be interpreted as precluding a person who has participated in a contract award procedure from being regarded as having lost his interest in obtaining the contract on the ground that, before seeking the review provided for by the Directive, he failed to refer the case to a conciliation committee such as the B-VKK.

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NATCOUR *A9* Bundesvergabeamt, Beschluß vom 14/05/2002

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PROCEDU Reference for a preliminary ruling

ADVGEN Geelhoed

JUDGRAP Schintgen

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Order of the President of the Court
of 13 March 1987
Commission of the European Communities v Ireland. Public works contract - Community tender procedure - Article 30 of the EEC Treaty. Case 45/87 R.

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APPLICATION FOR INTERIM MEASURES - INTERIM MEASURES - CONDITIONS FOR GRANTING - PRIMA FACIE CASE - SERIOUS AND IRREPARABLE DAMAGE - WEIGHING UP ALL THE INTERESTS AT STAKE

(EEC TREATY, ART. 186; RULES OF PROCEDURE, ART. 83 (2)*)

IN CASE 45/87 R

COMMISSION OF THE EUROPEAN COMMUNITIES, REPRESENTED BY ITS AGENT, E . L . WHITE, A MEMBER OF ITS LEGAL DEPARTMENT, WITH AN ADDRESS FOR SERVICE IN LUXEMBOURG AT THE OFFICE OF G. KREMLIS, JEAN MONNET BUILDING, KIRCHBERG,

APPLICANT,

V

IRELAND, REPRESENTED BY ITS AGENT, J. L. DOCKERY, CHIEF STATE SOLICITOR, WITH AN ADDRESS FOR SERVICE IN LUXEMBOURG AT THE IRISH EMBASSY, 28 ROUTE D' ARLON,

DEFENDANT,

APPLICATION PRIMARILY FOR AN INTERIM ORDER THAT THE DEFENDANT SHOULD TAKE SUCH MEASURES AS MAY BE NECESSARY TO PREVENT, UNTIL SUCH TIME AS THE COURT HAS GIVEN FINAL JUDGMENT IN THIS CASE OR A SETTLEMENT HAS BEEN REACHED BETWEEN THE COMMISSION AND IRELAND, THE AWARD OF A CONTRACT FOR WORK RELATING TO THE DUNDALK WATER SUPPLY AUGMENTATION SCHEME : CONTRACT NO 4,

THE PRESIDENT OF THE COURT OF JUSTICE

OF THE EUROPEAN COMMUNITIES

MAKES THE FOLLOWING

ORDER

ON THOSE GROUNDS,

THE PRESIDENT,

BY WAY OF INTERIM DECISION,

HEREBY ORDERS AS FOLLOWS :

(1) THE APPLICATION IS DISMISSED.

(2) THIS ORDER CANCELS AND REPLACES THE ORDER OF 16 FEBRUARY 1987.

(3) COSTS ARE RESERVED.

LUXEMBOURG, 13 MARCH 1987.

1 BY AN APPLICATION LODGED AT THE COURT REGISTRY ON 13 FEBRUARY 1987, THE

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COMMISSION OF THE EUROPEAN COMMUNITIES BROUGHT AN ACTION UNDER ARTICLE 169 OF THE EEC TREATY FOR A DECLARATION THAT BY ADOPTING THE TENDERING PROCEDURE RELATING TO THE DUNDALK WATER SUPPLY AUGMENTATION SCHEME : CONTRACT NO 4, IRELAND HAD FAILED TO COMPLY WITH ITS OBLIGATIONS UNDER ARTICLE 30 OF THE EEC TREATY AND COUNCIL DIRECTIVE 71/305/EEC OF 26*JULY 1971 CONCERNING THE COORDINATION OF PROCEDURES FOR THE AWARD OF PUBLIC WORKS CONTRACTS (OFFICIAL JOURNAL, ENGLISH SPECIAL EDITION 1971 (II), P. 682), AND IN PARTICULAR ARTICLE 10 (2) THEREOF.

2 BY AN APPLICATION LODGED AT THE COURT REGISTRY ON THE SAME DAY, THE APPLICANT REQUESTED THE COURT, UNDER ARTICLE 186 OF THE EEC TREATY AND ARTICLE 83 OF THE RULES OF PROCEDURE, PRIMARILY TO MAKE AN INTERIM ORDER THAT IRELAND SHOULD TAKE SUCH MEASURES AS MAY BE NECESSARY TO PREVENT, UNTIL SUCH TIME AS THE COURT HAS GIVEN FINAL JUDGMENT IN THIS CASE OR A SETTLEMENT HAS BEEN REACHED BETWEEN THE COMMISSION AND IRELAND, THE AWARD OF A CONTRACT FOR THE WORK RELATING TO THE DUNDALK WATER SUPPLY AUGMENTATION SCHEME : CONTRACT NO 4. ALSO IN THAT APPLICATION, IN THE EVENT THAT SUCH A CONTRACT SHOULD ALREADY HAVE BEEN AWARDED, THE COMMISSION REQUESTED THE COURT TO ORDER THE DEFENDANT TO TAKE SUCH MEASURES AS MAY BE NECESSARY TO CANCEL THAT CONTRACT .

3 IT APPEARS FROM THE DOCUMENTS IN THE CASE, IN PARTICULAR A LETTER DATED 3 FEBRUARY 1987, THAT IRELAND GAVE AN UNDERTAKING TO THE COMMISSION NOT TO AWARD THE CONTRACT BEFORE 20 FEBRUARY 1987. IRELAND STATED, MOREOVER, THAT IT WOULD NOT BE ABLE TO DELAY THE AWARD ANY FURTHER UNLESS THE COURT OF JUSTICE SO ORDERED.

4 BY ORDER OF 16 FEBRUARY 1987 PURSUANT TO ARTICLE 84 (2) OF THE RULES OF PROCEDURE, THE PRESIDENT OF THE COURT OF JUSTICE THEREFORE DECIDED IN THE INTERESTS OF JUSTICE AND IN ORDER TO MAINTAIN THE STATUS QUO TO ORDER THE DEFENDANT TO TAKE SUCH MEASURES AS MIGHT BE NECESSARY TO PREVENT THE AWARD OF THE CONTRACT IN QUESTION BY DUNDALK URBAN DISTRICT COUNCIL BEFORE THE FINAL ORDER WAS DELIVERED IN THE PROCEEDINGS FOR INTERIM MEASURES IN CASE 45/87 R.

5 IRELAND PRESENTED ITS WRITTEN OBSERVATIONS ON 2 MARCH 1987. THE PARTIES PRESENTED ORAL ARGUMENT ON 9 MARCH 1987.

6 BEFORE CONSIDERING THE MERITS OF THIS APPLICATION FOR INTERIM MEASURES IT MAY BE USEFUL TO GIVE A BRIEF DESCRIPTION OF THE BACKGROUND TO THIS CASE AND IN PARTICULAR OF THE VARIOUS FACTS THAT PROMPTED THE COMMISSION TO BRING THE MAIN PROCEEDINGS.

7 DUNDALK URBAN DISTRICT COUNCIL IS THE PROMOTER OF THE PROJECT KNOWN AS THE DUNDALK WATER SUPPLY AUGMENTATION SCHEME. CONTRACT NO 4 OF THAT SCHEME CONCERNS THE CONSTRUCTION OF A WATER MAIN TO TRANSPORT WATER FROM THE RIVER FANE SOURCE TO A TREATMENT PLANT AT CAVAN HILL AND THENCE INTO THE EXISTING TOWN SUPPLY SYSTEM. THE INVITATION TO TENDER FOR THIS CONTRACT BY OPEN PROCEDURE WAS PUBLISHED ON PAGE 13 OF SUPPLEMENT NO S*50 OF THE OFFICIAL JOURNAL OF THE EUROPEAN COMMUNITIES OF 13 MARCH 1986. AT POINT 13 OF THE PUBLISHED NOTICE IT WAS STATED THAT :

"THE CONTRACT WILL BE AWARDED, SUBJECT TO THE DUNDALK URBAN DISTRICT

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COUNCIL BEING SATISFIED AS TO THE ABILITY OF THE CONTRACTOR TO CARRY OUT THE WORK, TO THE CONTRACTOR WHO SUBMITS A TENDER, IN ACCORDANCE WITH THE TENDER DOCUMENTS, WHICH IS ADJUDGED TO BE THE MOST ECONOMICALLY ADVANTAGEOUS TO THE COUNCIL IN RESPECT OF PRICE, PERIOD OF COMPLETION, TECHNICAL MERIT AND RUNNING COSTS.

THE LOWEST OR ANY TENDER NEED NOT NECESSARILY BE ACCEPTED."

8 IN RESPONSE TO THAT INVITATION TO TENDER, AN IRISH CONTRACTOR, P.*J.*WALLS (CIVIL) LTD (HEREINAFTER REFERRED TO AS "WALLS"),SUBMITTED THREE TENDERS. ONE WAS BASED ON THE USE OF ASBESTOS CEMENT PIPES SUPPLIED BY A SPANISH COMPANY, URALITA SA. WALLS CONSIDERED THAT THAT TENDER, WHICH WAS THE LOWEST IT HAD SUBMITTED, OFFERED IT THE BEST POSSIBILITY OF OBTAINING THE CONTRACT. HOWEVER, THE ENGINEERS CONSULTED BY THE DUNDALK AUTHORITIES CONCERNING THE PROJECT CONSIDERED THAT THE TENDER DID NOT COMPLY WITH CLAUSE 4.29 OF THE SPECIFICATION FOR THE CONTRACT. THAT CLAUSE PROVIDES THAT :

"ASBESTOS CEMENT PRESSURE PIPES SHALL BE CERTIFIED AS COMPLYING WITH IRISH STANDARD SPECIFICATION 188-1975 IN ACCORDANCE WITH THE IRISH STANDARD MARK LICENSING SCHEME OF THE INSTITUTE FOR INDUSTRIAL RESEARCH AND STANDARDS. ALL ASBESTOS CEMENT WATER MAINS ARE TO HAVE A BITUMINOUS COATING INTERNALLY AND EXTERNALLY. SUCH COATINGS SHALL BE APPLIED AT THE FACTORY BY DIPPING."

THE CONSULTING ENGINEERS THEREFORE INFORMED WALLS THAT THAT TENDER COULD NOT BE CONSIDERED. WALLS AND URALITA THEN COMPLAINED TO THE COMMISSION THAT THEIR TENDER HAD NOT BEEN DULY CONSIDERED.

9 IN FACT ONLY ONE MANUFACTURER HAS OBTAINED APPROVAL FROM THE INSTITUTE FOR INDUSTRIAL RESEARCH AND STANDARDS AS REGARDS IRISH STANDARD (IS) 188 AND IS AUTHORIZED TO AFFIX THE IRISH STANDARD MARK TO PIPES OF THE TYPE REQUIRED FOR THE WORK IN QUESTION. THAT COMPANY IS TEGRAL PIPES LTD, OF DROGHEDA, IRELAND.

10 THE COMMISSION TOOK THE VIEW THAT CLAUSE 4.29 INFRINGED ARTICLES 30 TO 36 OF THE EEC TREATY AND ARTICLE 10 OF COUNCIL DIRECTIVE 71/305/EEC AND THEREFORE INITIATED THE PRE-LITIGATION PROCEDURE UNDER ARTICLE 169 OF THE EEC TREATY BY A TELEX DATED 11 AUGUST 1986. THAT TELEX DREW IRELAND' S ATTENTION TO THE ALLEGED INFRINGEMENTS AND INVITED IT TO SUBMIT ITS OBSERVATIONS. BY LETTER DATED 9 SEPTEMBER 1986 THE DEFENDANT STATED THAT IT DID NOT ACCEPT THE VALIDITY OF THE COMPLAINT SINCE THE COMPLAINANTS HAD NOT SUBMITTED ANY EVIDENCE THAT THEIR PRODUCTS MET THE REQUIREMENTS OF IS 188 OR ANY EQUIVALENT RECOGNIZED INTERNATIONAL STANDARD.

11 BY LETTER DATED 20 OCTOBER 1986 THE COMMISSION FORMALLY REITERATED ITS VIEWS TO THE DEFENDANT AND INVITED IT TO SUBMIT ITS OBSERVATIONS WITHIN TWO WEEKS OF RECEIVING THE LETTER. IRELAND' S REPLY DID NOT SATISFY THE COMMISSION WHICH, BY LETTER OF 13 JANUARY 1987, DELIVERED A REASONED OPINION STATING THAT CLAUSE 4.29 INFRINGED ARTICLES 30 TO 36 OF THE EEC TREATY AND ARTICLE 10 OF COUNCIL DIRECTIVE 71/305/EEC; THE COMMISSION REQUESTED IRELAND TO TAKE ALL NECESSARY MEASURES TO COMPLY WITH THE REASONED OPINION WITHIN 15 DAYS FOLLOWING NOTIFICATION. BY LETTER DATED 3 FEBRUARY 1987 IRELAND

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STATED THAT IT STOOD BY THE VIEWS EXPRESSED IN ITS LETTER OF 9*SEPTEMBER 1986. IT DID, HOWEVER, ALSO UNDERTAKE NOT TO AWARD THE CONTRACT BEFORE 20 FEBRUARY 1987. SINCE IRELAND HAD NOT COMPLIED WITH THE REASONED OPINION, THE COMMISSION APPLIED TO THE COURT ON 13 FEBRUARY 1987 PURSUANT TO ARTICLE 169 OF THE EEC TREATY FOR A DECLARATION THAT IRELAND HAD FAILED TO FULFIL ITS OBLIGATIONS UNDER THE TREATY .

12 PURSUANT TO ARTICLE 186 OF THE EEC TREATY, THE COURT OF JUSTICE MAY IN CASES BEFORE IT PRESCRIBE ANY NECESSARY INTERIM MEASURES.

13 AS A CONDITION FOR THE GRANT OF A MEASURE SUCH AS THAT REQUESTED, ARTICLE 83 (2) OF THE RULES OF PROCEDURE PROVIDES THAT AN APPLICATION FOR INTERIM MEASURES MUST STATE THE CIRCUMSTANCES GIVING RISE TO URGENCY AND THE FACTUAL AND LEGAL GROUNDS ESTABLISHING A PRIMA FACIE CASE FOR THE INTERIM MEASURES APPLIED FOR.

14 IN ORDER TO ESTABLISH A PRIMA FACIE CASE FOR THE INTERIM MEASURE IT SEEKS THE APPLICANT REFERS TO THE TWO SUBMISSIONS ON WHICH IT BASES ITS MAIN APPLICATION. ITS FIRST SUBMISSION IS THAT, HAVING REGARD TO ITS DETAILED TECHNICAL REQUIREMENTS, CLAUSE 4.29 OF THE SPECIFICATIONS FOR THE CONTRACT IS INCOMPATIBLE WITH ARTICLE 10 OF COUNCIL DIRECTIVE 71/305/EEC .

15 ARTICLE 10 (1) OF DIRECTIVE 71/305 STATES THAT THE "TECHNICAL SPECIFICATIONS MAY BE DEFINED BY REFERENCE TO NATIONAL STANDARDS ". HOWEVER, ARTICLE 10 (2) LAYS DOWN CERTAIN CONDITIONS WITH WHICH SUCH TECHNICAL SPECIFICATIONS MUST COMPLY. IT PROVIDES : "UNLESS SUCH SPECIFICATIONS ARE JUSTIFIED BY THE SUBJECT OF THE CONTRACT, MEMBER STATES SHALL PROHIBIT THE INTRODUCTION INTO THE CONTRACTUAL CLAUSES RELATING TO A GIVEN CONTRACT OF TECHNICAL SPECIFICATIONS WHICH MENTION PRODUCTS OF A SPECIFIC MAKE OR SOURCE OR OF A PARTICULAR PROCESS AND WHICH THEREFORE FAVOUR OR ELIMINATE CERTAIN UNDERTAKINGS. IN PARTICULAR, THE INDICATION OF TRADE MARKS, PATENTS, TYPES OR OF A SPECIFIC ORIGIN OR PRODUCTION, SHALL BE PROHIBITED. HOWEVER, IF SUCH INDICATION IS ACCOMPANIED BY THE WORDS 'OR EQUIVALENT' , IT SHALL BE AUTHORIZED IN CASES WHERE THE AUTHORITIES AWARDING CONTRACTS ARE UNABLE TO GIVE A DESCRIPTION OF THE SUBJECT OF THE CONTRACT USING SPECIFICATIONS WHICH ARE SUFFICIENTLY PRECISE AND INTELLIGIBLE TO ALL PARTIES CONCERNED."

16 THE COMMISSION' S SECOND SUBMISSION IS THAT CLAUSE 4.29 INSERTED IN THE SPECIFICATIONS BY DUNDALK URBAN DISTRICT COUNCIL, A BODY SUBJECT TO THE AUTHORITY OF THE IRISH DEPARTMENT OF THE ENVIRONMENT, CREATES A BARRIER TO TRADE WHICH IS CONTRARY TO ARTICLE 30 OF THE EEC TREATY SINCE IT HAS THE EFFECT OF EXCLUDING THE USE OF PIPES MANUFACTURED IN OTHER MEMBER STATES WHICH WOULD PROVIDE GUARANTEES OF SAFETY, PERFORMANCE AND RELIABILITY EQUIVALENT TO THOSE OFFERED BY PIPES MANUFACTURED BY THE IRISH COMPANY, TEGRAL PIPES LTD, WHICH IS THE ONLY UNDERTAKING CERTIFIED TO IS 188 AS REQUIRED BY THAT CLAUSE. IRELAND HAS, MOREOVER, NOT PUT FORWARD ANY GROUND BASED ON ARTICLE 36 OF THE EEC TREATY OR ON THE "MANDATORY REQUIREMENTS" WITHIN THE MEANING OF THE COURT' S CASE-LAW TO JUSTIFY THAT INFRINGEMENT OF ARTICLE 30 OF THE EEC TREATY. THE EXISTENCE OF SUCH AN INFRINGEMENT IS ALSO CLEARLY BORNE OUT BY THE FACT THAT CONTRACTORS WHICH MIGHT HAVE CONSIDERED SUBMITTING A TENDER BASED ON THE USE OF IMPORTED PIPES WERE DETERRED FROM DOING SO AND A CONTRACTOR WHO DID IN FACT SUBMIT SUCH A

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TENDER WAS HAMPERED BY THE FACT THAT HE WAS UNAWARE OF THE ADDITIONAL CONDITIONS WHICH MIGHT BE IMPOSED IF OTHER PIPES WERE TO BE USED .

17 IN THE WRITTEN OBSERVATIONS SUBMITTED BY IT IN THESE PROCEEDINGS FOR INTERIM MEASURES, THE DEFENDANT ARGUES THAT ARTICLE 30 OF THE EEC TREATY IS NOT APPLICABLE SINCE THERE IS NO BARRIER TO TRADE OR, IN ANY EVENT, NO BARRIER TO TRADE AS A RESULT OF A COMMERCIAL PROVISION OR OTHER MEASURE ADOPTED BY IRELAND. IT REFERS TO THE JUDGMENT OF THE COURT OF 22 MARCH 1977 (IANNELLI & VOLPI SPA V MERONI ((1977)) ECR 577) IN PARAGRAPH 9 OF WHICH THE COURT STATED THAT THE FIELD OF APPLICATION OF ARTICLE 30 OF THE EEC TREATY "DOES NOT INCLUDE OBSTACLES TO TRADE COVERED BY OTHER PROVISIONS OF THE TREATY ". IT POINTS OUT THAT, IN ANY EVENT, ANY BARRIER TO TRADE IN THIS FIELD WOULD BE COVERED BY OTHER PROVISIONS OF COMMUNITY LAW, NAMELY COUNCIL DIRECTIVE 71/305/EEC ADOPTED PURSUANT TO ARTICLE 57 (2) AND ARTICLES 66 AND 100 OF THE EEC TREATY, AND IS THUS EXCLUDED FROM THE SCOPE OF ARTICLE 30 OF THE TREATY. THE PROPER COURSE FOR THE COMMISSION TO TAKE IN ORDER TO PUT AN END TO THE BARRIERS TO TRADE RESULTING FROM DISPARITY BETWEEN NATIONAL STANDARDS IS TO PROPOSE MEASURES OF HARMONIZATION UNDER ARTICLE 100 OF THE EEC TREATY RATHER THAN TO APPLY ARTICLE 30 .

18 IT DOES NOT APPEAR THAT THE FIRST SUBMISSION RELIED ON BY THE COMMISSION CAN ESTABLISH A PRIMA FACIE CASE FOR THE INTERIM MEASURES APPLIED FOR . IT IS CLEAR FROM THE SIXTH RECITAL IN THE PREAMBLE TO DIRECTIVE 71/305/EEC READ IN CONJUNCTION WITH ARTICLE 5 (3), WHICH PROVIDES THAT :

> "THE PROVISIONS OF THIS DIRECTIVE SHALL NOT APPLY TO PUBLIC WORKS CONTRACTS AWARDED BY THE PRODUCTION, DISTRIBUTION, TRANSMISSION OR TRANSPORTATION SERVICES FOR WATER AND ENERGY",

THAT THE PUBLIC WORKS CONTRACT NO 4 OF THE DUNDALK WATER SUPPLY AUGMENTATION SCHEME DOES NOT FALL WITHIN THE SCOPE OF THAT DIRECTIVE AND IS NOT SUBJECT TO THE REQUIREMENTS LAID DOWN THEREIN.

19 AS REGARDS THE COMMISSION' S SECOND SUBMISSION, IT SHOULD BE POINTED OUT THAT ONCE IT IS FOUND THAT PRIMA FACIE DIRECTIVE 71/305/EEC DID NOT APPLY TO THE PUBLIC WORKS CONTRACT IN QUESTION, IRELAND' S ARGUMENTS AGAINST THE APPLICABILITY OF ARTICLE 30 OF THE EEC TREATY WHICH IT BASES ON THE JUDGMENT IN IANNELLI & VOLPI SPA V MERONI BECOME WHOLLY IRRELEVANT. FURTHERMORE, AS THE COMMISSION HAS RIGHTLY POINTED OUT, SECONDARY COMMUNITY LEGISLATION SUCH AS A DIRECTIVE CANNOT DEROGATE FROM A DIRECTLY APPLICABLE PROVISION OF THE EEC TREATY SUCH AS ARTICLE 30.

20 THE NEXT STEP IS TO EXAMINE WHETHER CLAUSE 4.29 OF THE SPECIFICATIONS MAY AMOUNT TO A BARRIER TO TRADE AND WHETHER SUCH A BARRIER IS IMPUTABLE TO A MEASURE ADOPTED BY IRELAND.

21 ALTHOUGH IT WOULD SEEM NORMAL THAT IN A PUBLIC WORKS CONTRACT SUCH AS THAT AT ISSUE THE MATERIALS TO BE USED MAY BE REQUIRED TO COMPLY WITH A CERTAIN TECHNICAL STANDARD, EVEN A NATIONAL STANDARD, IN ORDER TO ENSURE THAT THEY ARE APPROPRIATE AND SAFE, SUCH A TECHNICAL STANDARD CANNOT, WITHOUT CREATING PRIMA FACIE A BARRIER TO TRADE WHICH IS CONTRARY TO ARTICLE 30 OF THE EEC TREATY, HAVE THE EFFECT OF EXCLUDING, WITHOUT SO MUCH AS AN EXAMINATION, ANY TENDER BASED ON ANOTHER TECHNICAL STANDARD RECOGNIZED

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IN ANOTHER MEMBER STATE AS PROVIDING EQUIVALENT GUARANTEES OF SAFETY, PERFORMANCE AND RELIABILITY

22 IN THIS CASE IT SHOULD BE OBSERVED THAT THE AUTOMATIC EFFECT OF CLAUSE 4.29 OF THE SPECIFICATIONS, BY ITSELF AND WITHOUT ANY OTHER JUSTIFICATION, IS TO EXCLUDE ANY TENDER BASED ON THE USE OF ANY TYPES OF PIPES OTHER THAN THOSE CERTIFIED TO COMPLY WITH IS 188, THAT IS TO SAY THOSE MANUFACTURED BY THE ONLY UNDERTAKING CERTIFIED TO THAT STANDARD, TEGRAL PIPES LTD, IRELAND, ALTHOUGH THERE ARE A NUMBER OF FEATURES IN THE DOCUMENTS BEFORE THE COURT THAT SUGGEST THAT THE POSSIBILITY CANNOT NECESSARY BE RULED OUT THAT EQUIVALENT TECHNICAL STANDARDS EXIST IN OTHER MEMBER STATES.

23 SINCE THAT CLAUSE WAS INSERTED IN THE SPECIFICATIONS BY DUNDALK URBAN DISTRICT COUNCIL, A BODY SUBJECT TO THE AUTHORITY OF THE MINISTER FOR THE ENVIRONMENT AND FOR WHOSE ACTS IRELAND IS RESPONSIBLE, THE BARRIER TO INTRA-COMMUNITY TRADE TO WHICH IT PRIMA FACIE GIVES RISE IS IMPUTABLE TO IRELAND.

24 IN THE LIGHT OF THE FOREGOING IT MUST BE CONSIDERED THAT THE COMMISSION HAS INDEED RAISED A MATERIAL ARGUMENT WHICH ESTABLISHES A PRIMA FACIE CASE FOR THE INTERIM MEASURE APPLIED FOR.

25 ALTHOUGH IT MAY BE CONSIDERED THAT IN THIS CASE THE COMMISSION HAS INDICATED FACTUAL AND LEGAL GROUNDS ESTABLISHING A PRIMA FACIE CASE FOR THE INTERIM MEASURE APPLIED FOR, THE COURT STILL HAS TO ASSESS THE CIRCUMSTANCES GIVING RISE TO URGENCY.

26 THE COURT HAS CONSISTENTLY HELD THAT THE URGENCY REQUIRED BY ARTICLE 83 (2) OF THE RULES OF PROCEDURE IN REGARD TO AN APPLICATION FOR INTERIM MEASURES MUST BE ASSESSED ON THE BASIS OF THE NEED TO ADOPT SUCH MEASURES IN ORDER TO AVOID SERIOUS AND IRREPARABLE DAMAGE TO THE PARTY SEEKING THOSE MEASURES.

27 THE COMMISSION SUBMITS THAT IF THE CONTRACT IN QUESTION WERE AWARDED IN A MANNER CONTRARY TO COMMUNITY LAW, IRREPARABLE HARM WOULD BE CAUSED NOT ONLY TO THE INTERESTS OF THE COMMUNITY BUT ALSO TO THOSE OF CONTRACTORS WHOSE TENDERS WERE NOT CONSIDERED AS A RESULT OF CLAUSE 4.29 AND THEIR SUPPLIERS. THE AWARD OF THE CONTRACT WILL CREATE A SITUATION WHEREBY THE INFRINGEMENT BECOMES PROGRESSIVELY IRREVERSIBLE AS COMMITMENTS ARE ENTERED INTO BY THE CONTRACTOR, ORDERS ARE PLACED AND PHYSICAL WORK COMMENCES ON THE EXECUTION OF THE CONTRACT. THE URGENCY FOR THE INTERIM MEASURES APPLIED FOR IS SUFFICIENTLY HIGHLIGHTED BY THE MERE FACT THAT IRELAND' S UNDERTAKING NOT TO AWARD THE CONTRACT IN QUESTION EXPIRED ON 20 FEBRUARY 1987.

28 THE COMMISSION ALSO STATES THAT A DELAY IN THE AWARD OF THE CONTRACT WILL NOT INVOLVE SERIOUS INCONVENIENCE FOR THE IRISH AUTHORITIES SINCE OTHER PHASES OF THE DUNDALK WATER SUPPLY AUGMENTATION SCHEME ARE STILL AT THE DESIGN STAGE. A DELAY IN THE AWARD OF THE CONTRACT IN QUESTION WILL THEREFORE SCARCELY DELAY THE ACHIEVEMENT OF THE ULTIMATE OBJECTIVE OF INCREASING THE WATER SUPPLY IN THE DUNDALK AREA.

29 IRELAND CONTENDS THAT THE COMMISSION HAS NOT RAISED ANY SERIOUS ARGUMENTS SHOWING THAT THE DAMAGE TO WHICH THE SITUATION WOULD ALLEGEDLY GIVE RISE

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WOULD BE SERIOUS AND IRREPARABLE. THE COMMISSION HAS MERELY INFERRED AS MUCH FROM THE TRITE OBSERVATION THAT THE PIPELINE CAN ONLY BE CONSTRUCTED ONCE AND REFERENCE TO ALL THE CONSEQUENCES THAT ENTAILS. IT HAS NOT STATED WHO WILL SUFFER DAMAGE AND HOW OR THE NATURE AND EXTENT OF THE DAMAGE. BESIDES, TENDERERS WRONGFULLY EXCLUDED FROM CONSIDERATION FOR THE CONTRACT CAN ALWAYS CLAIM DAMAGES.

30 IRELAND EMPHASIZES THAT CONTRARY TO WHAT THE COMMISSION ASSERTS, THE INTERIM MEASURE APPLIED FOR WOULD HAVE THE EFFECT OF DELAYING COMPLETION OF THE SCHEME ITSELF WHICH WOULD HAVE VERY SERIOUS IMPLICATIONS FOR THE PEOPLE OF DUNDALK AND THE SURROUNDING REGION.

31 IRELAND CITES THE FOLLOWING EXAMPLES OF THE REPERCUSSIONS FOR THE PEOPLE OF DUNDALK IF THE INTERIM MEASURE APPLIED FOR IS GRANTED :

THE OVERALL PROJECT, WHOSE OBJECTIVE IS TO PROVIDE WATER TO THE TOWN OF DUNDALK BY 1990, HAS BEEN SUBDIVIDED INTO EIGHT CONTRACTS. THE COMPLETION OF THREE OF THOSE CONTRACTS IS DEPENDENT ON THE COMMENCEMENT OF WORK ON THE CONTRACT AT ISSUE, CONTRACT NO 4. THE WORK UNDER CONTRACT NO 4 MUST BE STARTED BY JUNE AT THE LATEST IF THE PROJECT IS TO BE COMPLETED BY 1990.

FROM A PUBLIC INQUIRY HELD IN 1982 IT EMERGED THAT THE 30*000 INHABITANTS OF DUNDALK HAVE FOR MANY YEARS BEEN FACED BY ACUTE WATER SHORTAGES WHICH HAVE FREQUENTLY NECESSITATED WATER RATIONING. EVIDENCE WAS ALSO GIVEN AT THE INQUIRY THAT THE WATER SHORTAGE CONSTITUTES A SERIOUS FIRE HAZARD AND EVEN A HEALTH HAZARD. IT IS ALSO A SERIOUS DISINCENTIVE TO ATTRACTING INDUSTRY TO THE REGION.

32 ALTHOUGH AT FIRST SIGHT THE PROBLEM SEEMS TO BE A MATTER OF SOME URGENCY, PARTICULARLY SINCE THE DAMAGE TO THE COMMISSION, AS GUARDIAN OF THE INTERESTS OF THE COMMUNITY, WILL ARISE AS SOON AS THE CONTRACT AT ISSUE IS AWARDED, IT MAY BE NECESSARY IN PROCEEDINGS FOR INTERIM MEASURES UNDER ARTICLES 185 AND 186 OF THE EEC TREATY TO WEIGH AGAINST EACH OTHER ALL THE INTERESTS AT STAKE.

33 IN THIS CASE THE OBJECTIVE OF THE PUBLIC WORKS CONTRACT IN QUESTION, NAMELY TO SECURE WATER SUPPLIES FOR THE INHABITANTS OF THE DUNDALK AREA BY 1990 AT THE LATEST, AND THE AGGRAVATION OF THE EXISTING HEALTH AND SAFETY HAZARDS FOR THEM IF THE AWARD OF THE CONTRACT AT ISSUE IS DELAYED TILT THE BALANCE OF INTERESTS IN FAVOUR OF THE DEFENDANT. IT SHOULD BE STRESSED THAT A QUITE DIFFERENT ASSESSMENT MIGHT BE ARRIVED AT IN THE CASE OF OTHER PUBLIC WORKS CONTRACTS SERVING DIFFERENT PURPOSES WHERE A DELAY IN THE AWARD OF THE CONTRACT WOULD NOT EXPOSE A POPULATION TO SUCH HEALTH AND SAFETY HAZARDS .

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AUTHOR Court of Justice of the European Communities

FORM Order

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SUB	Free movement of goods ; Quantitative restrictions ; Measures having equivalent effect ; Approximation of laws
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APPLICA	Commission ; Institutions
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PROCEDU	Proceedings concerning failure by Member State;Application for interim measures - unfounded
ADVGEN	Mancini
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Affaire C-503/04

Commission des Communautés européennes

contre

République fédérale d'Allemagne

«Manquement d'État — Arrêt de la Cour constatant le manquement — Inexécution — Article 228 CE — Mesures que comporte l'exécution de l'arrêt de la Cour — Résiliation d'un contrat»

Sommaire de l'arrêt

1. *Recours en manquement — Arrêt de la Cour constatant le manquement — Manquement à l'obligation d'exécuter l'arrêt — Sanctions pécuniaires*

   (Art. 228, § 2, CE)

2. *Rapprochement des législations — Procédures de recours en matière de passation des marchés publics de fournitures et de travaux — Directive 89/665*

   (Art. 226 CE et 228 CE; directive du Conseil 89/665, art. 3)

3. *Rapprochement des législations — Procédures de recours en matière de passation des marchés publics de fournitures et de travaux — Directive 89/665*

   (Art. 226 CE et 228 CE; directive du Conseil 89/665, art. 2, § 6, al. 2)

4. *Rapprochement des législations — Procédures de recours en matière de passation des marchés publics de services — Directive 92/50*

   (Art. 226 CE; directive du Conseil 92/50)

5. *États membres — Obligations — Manquement — Justification tirée de l'ordre interne — Inadmissibilité*

   (Art. 226 CE)

1. Dans le cadre de la procédure prévue à l'article 228, paragraphe 2, CE, le recours n'est pas irrecevable au motif que la Commission ne demande plus l'imposition d'une astreinte. En effet, la Cour étant compétente pour arrêter une sanction pécuniaire non proposée par la Commission, le recours n'est pas irrecevable du simple fait que la Commission estime, à un certain stade de la procédure devant la Cour, qu'une astreinte ne s'impose plus.

   (cf. points 21-22)

2. La procédure particulière prévue à l'article 3 de la directive 89/665, portant coordination des dispositions législatives, réglementaires et administratives relatives à l'application des procédures de recours en matière de passation des marchés publics de fournitures et de travaux, en vertu de laquelle la Commission peut intervenir auprès d'un État membre si elle estime qu'une violation claire et manifeste des dispositions communautaires en matière de passation des marchés publics a été commise, constitue une mesure préventive qui ne peut ni déroger ni se substituer aux compétences de la Commission au titre des articles 226 CE et 228 CE.

(cf. point 23)

3. S'il est vrai que la disposition de l'article 2, paragraphe 6, second alinéa, de la directive 89/665, portant coordination des dispositions législatives, réglementaires et administratives relatives à l'application des procédures de recours en matière de passation des marchés publics de fournitures et de travaux, autorise les États membres à maintenir les effets de contrats conclus en violation des directives en matière de passation des marchés publics et protège ainsi la confiance légitime des cocontractants, elle ne saurait, sans réduire la portée des dispositions du traité établissant le marché intérieur, avoir pour conséquence que le comportement du pouvoir adjudicateur à l'égard des tiers doive être considéré comme conforme au droit communautaire postérieurement à la conclusion de tels contrats.

   Or, si ladite disposition n'affecte pas l'application de l'article 226 CE, elle ne saurait pas non plus affecter l'application de l'article 228 CE, sous peine de réduire la portée des dispositions du traité établissant le marché intérieur. Par ailleurs, elle concerne, ainsi qu'il résulte de son libellé, la réparation qu'une personne lésée par une violation commise par un pouvoir adjudicateur peut obtenir de ce dernier. Or, en raison de sa spécificité, cette disposition ne saurait être considérée comme réglant également la relation entre un État membre et la Communauté, relation dont il s'agit dans le contexte des articles 226 CE et 228 CE.

(cf. points 33-35)

4. À supposer même que le pouvoir adjudicateur puisse se voir opposer les principes de sécurité juridique et de protection de la confiance légitime, le principe pacta sunt servanda ainsi que le droit de propriété par son cocontractant en cas de résiliation du contrat conclu en violation de la directive 92/50, portant coordination des procédures de passation des marchés publics de services, un État membre ne saurait, en tout état de cause, se prévaloir de ces principes ou de ce droit pour justifier la non-exécution d'un arrêt constatant un manquement au titre de l'article 226 CE et, de ce fait, échapper à sa propre responsabilité en droit communautaire.

(cf. point 36)

5. Un État membre ne saurait exciper de dispositions, pratiques ou situations de son ordre juridique interne pour justifier l'inobservation des obligations résultant du droit communautaire.

(cf. point 38)

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JUDGMENT OF THE COURT (Second Chamber)

18 July 2007 (*)

(Failure of a Member State to fulfil obligations – Judgment of the Court establishing the failure to fulfil obligations – Non-implementation – Article 228 EC – Measures necessary to comply with the judgment of the Court – Rescission of a contract)

In Case C-503/04,

ACTION under Article 228 EC for failure to fulfil obligations, brought on 7 December 2004,

Commission of the European Communities, represented by B. Schima, acting as Agent, with an address for service in Luxembourg,

applicant,

v

Federal Republic of Germany, represented by W.-D. Plessing and C. Schulze-Bahr, acting as Agents, and H.-J. Prieß, Rechtsanwalt,

defendant,

supported by

French Republic, represented by G. de Bergues and J.-C. Gracia, acting as Agents, with an address for service in Luxembourg,

Kingdom of the Netherlands, represented by H.G. Sevenster and D.J.M. de Grave, acting as Agents,

Republic of Finland, represented by T. Pynnä, acting as Agent, with an address for service in Luxembourg,

interveners,

THE COURT (Second Chamber),

composed of C.W.A. Timmermans (Rapporteur), President of the Chamber, P. Kūris, K. Schiemann, J. Makarczyk and J.-C. Bonichot, Judges,

Advocate General: V. Trstenjak,

Registrar: H. von Holstein, Deputy Registrar,

having regard to the written procedure and further to the hearing on 7 December 2006,

after hearing the Opinion of the Advocate General at the sitting on 28 March 2007,

gives the following

Judgment

1 By its application, the Commission of the European Communities requests the Court to declare that, by failing to adopt all the necessary measures to comply with the judgment in Joined Cases C-20/01 and C-28/01 *Commission* v *Germany* [2003] ECR I-3609 regarding the conclusion of a contract for the collection of waste water by the municipality of Bockhorn (Germany) and of a contract for waste disposal by the City of Brunswick (Germany), the Federal Republic of Germany has failed to fulfil its obligations under Article 228(1) EC, and to order that Member State to pay to the Commission's own resources account of the European Community a penalty payment of EUR 31 680 for each day of delay in implementing the measures necessary to comply with that judgment in respect of the contract relating to the municipality of Bockhorn and of EUR 126 720 for each day of delay in implementing the measures necessary to comply with the abovementioned judgment in respect of the contract relating to the City of Brunswick, in each case from the date of delivery of that judgment until the measures are implemented.

2 By order of the President of the Court of 6 June 2005, the French Republic, the Kingdom of the Netherlands and the Republic of Finland were granted leave to intervene in support of the forms of order sought by the Federal Republic of Germany.

Legal context

3 Article 2(6) 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) provides:

'The effects of the exercise of the powers referred to in paragraph 1 on a contract concluded subsequent to its award shall be determined by national law.

Furthermore, except where a decision must be set aside prior to the award of damages, a Member State may provide that, after the conclusion of a contract following its award, the powers of the body responsible for the review procedures shall be limited to awarding damages to any person harmed by an infringement.'

4 Article 3(1) of Directive 89/665 states:

'The Commission may invoke the procedure for which this Article provides when, prior to a contract being concluded, it considers that a clear and manifest infringement of Community provisions in the field of public procurement has been committed during a contract award procedure falling within the scope of Directives 71/305/EEC and 77/62/EEC.'

The judgment in *Commission* v *Germany*

5 In paragraphs 1 and 2 of the operative part of the judgment in *Commission* v *Germany*, the Court:

'1. Declare[d] that since the Municipality of Bockhorn (Germany) failed to invite tenders for the award of the contract for the collection of its waste water and failed to publish notice of the results of the procedure for the award of the contract in the Supplement to the *Official Journal of the European Communities*, the Federal Republic of Germany, at the time of the award of that public service contract, failed to fulfil its obligations under Article 8 in conjunction with Article 15(2) and Article 16(1) of Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts (OJ 1992 L 209, p. 1);

2. Declare[d] that since the City of Braunschweig (Germany) awarded a contract for waste disposal by negotiated procedure without prior publication of a contract notice, although the criteria laid down in Article 11(3) of Directive 92/50 for an award by privately negotiated procedure without a Community-wide invitation to tender had not been met, the Federal Republic of Germany, at the time of the award of that public service contract, failed to fulfil its obligations under Article 8 and Article 11(3)(b) of that directive.'

Pre-litigation procedure

6 By letter of 27 June 2003, the Commission requested the German Government to notify it of the measures taken to comply with the judgment in *Commission* v *Germany*.

7 Since it was not satisfied by the German Government's response of 7 August 2003, on 17 October 2003 the Commission requested the German authorities to submit their observations within two months.

8 In its letter of 23 December 2003, the German Government referred to a letter sent in early December 2003 to the government of the *Land* of Lower Saxony asking it to ensure compliance with the public procurement legislation in force and to notify it of the measures intended to prevent similar infringements in future. In addition, the German Government referred to Paragraph 13 of the German Vergabeverordnung (Public Procurement Regulation) which entered into force on 1 February 2001 and which provides that a contract concluded by a contracting authority is invalid if unsuccessful tenderers have not been informed of the conclusion of that contract at least 14 days before its award. That government also submitted that Community law did not require the rescission of the two contracts at issue in the case which gave rise to the judgment in *Commission* v *Germany*.

9 On 1 April 2004, the Commission sent a reasoned opinion to the Federal Republic of Germany, to which the latter responded on 7 June 2004.

10 Since the Commission considered that the Federal Republic of Germany had failed to comply with the judgment in *Commission* v *Germany*, it decided to bring the present action.

The action

The subject-matter of the action

11 Since the Federal Republic of Germany stated in its defence that on 28 February 2005 the contract for the collection of waste water concluded by the municipality of Bockhorn was to be annulled, the Commission stated in its reply that it was not pursuing either its action or its claim for imposition of a periodic penalty payment in so far as they related to that contract.

12 As the Commission has partly discontinued its action, it is necessary to examine it only in so far as it relates to the contract concluded by the City of Brunswick for waste disposal.

Admissibility

13 The Federal Republic of Germany alleges, firstly, that the Commission has no interest in bringing proceedings because of its failure to submit an application for interpretation within the meaning of Article 102 of the Rules of Procedure. According to that Member State, the dispute relating to the consequences which follow from the judgment in *Commission* v *Germany* could and should have been resolved by way of an application for interpretation of that judgement and not by way of an action based on Article 228 EC.

14 However, that argument cannot be accepted.

15 In proceedings for failure to fulfil obligations under Article 226 EC, the Court is required to find only that a provision of Community law has been infringed. Pursuant to Article 228(1) EC, the Member State concerned is required to take the measures necessary to comply with the judgment of the Court (see, to that effect, Case C-126/03 *Commission* v *Germany* [2004] ECR I-11197, paragraph 26). Since a question concerning the measures required for the implementation of a judgment establishing a failure to fulfil obligations under Article 226 EC does not form part of the subject-matter of such a judgment, such a question cannot form the subject-matter of an application for interpretation of a judgment (see also, to that effect, order in Joined Cases 146/85 INT and 431/85 INT *Maindiaux and Others* v *ESC and Others* [1988] ECR 2003, paragraph 6).

16 Furthermore, it is precisely at the stage of an action under Article 228(2) EC that it is for the Member State, whose responsibility it is to draw the conclusions to which the judgment establishing the failure to fulfil obligations appears to it to give rise, to justify the validity of those conclusions, should they be criticised by the Commission.

17 Secondly, in its rejoinder, the Federal Republic of Germany, supported by the Kingdom of the Netherlands, requests the Court to close the procedure by application of Article 92(2) of the Rules of Procedure, as the action has become devoid of purpose since, with effect from 10 July 2005, the contract concluded by the City of Brunswick concerning waste disposal has also been rescinded.

18 The Commission responds, in its observations relating to the statements in intervention of the French Republic, the Kingdom of the Netherlands and of the Republic of Finland, that it retains an interest in obtaining from the Court a ruling on whether, on expiry of the period laid down in the reasoned opinion issued under Article 228 EC, the Federal Republic of Germany had already complied with the judgment of 10 April 2003 in Joined Cases C-20/01 and C-28/01 *Commission* v *Germany*. The Commission states, however, that an order for payment of a periodic penalty payment is no longer necessary.

19 In that regard, it should be recalled that, according to settled case-law, the reference date for assessing whether there has been a failure to fulfil obligations under Article 228 EC is the date of expiry of the period prescribed in the reasoned opinion issued under that provision (see Case C-119/04 *Commission* v *Italy* [2006] ECR I-6885, paragraph 27, and case-law cited).

20 In the present case, the period referred to in the reasoned opinion which, as is apparent from the receipt stamp, was received by the German authorities on 1 April 2004, was one of two months. The reference date for assessing whether there has been a failure to fulfil obligations under Article 228 EC is therefore 1 June 2004. At that date, the contract concluded by the City of Brunswick for waste disposal had not yet been terminated.

21 Nor, moreover, is the action inadmissible contrary to the Federal Republic of Germany's submissions at the hearing, on the ground that the Commission is no longer requesting the imposition of a periodic penalty payment.

22 Since the Court has jurisdiction to impose a financial penalty not suggested by the Commission (see, to that effect, Case C-304/02 *Commission* v *France* [2005] ECR I-6263, paragraph 90), the action is not inadmissible simply because the Commission takes the view, at a certain stage of the procedure before the Court, that a penalty is no longer necessary.

23 With regard, thirdly, to the plea of inadmissibility based on Article 3 of Directive 89/665, to which the Advocate General refers in point 44 of her Opinion, it is appropriate to note that the particular procedure laid down in that provision constitutes a preventive measure which can neither derogate from nor replace the powers of the Commission under Articles 226 EC and 228 EC (see, to that effect, Case C-394/02 *Commission* v *Greece* [2005] ECR I-4713, paragraph 27, and case-law cited).

24 It follows from all the foregoing that the action is admissible.

Substance

25 The Commission takes the view that the Federal Republic of Germany has not adopted measures sufficient to comply with the judgment in Joined Cases C-20/01 and C-28/01 *Commission* v *Germany*, since that Member State did not, before the date of expiry of the period laid down in the reasoned opinion, rescind the contract concluded by the City of Brunswick for waste disposal.

26 The Federal Republic of Germany reiterates the position expressed in the letter from the German Government of 23 December 2003 that rescission of the contracts affected by that judgment was not required and submits that the steps set out in that communication constituted measures sufficient to comply with that judgment.

27 In that regard, it should be recalled that, as is apparent from paragraph 12 of the judgment in Joined Cases C-20/01 and C-28/01 *Commission* v *Germany*, the City of Brunswick and Braunschweigsche Kohlebergwerke ('BKB') concluded a contract under which BKB was made responsible for residual waste disposal by thermal processing for a period of 30 years from June/July 1999.

28 As the Advocate General observes in point 72 of her Opinion, the measures mentioned by the German Government in its letter of 23 December 2003 were intended exclusively to prevent the conclusion of new contracts which would constitute failures to fulfil obligations similar to those found in that judgment. However, they did not prevent the contract concluded by the City of Brunswick from continuing to have full effect on 1 June 2004.

29 Accordingly, since that contract had not been terminated on 1 June 2004, the failure to fulfil obligations continued on that date. The adverse effect on the freedom to provide services arising

from the disregard of the provisions of Directive 92/50 subsists throughout the entire performance of the contracts concluded in breach thereof (Joined Cases C-20/01 and C-28/01 *Commission* v *Germany*, paragraph 36). Furthermore, at that date, the failure to fulfil obligations was to continue for decades, given the long period for which the contract in question had been concluded.

30 Having regard to all those facts, the view cannot be taken, in a situation such as that of the present case, that, with regard to the contract concluded by the City of Brunswick, the Federal Republic of Germany had adopted, as at 1 June 2004, measures implementing the judgment in Joined Cases C-20/01 and C-28/01 *Commission* v *Germany*.

31 However, the Federal Republic of Germany, supported by the French Republic, the Kingdom of the Netherlands and the Republic of Finland, submits that the second subparagraph of Article 2(6) of Directive 89/665, which allows Member States to provide in their legislation that, after the conclusion of a contract following the award of a public contract, the bringing of an action can give rise only to an award of damages and, thus, to exclude any possibility of rescission of that contract, precludes a finding of failure to fulfil obligations within the meaning of Article 226 EC with regard to such a contract entailing the obligation to rescind it. According to those Member States, the principles of legal certainty and of the protection of legitimate expectations, the principle *pacta sunt servanda*, the fundamental right to property, Article 295 EC and the case-law of the Court regarding the limitation in time of the effects of a judgment also preclude such a result.

32 However, such arguments cannot be upheld.

33 With regard, firstly, to the second subparagraph of Article 2(6) of Directive 89/665, the Court has already held that, although that provision permits the Member States to preserve the effects of contracts concluded in breach of directives relating to the award of public contracts and thus protects the legitimate expectations of the parties thereto, its effect cannot be, unless the scope of the EC Treaty provisions establishing the internal market is to be reduced, that the contracting authority's conduct vis-à-vis third parties is to be regarded as in conformity with Community law following the conclusion of such contracts (Joined Cases C-20/01 and C-28/01 *Commission* v *Germany*, paragraph 39).

34 If the second subparagraph of Article 2(6) of Directive 89/665 does not affect the application of Article 226 EC, nor can it affect the application of Article 228 EC, without, in a situation such as that in the present case, reducing the scope of the Treaty provisions establishing the internal market.

35 Furthermore, the second subparagraph of Article 2(6) of Directive 89/665, which has the objective of guaranteeing the existence, in all Member States, of effective remedies for infringements of Community law in the field of public procurement or of the national rules implementing that law, so as to ensure the effective application of the directives on the coordination of public procurement procedures (Case C-470/99 *Universale-Bau and Others* [2002] ECR I-11617, paragraph 71), relates, as is apparent from its wording, to the compensation which a person harmed by an infringement committed by a contracting authority may obtain from it. That provision, because of its specific nature, cannot be regarded also as regulating the relations between a Member State and the Community in the context of Articles 226 EC and 228 EC.

36 With regard, secondly, even if it were to be accepted that the principles of legal certainty and of the protection of legitimate expectations, the principle *pacta sunt servanda* and the right to property could be used against the contracting authority by the other party to the contract in the event of rescission, Member States cannot rely thereon to justify the non-implementation of a judgment establishing a failure to fulfil obligations under Article 226 EC and thereby evade their own liability under Community law (see, by analogy, Case C-470/03 *AGM.-COS.MET* [2007] ECR I-0000, paragraph 72).

37 With regard, thirdly, to Article 295 EC, according to which 'this Treaty shall in no way prejudice the rules in Member States governing the system of property ownership', it should be recalled that that article does not have the effect of exempting the Member States' systems of property ownership from the fundamental rules of the Treaty (see Case C-463/00 *Commission* v *Spain* [2003] ECR I-4581, paragraph 67, and case-law cited). The particular features of the system of property ownership in a Member State cannot therefore justify the continuation of a failure to fulfil obligations which consists of an obstacle to the freedom to provide services in disregard of the provisions of Directive 92/50.

38 Moreover, it should be recalled that a Member State cannot plead provisions, practices or situations prevailing in its domestic legal order to justify the failure to observe obligations arising under Community law (see *Commission* v *Italy*, paragraph 25, and case-law cited).

39 Fourthly, with regard to the Court's case-law on the limitation in time of the effects of a judgment, it is sufficient to state that, in any event, that case-law does not justify the non-implementation of a judgment establishing a failure to fulfil obligations under Article 226 EC.

40 Although, with regard to the contract concluded by the City of Brunswick, it must therefore be held that the Federal Republic of Germany had not, as at 1 June 2004, adopted the measures to implement the judgment in Joined Cases C-20/01 and C-28/01 *Commission* v *Germany*, the same is not, however, true at the date of examination of the facts by the Court. It follows that the imposition of the periodic penalty payment, which the Commission is in fact no longer requesting, is not justified.

41 In the same way, the facts of the present case are such that it does not appear necessary to order payment of a lump sum.

42 Accordingly, it must be held that, by having failed, at the date on which the period laid down in the reasoned opinion issued by the Commission pursuant to Article 228 EC, to adopt all the necessary measures to comply with the judgment in Joined Cases C-20/01 and C-28/01 *Commission* v *Germany* regarding the conclusion of a contract for waste disposal by the City of Brunswick, the Federal Republic of Germany has failed to fulfil its obligations under that article.

Costs

43 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. As the Commission has asked that costs be awarded against the Federal Republic of Germany and the latter has been unsuccessful, the Federal Republic of Germany must be ordered to pay the costs. The intervening Member States, the French Republic, the Kingdom of the Netherlands and the Republic of Finland, must be ordered to bear their own costs in accordance with Article 69(4) of the Rules of Procedure.

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

1. **Declares that, by having failed, at the date on which the period laid down in the reasoned opinion issued by the Commission of the European Communities pursuant to Article 228 EC, to adopt all the necessary measures to comply with the judgment of 10 April 2003 in Joined Cases C-20/01 and C-28/01 *Commission* v *Germany* regarding the conclusion of a contract for waste disposal by the City of Brunswick (Germany), the Federal Republic of Germany has failed to fulfil its obligations under that article;**

2. **Orders the Federal Republic of Germany to pay the costs;**

3. **Orders the French Republic, the Kingdom of the Netherlands and the Republic of Finland to bear their own costs.**

[Signatures]

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* Language of the case: German.